DOCKET

No. 08-1521
Vide 08-1497
Title: Otis McDonald, et al., Petitioners
v.
City of Chicago, Illinois, et al.
Docketed: June 11, 2009
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (08-4241, 08-4243, 08-4244)
Decision Date: June 2, 2009
Questions Presented

Date	Proceedings and Orders
Jun 9 2009	Petition for a writ of certiorari filed. (Response due July 13, 2009)
Jun 18 2009	Brief amicus curiae of Arms Keepers filed. VIDED.
Jun 18 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from Counsel for the petitioners
Jun 25 2009	Order extending time to file response to petition to and including August 5, 2009.
Jul 6 2009	Brief amicus curiae of California filed. VIDED.
Jul 6 2009	Brief amici curiae of Texas, et al. filed. VIDED.
Jul 6 2009	Brief amici curiae of Institute for Justice, and Cato Institute filed. VIDED.
Jul 6 2009	Brief amici curiae of Gun Owners of America, Inc.,et al. filed. VIDED.
Jul 9 2009	Brief amici curiae of Constitutional Law Professors filed.
Aug 5 2009	Brief of respondent City of Chicago in opposition filed. VIDED.
Aug 18 2009	Reply of petitioners Otis McDonald, et al. filed. (Distributed)
Aug 19 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 30 2009	Petition GRANTED.
Oct 14 2009	Consent to the filing of amicus briefs, in support of either party or of neither party,conditioned on 7 day written notice of intent to file, received from counsel for the petitioner.
Oct 16 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, conditioned on 7 day written notice of intent to file, received from counsel for respondents National Rifle Association of America, Inc., et al. in support of petitioners.
Oct 19 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, conditioned on 10 notice of intent to file, received from counsel for respondents City of Chicago and Village of Oak Park.
Nov 12 2009	The time within which to file respondents' brief on the merits is extended to and including December 30, 2009.
Nov 16 2009	Brief of respondents National Rifle Association, Inc., et al. in support of petitioners filed.
Nov 16 2009	Joint appendix filed. (Statement of costs filed)
Nov 16 2009	Brief of petitioners Otis McDonald, et al. filed.
Nov 16 2009	Brief amicus curiae of Rutherford Institute filed.
Nov 18 2009	Brief amicus curiae of Paragon Foundation, Inc. filed.
Nov 19 2009	Brief amicus curiae of Heartland Institute filed
Nov 19 2009	Brief amici curiae of Cato Institute, and Pacific Legal Foundation filed

Nov 20 2009	Brief amici curiae of Appellants from the Ninth Circuit Incorporation case of Nordyke v. King, et al. filed.
Nov 23 2009	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Nov 23 2009	Brief amici curiae of State Firearm Associations filed.
Nov 23 2009	Brief amicus curiae of American Center for Law & Justice filed.
Nov 23 2009	Brief amicus curiae of Maryland Arms Collectors' Association, Inc. filed.
Nov 23 2009	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. in support of neither party filed.
Nov 23 2009	Brief amicus curiae of Calguns Foundation, Inc. filed.
Nov 23 2009	Brief amicus curiae of Safari Club International filed.
Nov 23 2009	Brief amici curiae of American Civil Rights Union, et al. filed.
Nov 23 2009	Brief amici curiae of Brady Center to Prevent Gun Violence, et al., filed.
Nov 23 2009	Brief amicus curiae of Arms Keepers filed.
Nov 23 2009	Brief amicus curiae of National Shooting Sports Foundation, Inc. filed.
Nov 23 2009	Brief amicus curiae of Eagle Forum Education & Legal Defense filed.
Nov 23 2009	Brief amicus curiae of Institute for Justice filed.
Nov 23 2009	Brief amici curiae of Thirty-Four California District Attorneys, et al. filed.
Nov 23 2009	Brief amicus curiae of Foundation for Moral Law filed.
Nov 23 2009	Brief amici curiae of Constitutional Law Professors filed.
Nov 23 2009	Brief amicus curiae of Jews for the Preservation of Firearms Ownership filed.
Nov 23 2009	Brief amicus curiae of Women State Legislators and Academics filed.
Nov 23 2009	Brief amici curiae of Texas, et al. filed.
Nov 23 2009	Brief amici curiae of Senator Kay Bailey Hutchinson, et al. filed.
Nov 23 2009	Brief amici curiae of Gun Owners of America, Inc., et al. filed.
Nov 23 2009	Brief amici curiae of International Law Enforcement Educators and Trainers Association, et al. filed.
Nov 23 2009	Brief amici curiae of Buckeye Firearms Foundation, Inc., et al. filed.
Nov 23 2009	Brief amici curiae of Goldwater Institute, et al. filed.
Nov 23 2009	Brief amici curiae of Rocky Mountain Gun Owners, et al. filed.
Nov 23 2009	Brief amici curiae of Professors of Philosophy, Criminology, Law and Other Fields filed.
Nov 23 2009	Brief amicus curiae of Academics for the Second Amendment filed.
Nov 23 2009	Motion for leave to file amicus brief filed by American Legislative Exchange Council.
Nov 23 2009	Brief amici curiae of State Legislators filed.
Nov 30 2009	SET FOR ARGUMENT ON Tuesday, March 2, 2010.
Dec 7 2009	CIRCULATED.
Dec 8 2009	Application (09A579) of City of Chicago and the Village of Oak Park for leave to file a consolidated respondents' brief on the merits in excess of the word limitation, submitted to Justice Stevens.
Dec 14 2009	Motion for leave to file amicus brief filed by American Legislative Exchange Council GRANTED.
Dec 15 2009	Application (09A579) granted by Justice Stevens of City of Chicago and the Village of Oak Park for leave to file a consolidated respondents' brief on the merits in excess of the word limitation.

Dec 21 2009	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Dec 22 2009	Response of City of Chicago, et al. to motion of Texas, et al. filed.
Dec 30 2009	Brief of respondents City of Chicago, and Village of Oak Park filed. (Distributed)
Dec 30 2009	Record from U.S.C.A. for 7th Circuit is electronic.
Jan 4 2010	Record from U.S.D.C. for Northern District of Illinois is electronic.
Jan 5 2010	Brief amicus curiae of Educational Fund to Stop Gun Violence filed. (Distributed)
Jan 5 2010	Motion for divided argument filed by National Rifle Association, Inc., et al.
Jan 6 2010	Brief amici curiae of Representatives Carolyn McCarthy, et al. filed. (Distributed)
Jan 6 2010	Brief amici curiae of Association of Prosecuting Attorneys and District Attorneys filed. (Distributed)
Jan 6 2010	Brief amici curiae of Thirty-Four Professional Historians and Legal Historians filed. (Distributed)
Jan 6 2010	Brief amicus curiae of Anti-Defamation League filed. (Distributed)
Jan 6 2010	Brief amici curiae of English Early American Historians filed. (Distributed)
Jan 6 2010	Brief amici curiae of Professors of Criminal Justice filed. (Distributed)
Jan 6 2010	Brief amici curiae of Illinois, et al. filed. (Distributed)
Jan 6 2010	Brief amici curiae of Historians on Early American Legal, Constitutional and Pennsylvania History filed. (Distributed)
Jan 6 2010	Brief amici curiae of Villages of Winnetka and Skokie, Illinois, et al. filed. (Distributed)
Jan 6 2010	Brief amici curiae of Historians and Legal Scholars filed. (Distributed)
Jan 6 2010	Brief amici curiae of Organizations Committed to Protecting the Public's Health, Safety, and Well-Being filed. (Distributed)
Jan 6 2010	Brief amici curiae of Board of Education of the City of Chicago, et al. filed. (Distributed)
Jan 6 2010	Brief amicus curiae of Conference of Mayors filed. (Distributed)
Jan 6 2010	Letter concerning representation, dated January 4, 2010, received from Counsel Paul Clement. (Distributed).
Jan 6 2010	Brief amicus curiae of Oak Park Citizens Committee for Handgun Control filed. (Distributed)
Jan 6 2010	Brief amici curiae of American Cities, et al. filed. (Distributed)
Jan 6 2010	Motion for leave to file amici brief filed by Law Professor and Students. (Distributed)
Jan 8 2010	Petitioners' opposition to motion of National Rifle Association, Inc., et al.
Jan 12 2010	Petitioners' opposition to motion of Law Professors and Students
Jan 25 2010	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Jan 25 2010	Motion for divided argument filed by National Rifle Association, Inc., et al. GRANTED.
Jan 25 2010	Motion for leave to file amici brief filed by Law Professor and Students GRANTED.
Jan 29 2010	Reply of respondents National Rifle Association of America, Inc., et al. filed. (Distributed)
Jan 29 2010	Reply of petitioners Otis McDonald, et al. filed. (Distributed)
Mar 2 2010	Argued. For petitioners: Alan Gura, Alexandria, Va. For respondents National Rifle Association, Inc. et al. in support of petitioners: Paul D. Clement, Washington, D. C. For respondents: James A. Feldman, Special Assistant Corporation Counsel, Washington, D. C.

PETITION
FOR
WRIT OF
CERTIORARI

Supreme Court, U.S.
FILED

No. 08-____

081521 JUN 9 - 2009

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In The
Supreme Court of the United States

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OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

PARTIES TO THE PROCEEDINGS

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

No parent or publicly owned corporation owns 10% or more of the stock in either Second Amendment Foundation, Inc. or the Illinois State Rifle Association.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the

PARTIES TO THE PROCEEDINGS – Continued

related case plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals. The plaintiffs in the related cases, other than Anthony Burton, have separately petitioned for certiorari. Sup. Ct. Rule 12.4.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, 2009 U.S. App. LEXIS 11721, is reprinted in the Appendix (App.) at 1. The decision of the United States District Court for the Northern District of Illinois in this case, reprinted at App. 17, 2008 U.S. Dist. LEXIS 98133, is unpublished. The District Court's decision in the related cases, reprinted at App. 11, 2008 U.S. Dist. LEXIS 98134, is unpublished.

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JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant provisions of the laws of the City of Chicago are reprinted in the Appendix.

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STATEMENT OF THE CASE

1. The City of Chicago enforces a handgun ban identical to that struck down by this Court as a violation of Washington, D.C. residents' Second Amendment rights. The Fourteenth Amendment guarantees that fundamental individual rights may not be violated by any form of government throughout the

United States. Accordingly, Chicago's handgun ban must meet the same fate as that which befell the District of Columbia's former law.

The federal appellate courts, and state courts of last resort, are split on the question of the Second Amendment's applicability to the states. The Ninth Circuit, applying this Court's test for selective incorporation of enumerated rights, held the states bound by the Second Amendment through the Fourteenth Amendment's Due Process Clause. *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009). But in this case, the Seventh Circuit declined to perform the required incorporation analysis, following inapposite pre-incorporation era precedent barring direct application of the Bill of Rights to the states. App. 3-4.[1]

This split of authority warrants speedy resolution, as it perpetuates the deprivation of fundamental constitutional rights among a large portion of the population. The split itself is not over whether the right to bear arms should be binding upon state actors, but rather, over which line of this Court's cases controls the question. Perpetuation of that dispute among the lower courts will serve no purpose. Moreover, the scholarly landscape concerning the core constitutional issues in the case is exceptionally well-developed, enabling a just and comprehensive treatment by this Court.

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[1] The Second Circuit followed the same logic in declining to perform an incorporation analysis for the right to keep and bear arms. *Maloney* v. *Cuomo*, 554 F.3d 56 (2d Cir. 2009).

The court below also declined to incorporate the Second Amendment under the Fourteenth Amendment's Privileges or Immunities Clause, following this Court's decisions which held that the provision incorporates only so-called rights of national citizenship. App. 2.

Application of this Court's selective incorporation doctrine is "required" to resolve the question of the Second Amendment's incorporation through the Fourteenth Amendment. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2813 n.23 (2008). Doing so for the first time in this case, this Court should reverse the judgment below.

More critically, owing to the Fourteenth Amendment's plain text, original purpose, and original public meaning, this Court should also hold the Second Amendment is incorporated through the Fourteenth Amendment's Privileges or Immunities Clause. Although consensus regarding this provision's full meaning will likely remain elusive, there is now near-uniform agreement that this Court's decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which all but eviscerated the Privileges or Immunities Clause, was wrongly decided. Given the profound scope of *Slaughter-House*'s error, and the confusion it has spawned in Fourteenth Amendment jurisprudence, overruling *Slaughter-House* remains imperative. The unique interplay between the Second and Fourteenth Amendments makes this the ideal case in which to do so.

2. Immediately upon announcement of this Court's decision in *Heller*, Petitioners brought this action in the United States District Court for the Northern District of Illinois, challenging various Chicago ordinances as violating their Second and Fourteenth Amendment rights. At issue are Chicago's laws (1) banning the registration of handguns, thus effecting a broad handgun ban;[2] (2) requiring that guns be registered prior to their acquisition by Chicago residents, which is not always feasible;[3] (3) mandating that guns be re-registered on an annual basis, including the payment of what amounts to an annual tax on the exercise of Second Amendment rights;[4] and (4) rendering any gun permanently non-registerable if its registration lapses.[5] The district court had jurisdiction over the subject matter of the case under 28 U.S.C. § 1331 and § 1343.

Respondent City of Chicago had denied each individual Petitioner's attempt to register a handgun on account of the handgun registration ban. App. 34-45.

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[2] Chicago Mun. Code § 8-20-050(c).

[3] Chicago Mun. Code § 8-20-090.

[4] Chicago Mun. Code § 8-20-200.

[5] Chicago Mun. Code § 8-20-200(c).

Petitioners Orlov and David Lawson were also denied handgun registrations on account of the city's pre-acquisition registration requirement. App. 37, 40.

Petitioners McDonald and David Lawson are the registered owners of long arms, and are thus subjected to the city's re-registration requirements. The registration for one of Petitioner David Lawson's rifles lapsed, thus rendering the rifle unregisterable. Petitioner David Lawson had also acquired a rifle through the federal Civilian Marksmanship Program ("CMP"), which sent the rifle directly to his Chicago home, rendering it automatically unregisterable as it was acquired prior to its possible registration. Respondent denied Lawson's administrative appeal of its refusal to register the CMP rifle. App. 47-48.

The day after Petitioners filed their complaint, the National Rifle Association ("NRA") and various individuals brought a separate challenge to the Chicago handgun ban, albeit not to the other provisions challenged by Petitioners. NRA also led a lawsuit challenging a similar handgun ban implemented by the Village of Oak Park, Illinois. It does not appear that the challenged provisions had been enforced against the NRA plaintiffs. This case, and the two NRA cases, were related in the District Court.

Petitioners moved for summary judgment on July 31, 2008. Subsequently, the District Court advised that the case should be resolved on a motion to narrow the legal issues under Fed. R. Civ. Proc. 16.

Heeding this advice, Petitioners filed such a motion, seeking to establish the Second Amendment's incorporation through the Privileges or Immunities and Due Process Clauses. The next day, NRA Plaintiffs sought leave to brief the incorporation issue, which was granted.

The parties advanced different arguments for incorporation. Petitioners have consistently argued that the Second Amendment is incorporated through both the Privileges or Immunities Clause and, pursuant to this Court's selective incorporation doctrine, the Due Process Clause of the Fourteenth Amendment. In contrast, NRA Plaintiffs initially posited that all rights are "fundamental" if "explicitly or implicitly protected by the Constitution," NRA Br., Dist. Ct. Nos. 08-3696, 08-3697, Dec. 4, 2008, at 12 (citation omitted), and that "[a]s such, the Second Amendment should be recognized as incorporated." *Id.* "An explicitly protected right, keeping and bearing arms is thus a fundamental right and is incorporated into the Fourteenth Amendment." NRA Br., Ct. App. Nos. 08-4241, 08-4243, Jan. 28, 2009 at 35; *cf.* Pet. for Cert., No. 08-1497 at 12 ("In recognizing substantive Bill of Rights guarantees to be incorporated, the Court has relied on their status as such rather on [sic] subjective values to determine if a constitutional right is really important.").

3. On December 4, 2008, the District Court entered orders denying both Rule 16 motions, as well as Petitioners' motion for summary judgment. Turning first to NRA Plaintiffs, the District Court termed their argument as a "simple syllogism," App. 12, that because most of the Bill of Rights has been incorporated under the Fourteenth Amendment, "[e]rgo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in *Heller*, also extends to Oak Park and Chicago via the Fourteenth Amendment. QED." App. 12-13. But the District Court held itself "duty bound . . . to adhere to the holding in *Quilici* [v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)] rather than accepting [NRA] plaintiffs' invitation to 'overrule' it(!)," App. 16, referring to circuit precedent following this Court's decision in *Presser* v. *Illinois*, 116 U.S. 252 (1886) declining to apply the Second Amendment to the states.

Petitioners acknowledged that it is for this Court to grant them relief under the Privileges or Immunities Clause, but maintained that neither *Quilici* nor *Presser* addressed their Due Process selective incorporation argument. Indeed, *Quilici* had refused consideration of "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments," *Quilici*, 695 F.2d at 270 n.8, key aspects of the selective incorporation analysis. Nonetheless, the District

Court referred to its decision in the related cases, reiterating its belief that *Quilici* controlled the outcome of Petitioners' selective incorporation claim. App. 18.

Notably, the District Court declined to opine whether the Second Amendment should be incorporated in the absence of what it considered to be binding precedent to the contrary. App. 16. Because it found the Second Amendment not to be incorporated, the District Court subsequently granted motions for judgment on the pleadings in all three cases.

On appeal, the Seventh Circuit held that this Court's opinions in *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser*, *supra*, and *Miller* v. *Texas*, 153 U.S. 535 (1894) "have direct application in [this] case" and are thus controlling. App. 3. The lower court reached this conclusion despite acknowledging that these three cases "did not consider [the] possibility, which had yet to be devised when those decisions were rendered," that the Second Amendment is selectively incorporated. App. 2.

The Seventh Circuit found support for its position in *Heller*'s footnote 23, observing "that *Presser* and *Miller* 'reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government.'" App. 4 (quoting *Heller*, 128 S. Ct. at 2813 n.23. Notably, the Seventh Circuit did not address the other portion of that same footnote, which Petitioners repeatedly emphasized indicate a contrary approach: "we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry *required by our later cases*." *Heller*, 128 S. Ct. at 2813 n.23 (emphasis added).

◆

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Of Appeals And The Highest Courts Of Numerous States Are Divided Over Whether The Second Amendment Is Incorporated As Against The States By The Fourteenth Amendment.

The decision below is consistent with the Second Circuit's opinion in *Maloney* v. *Cuomo*, 554 F.3d 56 (2d Cir. 2009), but it directly contradicts the Ninth Circuit's opinion incorporating the Second Amendment through the Due Process Clause in *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009). The court below acknowledged this conflict. App. 2.

State high courts are also divided on the question of whether they are bound by the Second Amendment. Several state courts consider themselves bound to respect the Second Amendment,[6] a view advanced before this Court by the Attorneys General of thirty-two states.[7] Yet other state high courts take the opposite view, usually by cursory reference to this Court's nineteenth century direct application precedent.[8]

This split of authority is ripe for resolution at this time. At the federal level, the split encompasses the nation's three largest population centers, depriving millions of Americans of what is for others a life-saving fundamental constitutional right. Moreover, as discussed *infra*, the Fourteenth Amendment's incorporating effect has recently enjoyed significant academic attention, fully developing the historical record in a manner that would empower the Court to reach a comprehensive and just resolution of this important question.

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[6] *Brewer* v. *Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State* v. *Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Rohrbaugh* v. *State*, 607 S.E.2d 404, 412-14 (W. Va. 2004); *Stillwell* v. *Stillwell*, 2001 Tenn. App. LEXIS 562 (Tenn. Ct. App. July 30, 2001); *State* v. *Anderson*, 2000 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Jan. 26, 2000); *State* v. *Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *In re Brickey*, 70 P. 609 (Idaho 1902).

[7] The Second Amendment "is properly subject to incorporation." Br. of Amici States Texas, et al., No. 07-290, at 23 n.6. North Carolina joined the brief's thirty-one original signatories by letter.

[8] *See, e.g. State* v. *Keet*, 190 S.W. 573 (Mo. 1916); *State* v. *Mendoza*, 920 P.2d 357 (Haw. 1996); *In re Ramirez*, 226 P. 914 (Cal. 1924); *Strickland* v. *State*, 72 S.E. 260 (Ga. 1911); *Harris* v. *State*, 432 P.2d 929 (Nev. 1967); *State* v. *Kerner*, 107 S.E. 222 (N.C. 1921); *Ex parte Thomas*, 97 P. 260 (Okla. 1908).

The two circuits and various state high courts holding against Second Amendment incorporation have done so not on the grounds that incorporation would be wrong, but that it is foreclosed by a line of this Court's precedent. The question of which precedential line controls is ultimately one for this Court to decide, and would not benefit from further disagreement among the lower federal courts.

II. The Court Below Decided An Important Question Of Law In A Manner Contrary To This Court's Precedent.

Precedent barring direct application of the Bill of Rights remains undisturbed by the Fourteenth Amendment. But contrary to the Seventh Circuit's assertion, pre-incorporation relics such as *Cruikshank*, *Presser*, and *Miller* have no direct application to the question of selective incorporation under the Due Process Clause. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters* v. *Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) (citation omitted). By the time this Court first incorporated the Fourth Amendment in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), *overruled on other grounds*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), *Miller*'s reasoning that the Second and Fourth Amendments "operate only upon the federal power, and have no reference whatever to proceedings in state courts," *Miller*, 153 U.S. at 538, was irrelevant with respect to both amendments it addressed.

The lower court's commendable respect for this Court's precedent and prerogatives was misapplied in that the lower court followed the wrong line of cases. Thus, the lower court decided an important constitutional issue in a manner contrary to the instructions of this Court. "[W]hen a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2nd Cir. 1942), *aff'd*, 317 U.S. 501 (1943) (footnotes omitted). "A court need not blindly follow decisions that have been undercut by subsequent cases. . . ." *United States* v. *Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (citations omitted).

> [S]ometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.

Norris v. *United States*, 687 F.2d 899, 904 (7th Cir. 1982).

The lower court erred in failing to heed *Heller*'s cautionary statement that the pre-incorporation relics lack "the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23. The lower court's decision, while faithful to *Cruikshank*, failed to follow the approach laid down by this Court in cases describing selective due process incorporation, such as *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

Responding to Petitioners' argument that in our legal system, it is the reasoning of precedent, not its result, which is controlling, the court below offered that if this were so, "the Court's decisions could be circumvented with ease" by any judge not "too dim-witted to come up with a novel argument." App. 3.

Respectfully, this is not correct. Time and again, this Court has rejected a result under one theory, only to adopt the same result under another. For example, this Court rejected a challenge to the mandatory federal Sentencing Guidelines under separation of powers and non-delegation theories, *Mistretta* v. *United States*, 488 U.S. 361 (1989), but sustained a similar challenge under the Sixth Amendment jury trial right. *United States* v. *Booker*, 543 U.S. 220 (2005). This is essentially the history of the selective incorporation doctrine. Most selectively-incorporated rights were earlier the subject of direct application bars. *Compare, e.g., Cruikshank* (First Amendment not directly applicable to the states) with *Gitlow* v. *New York*, 268 U.S. 652 (1925) (First Amendment incorporated), and *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847) (Fifth Amendment Double Jeopardy Clause not directly applicable to the states) with *Benton* v. *Maryland*, 395 U.S. 784 (1969) (Double Jeopardy Clause incorporated).

Yet in this case, unless the Court grants the petition, Americans residing in the Seventh Circuit will not only be deprived of their Second Amendment rights, they will also be denied consideration of whether those rights must be respected by state officials under this Court's established selective incorporation doctrine. It falls to this Court to perform the incorporation analysis that the lower court would not.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan*, 391 U.S. at 149, or "necessary to an Anglo-American regime of ordered liberty," *id.* at 149 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right.

As demonstrated by the only post-*Heller* opinion applying this Court's "required" selective incorporation analysis to the Second Amendment right, the court below erred in declining to apply the Second Amendment to the states. The Ninth Circuit began its analysis by observing that "the text of the Second Amendment already suggests that the right it protects relates to an institution, the militia, which is 'necessary to an Anglo-American regime of ordered liberty.'" *Nordyke*, 563 F.3d at 450 (quoting *Duncan*, 391 U.S. at 149 n.14). Noting *Heller*'s instruction that the right to arms codified in the Second Amendment was considered "fundamental," *Nordyke* observed that "the right contains both a political component – it is a means to protect the public from tyranny – and a personal component – it is a means to protect the individual from threats to life or limb." *Nordyke*, 563 F.3d at 451 (citing Akhil Reed Amar, THE BILL OF RIGHTS 46-59, 257-66 (1998)).

Surveying the founding era, with respect to the Second Amendment, *Nordyke* concluded that our nation's history "reveals a right indeed 'deeply rooted in this Nation's history and tradition.'" *Nordyke*, 563 F.3d at 454, a conclusion re-enforced by the history of the Post-Revolutionary period, *id.*, and the history surrounding Reconstruction and the adoption of the Fourteenth Amendment. *Id.*, at 455-56. And surveying the protection afforded the right to arms in state constitutions over the years, as also described in *Heller*, *Nordyke* found that history "compelling." *Nordyke*, 563 F.3d at 455.

Most importantly, instead of formulating its own ideas about the nature of the right secured by the Second Amendment, the Ninth Circuit took its guidance from this Court's definition of the right to arms. "[L]anguage throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated." *Nordyke*, 563 F.3d at 456-57.

In reversing the judgment below, this Court should follow the Ninth Circuit's reasoning as more faithful to precedent. Yet this Court should also re-emphasize aspects of *Heller* which the Seventh Circuit appears to have not considered. In a remarkable passage, the court below suggested that the right of self-defense is a mere construct of positive law that, if rescinded, can obviate the Second Amendment right to keep and bear arms. App. 7-9. In other words, the Second Amendment secures a right that can be revoked by mere legislation. The court below thus suggested that the right of self-defense could be legislatively modified to deprive people of the Second Amendment right to possess a handgun. App. 7.

This dicta contradicts *Heller*'s teaching that "the *inherent right* of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817 (emphasis added). Self-defense "was the *central component* of the right itself." *Heller*, 128 S. Ct. at 2801 (emphasis original).

In a similar vein, the court below offered that reliance on the works of William Blackstone for the proposition that "the right to keep and bear arms is 'deeply rooted' not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right." App. 6 (emphasis original). The "other nation" was England in the centuries before the American Revolution, the relevance of its law established by *Duncan*'s inquiry into whether rights are "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

Heller reiterated that Blackstone "constituted the preeminent authority on English law for the founding generation," *Heller*, 128 S. Ct. at 2798 (quoting *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)), and quoted with approval his description of the right to arms as "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Heller*, 128 S. Ct. at 2798 (citation omitted). On this authority, *Heller* concluded that the right to arms "was by the time of the founding understood to be an individual right protecting against both public and private violence." *Heller*, 128 S. Ct. at 2798-99. Indeed, St. George Tucker, the earliest prominent commentator on the Constitution, regarded the Second Amendment right as equivalent to Blackstone's "right of the subject," protecting "[t]he right of self defence [which] is the first law of nature." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 143, 300 (1803). This is no mere "political" right.

The lower court's refusal to recognize the right of self-defense as inherent also contradicts a multitude of this Court's decisions affirming rights under the Due Process Clause arising from recognition of the individual interest in personal autonomy and bodily integrity.

> [N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Cruzan v. *Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (citation omitted). "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted); *cf. White* v. *Rockford*, 592 F.2d 381, 383 (7th Cir. 1979) ("the right to some degree of bodily integrity" is "chief among" the interests protected by the Due Process Clause).

"[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992). If abortion is protected because "[a]t the heart of liberty is the right to define one's own concept of existence," *id.*, and states may not restrict contraception owing to the "indefeasible right of personal security," *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted), it is unfathomable that states may abolish the right of self-defense against violent crime and thus moot its auxiliary, codified right to arms.

Also warranting this Court's attention is the suggestion that the court below would elevate an alleged state interest in federalism over the fundamental individual rights secured by our Constitution. Federalism is a venerable political institution, but since ratification of the Fourteenth Amendment, it no longer sanctions violation by state actors of Americans' civil rights.

States and localities are not laboratories of democracy when it comes to the establishment of religion, *Engel* v. *Vitale*, 370 U.S. 471 (1962); suppression of the press, *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931); racial segregation, *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954); interference with family planning, *Casey, Griswold*; intrusion into personal relationships, *Lawrence* v. *Texas*, 539 U.S. 558 (2003) – or disarmament. *Cf. Heller*, 128 S. Ct. at 2818 n.27. The Second Amendment "surely elevates above all other interests" -- including federalism – "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821.

To claim that of all rights, the Second Amendment must yield to local majoritarian impulses is especially wrong considering that the rampant violation of the right to keep and bear arms was understood to be among the chief evils vitiated by adoption of the Fourteenth Amendment. At the time, the Congress was beset by horrific reports of disarmament and its aftermath. *See, e.g.*, Cong. Globe 39th Cong., 1st Sess. 39, 40 (Dec. 13, 1865) (statement of Sen. Wilson) ("rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other sections of the country."); House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866) (Kentucky "marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs," while outlaws "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders").

Not surprisingly,

> With respect to the proposed [Fourteenth] Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead."

Heller, 128 S. Ct. at 2811 (citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866)).

The lower court expressed lack of confidence in conducting the required incorporation analysis. "How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." App. 6. The lower court's observations with respect to the inherent right of self-defense, Blackstone, and federalism suggest that it would not have correctly decided the question even had it been considered. In any event, with several state and lower federal courts deferring to this Court for an authoritative answer on the critically important question of Second Amendment incorporation, this Court should provide the necessary guidance by considering this case.

III. This Case Presents A Unique Opportunity To Correct This Court's Privileges Or Immunities Doctrine.

If reversal on substantive due process grounds is all but foretold by precedent, reversal is also commanded by adherence to the text, purpose, and original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause.

The almost meaningless construction given this provision in *Slaughter-House* was wrong the day it was decided and today stands indefensible. "Virtually no serious modern scholar – left, right, and center – thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001). "'[E]veryone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627 (1994); Thomas B. McAffee, *Constitutional Interpretation – The Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement"); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1121, 1297 n.247 (1995) ("*[T]he Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause.").

"Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting) (citations omitted). But within that "little" agreement is the realization that however one defines the unenumerated Privileges or Immunities, at a minimum, these include the individual rights secured by the first eight amendments.

Consideration of the Privileges or Immunities Clause must start with its textual command: "No state shall." U.S. Const. amend. XIV, sec. 1. The words are identical to those introducing the prohibitions against state conduct set forth in Article I, Section 10. This is no accident. Fourteenth Amendment author Rep. John Bingham made no secret that he intended for the amendment to effectively overrule *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), barring direct application of the Bill of Rights as against the states. In doing so, Bingham

> looked to *Barron* itself for guidance. Within the words of Chief Justice John Marshall he found clear instructions: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."

Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and*

Due Process Clauses, 72 Mo. L. Rev. 1, 18 (2007) (hereafter "Lawrence") (citing Cong. Globe, 42d Cong., 1st Sess. app. at 84 (1871); *Barron*, 32 U.S. at 250).

As for the "privileges or immunities" the states were not to abridge, "'[o]ver and over [John Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights' – a phrase he used more than a dozen times in a key speech. . . . '" Lawrence, 72 Mo. L. Rev. at 19 (quoting Akhil Reed Amar, THE BILL OF RIGHTS 182 (1998)). "[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42d Cong., 1st Sess. app. at 84 (Mar. 31, 1871) (Rep. Bingham).

The Fourteenth Amendment's Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause's incorporating scope:

> To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . *and the right to keep and to bear arms*. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at

> all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

"The newspaper coverage of the Bingham and Howard speeches provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1590 (2007); David Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (forthcoming 2009), available at SSRN: http://ssrn.com/abstract=1322323.

This understanding was not limited to the Fourteenth Amendment's supporters. "Fourteenth Amendment opponent Senator Reverdy Johnson . . . agreed that the privileges and immunities protected by the Fourteenth Amendment included the right to keep and bear arms." Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 98 (1993) (citations omitted). Interior Secretary Orville Browning

> published widely, in the fall of 1866, a letter denouncing the proposed Amendment. The Browning letter predicted the Amendment, especially the Due Process Clause, would "subordinate the State judiciaries to Federal supervision and control" and "annihilate

> the[ir] independence . . . in the administration of State laws." Indeed, he said, "all State laws . . . will be equally open to criticism, interpretation and adjudication by the Federal tribunals, whose judgments and decrees will be supreme and will override the decisions of the State Courts. . . . " Browning specifically noted that the Amendment would authorize federal court claims by state criminal defendants.

Wildenthal, 68 Ohio St. L.J. at 1604.[9]

And until the *Slaughter-House* surprise, leading legal scholars of the day understood the incorporationist effect of this language. Describing *Barron* as "unfortunate," Dean Pomeroy added that "a remedy is easy, and the question of its adoption is now pending before the people," referring to the Fourteenth Amendment. John N. Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 149, 151 (1868). Judge Farrar, referring to precedent holding the Bill of Rights inapplicable to the states, wrote: "All these decisions . . . are entirely swept away by the 14th amendment." Timothy Farrar, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (3d ed. 1872). Writing during the Fourteenth Amendment's ratification period, Judge Paschal offered that "[t]he new feature declared is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." George W. Paschal, THE CONSTITUTION OF THE UNITED STATES 290 (1868).

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[9] "The letter was published in numerous papers. The quotations in the text are taken from the *Cincinnati Commercial* of October 26, 1866." Wildenthal, at 1604 n.313 (other citations omitted).

It bears emphasizing that while the original public meaning of the Fourteenth Amendment with respect to incorporation is consistent with the Court's incorporation precedent under the Due Process Clause, the original understanding relates directly to the Privileges or Immunities Clause. The original error of eviscerating the Privileges or Immunities Clause has led to increased reliance on substantive due process, a concept which, whatever its merits, rests on shakier textual and originalist roots and is thus more prone to controversy.

This Court need not abandon substantive due process, which does not in and of itself conflict with faithful adherence to the original public meaning of the Privileges or Immunities Clause. However, when as here, substantive due process incorporation would lead to the same result as under a more straightforward, correct reading of the Privileges or Immunities Clause, the latter approach is preferable.

Justice Thomas, joined by Chief Justice Rehnquist, declared that he "would be open to reevaluating [the Privileges or Immunities Clause's] meaning in an appropriate case." *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).[10] Complete restoration of the Privileges or Immunities Clause may not occur overnight, but as the Second Amendment is among the last provisions of the Bill of Rights whose incorporation has not been considered in the modern era, this case presents a logical starting point.

IV. This Case Is An Excellent Vehicle For Elucidating The Protections Of The Right To Keep And Bear Arms In Relation To State And Local Governments.

Several factors render this the ideal case in which to settle the question of the Second Amendment's incorporation. First, Petitioners have clearly and consistently advanced the two traditional incorporation doctrines – selective incorporation under the Due Process Clause, and textual incorporation under the Privileges or Immunities Clause – each of which was turned away by the lower court.

Second, the laws at issue unambiguously violate the Second Amendment right, and would be unconstitutional if the Second Amendment bound Respondent.

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[10] "Since the adoption of [the Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. . . . Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open." *Gideon* v. *Wainright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring) (citation omitted).

Finally, Respondent has already enforced these laws against Petitioners, and Petitioners have moved for summary judgment. A definitive resolution in Petitioners' favor is therefore available.

◆

CONCLUSION

The Seventh Circuit's deference to the precedent and prerogatives of this Court is admirable, but misplaced. The court below should have heeded *Heller*'s instruction to "engage in the sort of Fourteenth Amendment inquiry required by our later cases," *Heller*, 128 S. Ct. at 2813 n.23. *Duncan*, not *Cruikshank*, today controls incorporation questions under the Fourteenth Amendment's Due Process Clause. Moreover, *Heller* flatly precludes the concepts relating to the right to arms explored by the lower court's dicta.

As the Ninth Circuit correctly held, the modern analysis mandates incorporation of the Second Amendment right as against the states. It is vitally important that this split be resolved quickly, so that all Americans may enjoy the full measure of protection in their exercise of fundamental rights.

More critically, it is never too late to undo an error as grievous as that contained within *The Slaughter-House Cases*. Opportunities to correct such mistakes should be seized when they present themselves.

Petitioners respectfully pray that the Court grant the petition.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 08-4241, 08-4243 & 08-4244

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ILLINOIS, and
VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 08 C 3645 *et al.* – **Milton I. Shadur**, *Judge.*

ARGUED MAY 26, 2009 – DECIDED JUNE 2, 2009

Before EASTERBROOK, *Chief Judge*, and BAUER and POSNER, *Circuit Judges.*

EASTERBROOK, *Chief Judge*. Two municipalities in Illinois ban the possession of most handguns. After the Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), that the second amendment entitles people to keep handguns at home for self-protection, several suits were filed against Chicago and Oak Park. All were dismissed on the ground that *Heller* dealt with a law enacted under the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state. The Supreme Court has rebuffed requests to apply the second amendment to the states. See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894). The district judge thought that only the Supreme Court may change course. 2008 U.S. Dist. LEXIS 98134 (N.D. Ill. Dec. 4, 2008).

Cruikshank, Presser, and *Miller* rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), holds that the privileges and immunities clause does not apply the Bill of Rights, en bloc, to the states. Plaintiffs respond in two ways: first they contend that *Slaughter-House Cases* was wrongly decided; second, recognizing that we must apply that decision even if we think it mistaken, plaintiffs contend that we may use the Court's "selective incorporation" approach to the second amendment. *Cruikshank, Presser,* and *Miller* did not consider that possibility, which had yet to be devised when those decisions were rendered. Plaintiffs ask us to follow *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), which concluded that *Cruikshank, Presser,* and *Miller* may be bypassed as fossils. (*Nordyke* applied the second amendment to the states but held that local governments may exclude weapons from public buildings and parks.) Another court of appeals has concluded that *Cruikshank, Presser,* and *Miller* still control even though their reasoning is obsolete. *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). We agree with *Maloney*, which followed our own decision in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Cruikshank, Presser,* and *Miller* have "direct application in [this] case". Plaintiffs say that a decision of the Supreme Court has "direct application" only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Anyone who doubts that *Cruikshank, Presser,* and *Miller* have "direct application in [this] case" need only read footnote 23 in *Heller*. It says that *Presser* and *Miller* "reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government." 128 S. Ct. at 2813 n.23. The Court did not say that *Cruikshank, Presser,* and *Miller* rejected a particular *argument* for applying the second amendment to the states. It said that they hold "that the Second Amendment applies only to the Federal Government." The Court added that "*Cruikshank*'s continuing validity on incorporation" is "a question not presented by this case". *Ibid.* That does not license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.

State Oil Co. v. Khan, 522 U.S. 3 (1997), illustrates the proper relation between the Supreme Court and a court of appeals. After *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), held that antitrust laws condemn all vertical maximum price fixing, other decisions (such as *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)) demolished *Albrecht*'s intellectual underpinning. Meanwhile new economic analysis showed that requiring dealers to charge no more than a prescribed maximum price could benefit consumers, a possibility that *Albrecht* had not considered. Thus by the time *Khan* arrived on appeal, *Albrecht*'s rationale had been repudiated by the Justices, and new arguments that the *Albrecht* opinion did not mention strongly supported an outcome other than the one that *Albrecht* announced. Nonetheless, we concluded that only the Justices could inter *Albrecht*. See *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996). By plaintiffs' lights, we should have treated *Albrecht* as defunct and reached what we deemed a better decision. Instead we pointed out *Albrecht*'s shortcomings while enforcing its holding. The Justices, who overruled *Albrecht* in a unanimous opinion, said that we had done exactly the right thing, "for it is this Court's prerogative alone to overrule one of its precedents." 522 U.S. at 20. See also, e.g., *Eberhart v. United States*, 546 U.S. 12 (2005).

What's more, the proper outcome of this case is not as straightforward as the outcome of *Khan*. Although the rationale of *Cruikshank, Presser,* and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this. See Akhil Reed Amar, *America's Constitution: A Biography* 390-92 (2005) (discussing how the second amendment relates to the privileges and immunities clause). The prevailing approach is one of "selective incorporation." Thus far neither the third nor the seventh amendment has been applied to the states – nor has the grand jury clause of the fifth amendment or the excessive bail clause of the eighth.

How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict.

Nordyke asked whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). It gave an affirmative answer. Suppose the same question were asked about civil jury trials. That institution also has deep roots, yet the Supreme Court has not held that the states are bound by the seventh amendment. Meanwhile the Court's holding that double-jeopardy doctrine is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (concluding that it is enough for the state to use res judicata to block relitigation of acquittals), was overruled in an opinion that paid little heed to history. *Benton v. Maryland*, 395 U.S. 784 (1969). "Selective incorporation" thus cannot be reduced to a formula.

Plaintiffs' reliance on William Blackstone, 1 *Commentaries on the Laws of England* *123-24, for the proposition that the right to keep and bear arms is "deeply rooted" not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right. The United Kingdom does not have a constitution that prevents Parliament and the Queen from matching laws to current social and economic circumstances, as the people and their representatives understand them. It is dangerous to rely on Blackstone (or for that matter modern European laws banning handguns) to show the meaning of a constitutional amendment that this nation adopted in 1868. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution*, 59 Stan. L. Rev. 1281 (2007). Blackstone also thought determinate criminal sentences (*e.g.*, 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. 4 *Commentaries* *371-72. That's not a plausible description of American constitutional law.

One function of the second amendment is to prevent the national government from interfering with state militias. It does this by creating individual rights, *Heller* holds, but those rights may take a different shape when asserted against a state than against the national government. Suppose Wisconsin were to decide that private ownership of long guns, but not handguns, would best serve the public interest in an effective militia; it is not clear that such a decision would be antithetical to a decision made in 1868. (The fourteenth amendment was ratified in 1868, making that rather than 1793 the important year for determining what rules must be applied to the states.) Suppose a state were to decide that people cornered in their homes must surrender rather than fight back – in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the second amendment protects only the interests of law-abiding citizens. See *United States v. Jackson*, 555 F.3d 635 (7th Cir. 2009) (no constitutional right to have guns ready to hand when distributing illegal drugs).

Our hypothetical is not as farfetched as it sounds. Self-defense is a common-law gloss on criminal statutes, a defense that many states have modified by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible. Wayne R. LaFave, 2 *Substantive Criminal Law* §10.4 (2d ed. 2003). An obligation to avoid lethal force in self-defense might imply an obligation to use pepper spray rather than handguns. A modification of the self-defense defense may or may not be in the best interest of public safety – whether guns deter or facilitate crime is an empirical question, compare John R. Lott, Jr., *More Guns, Less Crime* (2d ed. 2000), with Paul H. Rubin & Hashem Dzehbakhsh, *The effect of concealed handgun laws on crime*, 23 International Rev. L. & Econ. 199 (2003), and Mark Duggan, *More Guns, More Crime,* 109 J. Pol. Econ. 1086 (2001) – but it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868. The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate. See *Clark v. Arizona*, 548 U.S.

735 (2006) (state may reformulate, and effectively abolish, insanity defense); *Martin v. Ohio*, 480 U.S. 228 (1987) (state may assign to defendant the burden of raising, and proving, self-defense).

Chicago and Oak Park are poorly placed to make these arguments. After all, Illinois has *not* abolished self-defense and has *not* expressed a preference for long guns over handguns. But the municipalities can, and do, stress another of the themes in the debate over incorporation of the Bill of Rights: That the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *Crist v. Bretz*, 437 U.S. 28, 40-53 (1978) (Powell, J., dissenting) (arguing that only "fundamental" liberties should be incorporated, and that even for incorporated amendments the state and federal rules may differ); Robert Nozick, *Anarchy, State, and Utopia* (1974). Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to "incorporate" the second amendment are for the Justices rather than a court of appeals.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs,
v.
VILLAGE OF OAK PARK,
Defendant.

No. 08 C 3696

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs,
v.
CITY OF CHICAGO,
Defendant.

No. 08 C 3697

MEMORANDUM OPINION AND ORDER

(Filed Dec. 4, 2008)

Fresh from a historic victory for their cause before the Supreme Court in *Dist. of Columbia v. Heller*, 128 S.Ct. 2783 (2008), the National Rifle Association of America, Inc. ("Association") and some of its members filed these two lawsuits just one day after the *Heller* decision.[1] These cases have taken aim

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[1] Even so, the Association was not quite as quick on the trigger as counsel for the plaintiffs in *McDonald v. City of*

(Continued on following page)

at the gun control ordinances in the City of Chicago and the Village of Oak Park. Although counsel's constitutional arguments are set out in 15 well-written pages,[2] they may be encapsulated in a simple syllogism:

> 1. Under *Heller*, the Second Amendment's guaranty of the right to keep and bear arms has invalidated the District of Columbia's prohibition on the possession of handguns.
>
> 2. Almost all of the guaranties that apply against the federal government and its agencies under the Bill of Rights (the first ten amendments to the Constitution) have been held to have been incorporated in the guaranties that apply against the states and their subordinate units of government under the Fourteenth Amendment.
>
> 3. Ergo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in *Heller*, also

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Chicago, 08 C 3645, who actually filed suit here on the same morning that *Heller* was decided in Washington! What is eminently plain is that both sets of lawyers – the counsel who are handling both of these cases and another set of lawyers in *McDonald*-came loaded for bear, on the assumption that the Supreme Court majority would rule as it did.

[2] After brief introductory paragraphs, the remaining 14 pages of the two memoranda are word-for-word replicas of each other. This memorandum order will accordingly cite only to the memorandum filed in the City of Chicago case.

> extends to Oak Park and Chicago via the Fourteenth Amendment. QED.

That approach, however, ignores a fundamental and critical jurisprudential curb that confronts a district judge such as the writer who is asked to confirm that third proposition – the judge's duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction. As stressed in *Sabin v. United States Dep't of Labor,* 509 F.3d 376, 378 (emphasis in original) – one of many cases standing for the same proposition:[3]

> The Supreme Court has told the lower courts that they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless *the Court* overrules it, however out of step with current trends in the relevant case law the case may be.

That posture of the Court of Appeals vis-a-vis the Supreme Court is of course echoed in the posture of this Court vis-a-vis our Court of Appeals.

In this instance our Court of Appeals has squarely upheld the constitutionality of a ban on handguns a quarter century ago in *Quilici v. Village of Morton Grove,* 695 F.2d 261 (7th Cir. 1982). And in reaching that conclusion, *Quilici, id.* at 269 relied on the Supreme Court's decision in *Presser v. Illinois*, 116 U.S. 252, 265 (1886):

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[3] See also, e.g., *United States v. Santiago-Ochoa,* 447 F.3d 1015, 1020-21 (7th Cir. 2006).

> It is difficult to understand how appellants can assert that *Presser* supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the Presser decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government. . . . "

In doing so, *Quilici, id.* at 270 rejected arguments (1) that later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled *Presser* and (2) that the entire Bill of Rights had been implicitly incorporated into the Fourteenth Amendment to apply to the states.

Indeed, *Heller* itself (128 S.Ct. at 2812-13) confirmed that both *Presser* and the Court's predecessor decision in *United States v. Cruikshank*, 92 U.S. 542 (1876) have held that the Second Amendment applies only to the federal government. *Heller, id.* at 2812 described *Cruikshank* as having "held that the Second Amendment does not by its own force apply to anyone other than the Federal Government," after which *Heller, id.* at 2813 n.23 went on to state:

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois,* 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and *Miller v. Texas,* 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

To be sure, as the just-quoted language reflects, both *Cruikshank* and *Presser* long antedated the more modern jurisprudence of implied incorporation that began with the initial suggestion in *Gitlow v. New York,* 268 U.S. 652 (1925) that the First Amendment was brought into play against the states via the Fourteenth Amendment, and then continued with selective incorporation thereafter. But *Heller* deliberately and properly did not opine on the subject of incorporation vel non of the Second Amendment (after all, that question was not before the Court). It is simply wrong – an overreaching obviously prompted by the enthusiasm of advocacy – for plaintiffs' counsel to state (Mem. 8-9, emphasis added):

> *Heller*'s holding that the Second Amendment guarantees an individual right to keep and bear arms, including handguns, *squarely*

> *overrules* the Seventh Circuit's ruling that "the right to keep and bear handguns is not guaranteed by the second amendment."

This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs' argument – it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament. But as later-to-be-Justice Oliver Wendell Holmes famously observed in 1881 in *The Common Law:*

> The life of the law has not been logic: it has been experience.

In sum, this Court – duty bound as it is to adhere to the holding in *Quilici,* rather than accepting plaintiffs' invitation to "overrule" it (!) – declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances. These actions are set for a status hearing at 8:45 a.m. December 9, 2008 to discuss further proceedings.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: December 4, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTIS McDONALD, et al.,)
Plaintiffs,)
)
v.) No. 08 C 3645
CITY OF CHICAGO, et al.,)
)
Defendants.)

MEMORANDUM ORDER

This is one of three cases on this Court's calendar that seek to extrapolate from the Supreme Court's decision in *Dist. of Columbia v. Heller,* 128 S.Ct. 2783 (2008) to invalidate municipal ordinances that ban handguns – indeed, plaintiffs' counsel brought this lawsuit only one day after *Heller* came down (obviously having anticipated the decision reached by the five-Justice majority). This case, like *National Rifle Association of America, Inc. v. City of Chicago,* 08 C 3697, attacks Chicago's handgun ordinance, while *National Rifle Association of America, Inc. v. Village of Oak Park,* 08 C 3696 (brought by the same plaintiffs' counsel who are handling 08 C 3697) challenges the Oak Park ordinance.

Today this Court has issued an opinion that rejects, as contrary to jurisprudential principles, the invitation by counsel in the other two cases to "overrule" *Quilici v. Village of Morton Grove,* 695 F.2d

261 (7th Cir. 1982). *Quilici* is an on-all-fours decision by our Court of Appeals that takes the opposite position from that now pressed by plaintiffs in all three cases before this Court.

There is no need to repeat what is said in that opinion, for it might well have been written for this case too. Instead this memorandum order simply denies (1) plaintiffs' two pending motions – their Motion for Summary Judgment (Dkt. 32) and their Motion To Narrow Legal Issues (Dkt. 43) – and (2) sets this case as well for a status hearing at 8:45 a.m. December 9, 2008.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: December 4, 2008

ARTICLE II. REGISTRATION OF FIREARMS

8-20-030 Definitions.

* * *

(f) "Firearm" means any weapon which will, or is designed to or restored to, expel a projectile or projectiles by the action of any explosive; the frame or receiver of any such device; or any firearm muffler or silencer. Provided, that such term shall not include:

(1) antique firearm;

(2) any device used exclusively for line-throwing, signaling, or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission; or

(3) any device used exclusively for firing explosives, rivets, stud cartridges, or any similar industrial ammunition incapable of use as a weapon.

* * *

(k) "Handgun" means a firearm designed to be held and fired by the use of a single hand, and includes a combination of parts from which such firearm can be assembled.

* * *

8-20-040 Registration of firearms.

(a) All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall within the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver, or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver, or accept any firearm which is unregisterable under the provisions of this chapter.

(b) This section shall not apply to:

(1) Firearms owned or under the direct control or custody of any federal, state or local governmental authority maintained in the course of its official duties;

(2) Duty-related firearms owned and possessed by peace officers who are not residents of the City of Chicago;

(3) Duty-related firearms owned or possessed by corrections officers; provided, that such corrections officers are not residents of the City of Chicago;

(4) Firearms owned, manufactured or processed by licensed manufacturers of firearms, bulk transporters or licensed sellers of firearms at wholesale or retail, provided that such persons have, in addition to any other license required by law, a valid deadly weapons dealer license issued under Chapter 4-144 of this code;

(5) Any nonresident of the City of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another

jurisdiction; provided, that such weapon shall be unloaded and securely wrapped and that his possession or control of such firearm is lawful in the jurisdiction in which he resides;

(6) Peace officers, while in the course of their official duties, who possess and control any firearm or ammunition issued by their department, bureau or agency in the normal course of business;

(7) Private security personnel who possess or control any firearm or ammunition within the City of Chicago; provided, that such firearms shall be owned and maintained by the security firm employing such personnel and shall be registered by the security firm in accordance with this chapter;

(8) Those persons summoned by a peace officer to assist in making an arrest or preserving the peace while actually engaged in assisting the peace officer.

(Prior code § 11.1-2; Amend. Coun. J. 7-7-92, p. 19196)

8-20-050 Unregisterable firearms.

No registration certificate shall be issued for any of the following types of firearms:

(a) Sawed-off shotgun, machine gun, or short-barreled rifle;

(b) Firearms other than handguns, owned or possessed by any person in the City of

Chicago prior to the effective date of this chapter which are not validly registered prior to the effective date of this chapter;

(c) Handguns, except:

 (1) Those validly registered to a current owner in the City of Chicago prior to the effective date of this chapter, and which contain each of the following:

  (i) A safety mechanism to hinder the use of the handgun by unauthorized users. Such devices shall include, but shall not be limited to, trigger locks, combination handle locks, and solenoid use-limitation devices; and

  (ii) A loud indicator device that provides reasonable warning to potential users such that even users unfamiliar with the weapon would be forwarned and would understand the nature of the warning;

 (2) those owned by peace officers who are residents of the City of Chicago,

 (3) Those owned by security personnel,

 (4) Those owned by private detective agencies licensed under Chapter 111.2601, et seq., Illinois Revised Statutes;

(d) Firearm muffler or silencer;

(e) Assault weapons, as defined in Section 8-20-030, unless they are owned by a person who is entitled to own them under Section 8-24-025.

Any person who receives through inheritance any firearm validly registered pursuant to this chapter will be eligible to reregister such firearm within 60 days after obtaining possession or title, provided such person shall be qualified to do so in accordance with this chapter.

(Prior code § 11.1-3; Amend. Coun. J. 7-7-92, p. 19196; 2-7-97, p. 38729)

8-20-060 Prerequisites to registration – Application for registration.

(a) No registration certificate shall be issued to any person unless such person:

(1) Shall possess a valid Illinois firearm Owner's Identification Card in accordance with Chapter 38 Section 83-4 of the Illinois Revised Statutes as amended;

(2) Has not been convicted of a crime of violence, as defined herein as weapons offense, or a violation of this chapter; and

(3) Has not been convicted within the five years prior to the application of any:

(i) Violation of any law relating to the use, possession or sale of any narcotic or dangerous drug, or

(ii) Violation of Chapter 38 Section 12-2(a)(1) of the Illinois Revised Statutes, as amended, for aggravated assault or any similar provision of the law of any other jurisdiction; and

(4) Has vision better than or equal to that required to obtain a valid driver's license under the standards established by the Illinois Vehicle Code Chapter 95-1/2, Section 506-4 Illinois Revised Statutes, as amended; and

(5) Is not otherwise ineligible to possess a firearm under any federal, state or local law, statute or ordinance.

(b) All applicants for a registration certificate under this chapter shall file with the superintendent on a form provided, a sworn application in writing. The application shall include the following:

(1) Name, social security number, residential and business address and telephone number of the applicant;

(2) The applicant's age, sex and citizenship;

(3) The applicant's Illinois firearm owner's identification number;

(4) The name of manufacturer, the caliber or gauge, the model, type and the serial number identification of the firearm to be registered;

(5) The source from which the firearm was obtained;

(6) Evidence that the applicant meets the criteria of Section 8-20-060(a) of this chapter;

(7) Two photographs of the applicant taken within 30 days immediately prior to the date of filing the application equivalent to passport size showing the full face, head and shoulders of the applicant in a clear and distinguishing manner;

(8) Such other information as the superintendent shall find reasonably necessary to effectuate the purpose of this chapter and to arrive at a fair determination whether the terms of this ordinance have been complied with.

(c) The superintendent shall be the custodian of all applications for registration under this chapter.

(Prior Code § 11.1-4)

8-20-070 Fingerprints.

When necessary to establish the identity of any applicant or registrant, such applicant or registrant shall be required to submit to fingerprinting in accordance with procedures and regulations prescribed by the superintendent.

(Prior code § 11.1-5)

8-20-080 Application fees.

(a) A nonrefundable fee in the amount indicated in subsection (d) of this section shall accompany each initial registration.

(b) A nonrefundable fee in the amount indicated in subsection (d) of this section shall accompany each reregistration application.

(c) The registration fee shall not be applicable to (1) any duty-related handgun of a peace officer domiciled in the City of Chicago, or (2) to any duty-related handgun(s) owned by a resident of the City of Chicago who retired from the Chicago Police Department in good standing and without any disciplinary charges pending, and who is, or is eligible to become, an annuitant of the Policemen's Annuity and Benefit Fund of the City of Chicago, but only if the handgun(s) is registered in that person's name at the time of separation from active duty in the Chicago Police Department.

(d) Registration fees for firearms shall be as follows:

1 firearm	$20.00
2-10 firearms	25.00
More than ten firearms	35.00

(Prior code § 11.1-6; Amend Coun. J. 7-7-92, p. 19196; Amend Coun. J. 11-10-94, p. 59125; Amend Coun. J. 4-9-03, p. 106640, § 1)

8-20-090 Filing time.

(a) A registration certificate shall be obtained prior to any person taking possession of a firearm from any source.

(b) Any firearm currently registered must be reregistered pursuant to this chapter and in accordance with rules, regulations and procedures prescribed by the superintendent. An application to reregister such firearm shall be filed within 180 days from the effective date of this chapter; provided, however, that this section shall not apply to law enforcement officers during their tenure of continuous active duty.

(Prior code § 11.1-7; Amend Coun. J. 2-4-85, p. 13404; Amend Coun. J. 3-25-86, p. 28863)

* * *

8-20-120 Revocation – Denial.

A registration certificate shall be revoked or all application for registration or reregistration shall be denied by the mayor when she finds that:

(a) Any of the criteria in Section 8-20-060(a) of this chapter are not currently met; or

(b) The registered firearm is or has become an unregisterable firearm under the terms of Section 8-20-050 of this chapter; or

(c) The information furnished to the superintendent on the application for registration certificate proves to be false; or

(d) The applicant or registrant has violated any of the provisions of this chapter.

(Prior code § 11.1-10)

8-20-130 Procedures for denial or revocation.

(a) If it is determined that an application for registration or reregistration should be denied or that a registration certificate should be revoked, the mayor shall notify the applicant or registrant in writing of the proposed denial or revocation, briefly stating the reason or reasons therefore.

(b) The application or registrant, within ten days after receiving notice of the proposed denial or revocation, may file with the mayor a written request for a hearing before the mayor's license commission.

(c) Within ten days of receipt of a request for hearing, the commission shall give notice of a hearing to be held not less than five days after service of the notice on the person requesting the hearing.

At the hearing, the applicant or registrant may submit further evidence in support of the application for initial registration or to continue to hold a registration certificate as the case may be.

The commission shall determine whether the denial or revocation was in accordance with the provisions of this chapter and shall report its finding to the mayor within 21 days after the public hearing has been completed.

Upon a review of the commission's findings and a determination that the application should be denied or certificate revoked, the mayor shall issue a written finding stating the reasons for denial or evocation thereof and shall serve a copy of said findings upon the applicant or registrant and all parties appearing or represented at the hearing.

(d) If the applicant or registrant does not request a hearing or submit further evidence within ten days after receiving notification of the proposed denial or revocation, it shall be deemed that the applicant or registrant has conceded the validity of the reason or reasons stated in the notice and the denial or revocation shall become final.

(c) Within three days after notification of a decision unfavorable to the applicant or registrant and all time for appeal in accordance with paragraph 8-20-130(a) through (d) having expired, the applicant or registrant shall:

(1) Peaceably surrender to the Chicago Police Department the firearm for which the applicant was denied or the registration certificate was revoked; or

(2) Remove such firearm from the City of Chicago; or

(3) Otherwise lawfully dispose of his interest in such firearm.

(f) The applicant or registrant shall submit to the superintendent evidence of the disposition of nonregisterable firearms in accordance with paragraph 8-20-130(e)(2) and (3). Such evidence shall be submitted on forms and in the manner prescribed by the superintendent.

(Prior code § 11.1-11)

8-20-140 Additional duties of registrant.

Each person holding a registration certificate shall:

(a) Immediately notify the Chicago Police Department on a form prescribed by the superintendent of:

(1) The loss, theft or destruction of the registration certificate or of a registered firearm immediately upon discovery of such loss, theft, or destruction;

(2) A change in any of the information appearing on the registration certificate;

(3) The sale, transfer or other disposition of the firearm not less than 48 hours prior to delivery.

(b) Immediately return to the superintendent his copy of the registration certificate for any firearm which is lost, stolen, destroyed or otherwise disposed of.

(c) Each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device, unless such firearm is in his possession at his place of residence or business or while being used for lawful recreational purposes within the City of Chicago; provided, this paragraph shall not apply to law enforcement personnel as defined in paragraph 8-20-030(k) and provided further this paragraph shall not apply to security personnel as defined in paragraph 8-20-030(a), while in the course of their employment.

(Prior Code § 11.1-12)

8-20-150 Exhibition of registration.

Any person carrying or having in his possession or under his custody or control any firearm, shall have on his person or within his immediate custody a valid registration certificate for such firearm issued hereunder, which shall be exhibited for inspection to any peace officer upon demand. Failure of any such person to so exhibit his registration certificate shall be presumptive evidence that he is not authorized to possess such firearm.

Failure of any person to exhibit a registration certificate for any firearm in his possession, custody or control shall also be cause for the confiscation of such firearms and revocation of any registration certificates issued therefore under this chapter.

(Prior code § 11.1-13)

* * *

8-20-200 Renewal of Registration.

(a) Every registrant must renew his registration certificate annually. Applications for renewal shall be made by such registrants 60 days prior to the expiration of the current registration certificate.

(b) The application for renewal shall include the payment of a renewal fee as follows:

1 firearm	$20.00
2-10 firearms	25.00
More than ten firearms	35.00

(c) Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregisterable.

(d) All terms, conditions and requirements of this chapter for registration of firearms shall be applicable to renewal or registration of such firearms.

(e) The renewed fee shall not be applicable to duty-related handguns of peace officers domiciled in the City of Chicago.

(Prior code § 11.1-18; Amend Coun. J. 7-7-92, p. 19196; Amend Coun. J. 11-10-94, p. 59125)

* * *

8-20-241 Firearm used illegally – Penalty.

The owner of an unregistered firearm that is used in any criminal act shall be subject to a fine of $500.00 for each such use, regardless of whether the owner participated in, aided or abetted the criminal act. A fine under this section shall be in addition to any other penalty imposed on the criminal act or use of the firearm.

(Added Coun. J. 11-10-94, p. 59125)

8-20-250 Violation – Penalty.

Any person who violates any provision of this chapter, where no other penalty is specifically provided, shall upon conviction for the first time, be fined not less than $300.00, nor more than $500.00; or be incarcerated for not less than ten days nor more than 90 days or both. Any subsequent conviction for a violation of this chapter shall be punishable by a fine of $500.00 and by incarceration for a term of not less than 90 days, nor more than six months.

(Prior code § 11.1-23, Amend Coun. J. 11-10-94, p. 59125)

8-20-260 Severability.

If any provision or term of this chapter, or any application thereof, is held invalid, the invalidity shall not affect other applications of the provisions or terms of this chapter which reasonably can be given effect without the invalid provision or term for the application thereof.

(Prior code § 11.1-24)

[LOGO]

City of Chicago/
Department of Police
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Jody P. Weis,
Superintendent of Police

June 13, 2008

Mr. OTIS MCDONALD

Chicago, IL

Dear Mr. OTIS MCDONALD:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

The following firearm(s) are affected by this notification:

Registration Number	Make/ Manufacturer	Model	Serial Number
D007685L	**Beretta Usa Corp**	**950**	**C74057**

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
Chicago, IL 60610

The request can be faxed to (312) 742-8248

If you do not appeal this denial, you are directed to do one of the following: 1) peaceably surrender to the Chicago Police Department the firearm for which you were denied registration, or 2) remove your unregistered firearm(s) from the City of Chicago corporate limits within 10 days fo [sic] receiving this notification or within 3 days after notification of an unfavorable decision by the Mayor's License Commission, or 3) otherwise lawfully dispose of your interest in such firearm(s).

If the subject firearm has already been sold or transferred, complete the enclosed Firearm Dispositon [sic] Form (CPD-31.610) and mail the hard copy directly to the Gun Registration Program. If you are surrendering a firearm, you should call "911" and a police officer will pick up the weapon. The police officer will send

the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

[LOGO]

City of Chicago/
Department of Police
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Jody P. Weis,
Superintendent of Police

May 6, 2008

Mr. ADAM ORLOV
Chicago, IL

Dear Mr. ADAM ORLOV:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

---- A registration certificate was not obtained prior to the applicant taking possession of the firearm in violation of 8-20-090. (filing time)

The following firearm(s) are affected by this notification:

Registration Number	Make/ Manufacturer	Model	Serial Number
D007411S	**S.I.G. (Swiss Industriel Gesellshaft), ig-Arms;Sig-Sauer**	**P220**	**G247678**

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

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Department of Administration Hearings
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Gun Registration Program
Chicago Police Department

[LOGO]

City of Chicago/
Department of Police
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Jody P. Weis,
Superintendent of Police

January 23, 2008

Mr. DAVID LAWSON
Chicago, IL

Dear Mr. DAVID LAWSON:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

---- A registration certificate was not obtained prior to the applicant taking possession of the firearm in violation of 8-20-090. (filing time)

The following firearm(s) are affected by this notification:

Registration Number	Make/ Manufacturer	Model	Serial Number
D006343L	**Springfield Armory, Geneseo, Il**	M1	3031203

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
Chicago, IL 60610

The request can be faxed to (312) 742-8248

If you do not appeal this denial, you are directed to do one of the following: 1) peaceably surrender to the Chicago Police Department the firearm for which you were denied registration, or 2) remove your unregistered firearm(s) from the City of Chicago corporate limits within 10 days fo [sic] receiving this notification or within 3 days after notification of an unfavorable decision by the Mayor's License Commission, or 3) otherwise lawfully dispose of your interest in such firearm(s).

If the subject firearm has already been sold or transferred, complete the enclosed Firearm Dispositon [sic] Form (CPD-31.610) and mail the hard copy directly to the Gun Registration Program. If you are surrendering a firearm, you should call "911" and a police officer will pick up the weapon. The police officer will send

the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

[LOGO]

City of Chicago/
Department of Police
Gun Registration Program
3510 S. Michigan Avenue,
Room 1027
Chicago, Illinois 60653
(312) 745-5164

Richard M. Daley, Mayor
Dana V. Starks,
Interim Superintendent
of Police

January 3, 2008

Ms. COLLEEN LAWSON
Chicago, IL

Dear Ms. COLLEEN LAWSON:

A review of your application and the records maintained by the Chicago Police Department indicate that you are ineligible to register the below referenced firearm. Pursuant to Chapter 8-20 of the Municipal Code of the City of Chicago, your firearm registration(s) are denied for the following reason:

---- Firearm cannot be registered pursuant to Municipal Code Section 8-20-050. Hanguns [sic] cannot be registered.

The following firearm(s) are affected by this notification:

Registration Number	Make/ Manufacturer	Model	Serial Number
D006489S	**Smith & Wesson**	**M&P**	**MPP8429**

Pursuant to the Municipal Code Section 8-20-130, you may file a written request for hearing before the Mayor's License Commission. This request for hearing must be made in writing or by fax within 10 days after receipt of this notice. The request should be sent to:

Municipal Division Chief
Department of Administration Hearings
Municipal Hearings Division
740 N. Sedgwick, 2nd Floor
Chicago, IL 60610

The request can be faxed to (312) 742-8248

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If the subject firearm has already been sold or transferred, complete the enclosed Firearm Dispositon [sic] Form (CPD-31.610) and mail the hard copy directly to the Gun Registration Program. If you are surrendering a firearm, you should call "911" and a police officer will pick up the weapon. The police officer will send

the form to the Gun Registration Program. You Should retain the top copy of this form for your records.

Gun Registration Program
Chicago Police Department

THE CITY OF CHICAGO, ILLINOIS
DEPARTMENT OF ADMINISTRATIVE HEARINGS
MUNICIPAL HEARINGS DIVISION

IN RE PROCEEDINGS CONCERNING GUN REGISTRATION,	)	
REQUESTED BY:	)	
David Lawson	)	No. 07 GR-000122
Chicago, IL	)	
Registration No. D006343L Serial No. 3031203	)	

DECISION

1. I find that there is jurisdiction over the subject matter and the parties.

2. According to City Exhibit No. 4, applicant acquired the firearm through the mail on October 19, 2007 from the Civilian Marksmanship Program in Anniston, Arizona. The registration application was submitted November 30, 2007. Applicant testified the program periodically sells firearms and interested parties can bid for the right to buy them. In October 2007 applicant learned via e-mail that his request to purchase the firearm at issue in this case was granted. Applicant testified that the gun was delivered to his Chicago home the next day, October 19, 2007 and remained there for less than a week before being taken to Bloomington, Illinois. He said he could not register the firearm prior to receiving

possession because he would be unable to properly list the serial number and other information on the application without possessing the firearm. He added the program required delivery to his home since that is the address on both his driver's license and firearm owner's identification card. Applicant testified that the Chicago Police gun desk told him he had 30 days to register the firearm from the date of purchase. He explained that this application was beyond that time limit due to travel.

3. Section 8-20-040 of the Municipal Code of the City of Chicago requires that all firearms in the City be registered.. Section 8-20-040(a) states:

> (a) All firearms *in the City of Chicago* shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall, *within* the City of Chicago possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, *within* the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver or accept any firearm which is unregisterable under the provisions of this chapter. (Emphasis added).

4. I find that the applicant possessed the firearm in question within the City of Chicago without first properly registering it. Applicant resides in the

City of Chicago and the firearm was delivered to his home. Section 8-20-090(a) requires a firearm be registered *before* an applicant takes possession of the firearm. This section by its plain language is applicable to firearms *within* the City of Chicago. Further, the case of City of Chicago v. Cotton, 356 Ill. App. 3d1, 826 N.E. 2d 405 (1st. Dist 2005) holds that the use of the term "shall" in the Chicago Municipal Code is mandatory, not discretionary. Therefore, I find that I have no discretion in this matter and, as a result, since Applicant did not register the firearm prior to possessing it in the City of Chicago, the firearm is unregisterable.

5. Therefore, the denial of Applicant's application for registration of this firearm is affirmed.

6. Pursuant to Section 2-14-102 of the Chicago Municipal Code, this final decision is subject to review under the Illinois Administrative Review Act.

/s/ Gregory G. Plesha
Gregory G. Plesha
Administrative Law Officer

Dated: March 8, 2008

OPPOSITION
BRIEF

⑩ ⑧

Nos. 08-1497 and 08-152

Supreme Court, U.S.
FILED
AUG 5 - 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *ET AL.*,
Petitioners,
v.
CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondents.

OTIS MCDONALD, *ET AL.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the Court should consider claims that the Second Amendment right to keep and bear arms in common use, including handguns, is a fundamental liberty interest applicable against state and local governments by the selective incorporation doctrine of the Due Process Clause of the Fourteenth Amendment.

2. Whether the Court should refuse to revisit its repeated holdings that the Privileges or Immunities Clause of the Fourteenth Amendment does not incorporate Bill of Rights provisions to apply against state and local governments.

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IN THE

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Nos. 08-1497 and 08-1521

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *ET AL.*,
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OTIS MCDONALD, *ET AL.*,
Petitioners,
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CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because "the convenient availability of firearms and ammunition has increased firearm related deaths and injuries" and handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery."

Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago's ordinance, "no person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm," and no person may possess "any firearm which is unregisterable." Municipal Code of Chicago, Ill. § 8-20-040(a) (2009). Unregisterable firearms include most handguns. *Id.* § 8-20-050(c). Rifles and shotguns are registerable. *Ibid.* Registerable firearms must be registered before being possessed in Chicago (*id.* § 8-20-090(a)), and registration must be renewed annually (*id.* § 8-20-200(a)). Failure to renew registration "shall cause the firearm to become unregisterable." *Id.* § 8-20-200(c).

Oak Park's firearms ordinance makes it "unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm." Municipal Code of Oak Park, Ill. § 27-2-1 (2008). The definition of firearms includes "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1.

The National Rifle Association and several individual plaintiffs (collectively "NRA petitioners") filed one lawsuit against Chicago, and another against Oak Park, challenging the handgun restrictions. The individual petitioners allege that they wish to possess handguns for purposes of self-defense at home. Count I of the NRA's complaint against Chicago alleges that Chicago's handgun ban violates the

Second Amendment, as allegedly incorporated into the Fourteenth Amendment.[1]

In its complaint against Oak Park, the NRA similarly alleges that Oak Park's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment.

Another lawsuit was filed by Otis McDonald and other individual plaintiffs, along with the Illinois State Rifle Association and the Second Amendment Foundation (collectively "McDonald petitioners"). The individual petitioners allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. McDonald petitioners allege in count I that Chicago's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause.[2] Counts

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[1] Count II of both NRA complaints was an equal protection challenge to certain exceptions to the handgun bans. NRA petitioners do not mention the equal protection claims or make any argument concerning them but, to the contrary, have always conceded that the equal protection claims would fail without incorporation. See Dec. 9, 2008 Tr. 6, 10, 12, 14. Count III, which alleged that restrictions on transportation of firearms through Chicago and Oak Park violate 18 U.S.C. § 926A, was dismissed with prejudice by stipulation.

[2] McDonald petitioners incorrectly state that Chicago's ordinance is "identical to that struck down by this Court" in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). McDonald Pet. 2. The District's ordinance "require[d] residents to keep their lawfully owned firearms, such as registered long guns, 'unloaded and dissembled or bound by a trigger lock or similar device.'" 128 S. Ct. at 2788 (citation omitted). Chicago's ordinance does not contain this requirement for lawfully owned

II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregisterable for failure to comply with either requirement. Count V is an equal protection challenge to the unregisterability penalty.

All three cases were before the same district judge. McDonald petitioners moved for summary judgment, which the district court deferred for some discovery by Chicago. Subsequently, all petitioners filed motions to narrow the legal issues, asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment to apply to state and local governments. In response, the district court issued two opinions. In the first opinion, entered in the two NRA cases, the Court ruled that it was bound by *Presser v. Illinois*, 116 U.S. 252 (1886), and *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), which held that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government." NRA Pet. App. 20a (citations omitted). The second opinion, issued in *McDonald*, adopted the rationale in the *NRA* cases and denied the motions for summary judgment and to narrow the legal issues. McDonald Pet. App. 17-18.

At the next status hearing, Chicago and Oak Park made oral motions for judgment on the pleadings in

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firearms in the owner's residence or fixed place of business. See Municipal Code of Chicago, Ill. § 8-20-010.

all three cases, which the district court granted. Petitioners appealed, and the three appeals were consolidated.

The court of appeals affirmed, holding that "[t]he Supreme Court has rebuffed requests to apply the second amendment to the states" in three separate cases. NRA Pet. App. 2a (citing *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser*; *Miller v. Texas*, 153 U.S. 535 (1894)). The court of appeals further explained that it was bound by those decisions, and that it was not free to revisit the question based upon new arguments not considered in those cases, because that would "not only undermine[ ] the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision." *Id.* at 4a. The court further reasoned that the outcome of this case under the Court's more recent jurisprudence "is not as straightforward" as in other situations when the Court has overruled precedent. *Id.* at 5a. The court found it "hard to predict" how the Second Amendment would fare under the Court's "selective incorporation" doctrine, given that the Third and Seventh Amendments, and the Grand Jury Clause of the Fifth Amendment, have not been incorporated. *Id.* at 5a-6a. And the court observed that "the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this." *Id.*

ARGUMENT

The Seventh Circuit properly affirmed judgment for Chicago and Oak Park. This Court held long ago in *Cruikshank* that the Second Amendment "has no other effect than to restrict the powers of the national government." 92 U.S. at 553. Then, in *Presser*, the Court held that the amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state." 116 U.S. at 265. Again, in *Miller*, the Court made clear that the restrictions of the amendment "have no reference whatever to proceedings in state courts." 153 U.S. at 538.

Cruikshank, *Presser*, and *Miller* remain good law today. Just last year, this Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), "that the Second Amendment applies only to the Federal Government." *Id.* at 2813 n.23. This Court's jurisprudence under the Due Process Clause and the Privileges or Immunities Clause provides no reason to depart from the Court's conclusion that the Second Amendment does not bind the States. We acknowledge, however, that the Court has not decided whether, under its modern selective incorporation cases, the Second Amendment right to keep and bear arms in common use, including handguns, is incorporated into the Due Process Clause so that it binds the States. If the Court believes the time is right to address whether the Second Amendment restrains state and local governments under the Due Process Clause, the petitions should be granted to address this issue only.

This Court should decline to address whether the Second Amendment is incorporated under the Privileges or Immunities Clause. The Court has long ago, and repeatedly, rejected the Privileges or Immunities Clause as a vehicle for incorporation of Bill of Rights provisions. Petitioners do not claim a circuit split on this issue, and have not even attempted an argument on how the usual factors this Court considers before breaking with precedent favor revisiting the issue now.

I. THIS CASE PRESENTS THE QUESTION WHETHER THE SECOND AMENDMENT IS INCORPORATED INTO THE DUE PROCESS CLAUSE.

Among the factors this Court considers when reviewing a petition for writ of *certiorari* are whether the courts of appeals are split on an important matter and whether the lower court has decided an important federal question that has not been, but should be, decided by the Court. Here, the circuit split identified by the petitioners is presently resolved and, in any event, is not a basis for granting *certiorari*. Nevertheless, the issue whether the Second Amendment binds the States under this Court's due process selective incorporation doctrine is one that has not been settled by this Court. If the Court wishes to address that issue, this case is a vehicle for doing so.

1. There is no conflict among the circuits for this court to resolve. As petitioners observe (see NRA Pet. 4; McDonald Pet. 3), since *Heller* was decided, three circuits have decided the continuing force of the holdings in *Cruikshank*, *Presser*, and *Miller* that the Second Amendment binds only the federal government.[3] In *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir.

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[3] Before *Heller*, too, the circuits consistently agreed that the Second Amendment did not restrain States. See, *e.g.*, *Thomas v. Members of City Council of Portland*, 730 F.2d 41 (1st Cir. 1984) (per curiam); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005); *Edwards v. City of Goldsboro*, 178 F.3d 231, 232 (4th Cir. 1999); *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 730-31 (9th Cir. 1992).

2009) (per curiam), petition for writ of *cert.* filed (No. 08-1592), the Second Circuit, like the Seventh Circuit in this case, adhered to this Court's square holding that the Second Amendment binds only the federal government. See *id.* at 58-59. In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), a panel of the Ninth Circuit ruled that it was free to address the issue whether, under the Court's selective incorporation doctrine, the Second Amendment binds the States (see *id.* at 447-49), but on July 29, 2009, the Ninth Circuit determined that the case should be reheard *en banc* and that argument will be heard the week of September 21, 2009 (see *Nordyke v. King*, No. 07-15763 (July 29, 2009 order) (available at http://www.ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf)). The order provides that the panel opinion shall not be cited as precedent. Thus, at the present time, there is no conflict on due process incorporation and it is premature for this court to grant *certiorari* based upon petitioners' claim of a circuit split.[4]

2. Even though the circuit split does not support petitioners' request for review, the petitions do present an issue the Court has not addressed, namely, whether under this Court's evolved due process jurisprudence, the Due Process Clause imposes Second Amendment restrictions on the States. Last year, in *Heller*, the Court determined for the first time that the Second Amendment confers an individual right to keep and bear arms that are in common use for purposes of self-defense in the home. See 128 S. Ct. at 2815-18; see also *United States v.*

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[4] In our view, there should never be a conflict in the lower courts on this issue. This Court's cases are clear and binding, and no court should feel free to reach the issue.

Tagg, No. 08-16860, 2009 WL 1856803, at *5 (11th Cir. June 30, 2009) (describing the right recognized in *Heller* as a right to weapons "in common use" and finding a pipe bomb not such a weapon). *Heller*, of course, did not rule on incorporation, since the law at issue was that of a federal district. And, although the Court has held the Second Amendment inapplicable to the States on three occasions, Fourteenth Amendment jurisprudence has evolved since *Cruikshank, Presser*, and *Miller* were decided. Thus, as this Court explained in *Heller*, the prior cases "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

3. As the Court reviews whether to address that issue in this case, it may wish to consider our submission on incorporation. In our view, while *Heller* examined the meaning and intent of the Second Amendment in the founding era, that limited focus is not appropriate on the very different question whether Second Amendment rights are fundamental and therefore incorporated into the Due Process Clause. Thus, the precise Second Amendment right recognized in *Heller*—the right to a handgun as a weapon in common use—is not incorporated merely because it is protected under the Second Amendment. If there is a due process right to arms for self-defense, it is preserved with arms suitable for that purpose, and does not extend to any particular weapon merely because it is in common use. Moreover, the ordinances at issue here preserve any liberty interest that might exist under the Due Process Clause to some type of firearms for self-defense in the home, for they allow residents to possess long guns, such as rifles and shotguns, for self-defense in the home.

The most consistent theme in determining whether a right is a liberty interest protected under the Due Process Clause is whether it is implicit in the concept of ordered liberty. See, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (right to assisted suicide is not "deeply rooted in this Nation's history and tradition" so as to be fundamental and "implicit in the concept of ordered liberty") (internal citations omitted); *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) ("security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause") (internal quotation marks omitted); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (incorporation of First Amendment rights reflected that these rights are "implicit in the concept of ordered liberty"), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969). Thus, while there is no "tidy formula for the easy determination of what is a fundamental right" (*Wolf v. Colorado*, 338 U.S. 25, 27 (1949), overruled on other grounds, by *Mapp*, 367 U.S. at 655), it is quite settled that only a right that is itself an aspect of ordered liberty merits incorporation.

In assessing which rights are implicit in the concept of ordered liberty, the Court has flatly rejected "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution." *Wolf*, 338 U.S. at 26. Nor has the Court ever held that an amendment that contains a "substantive" rather than a "procedural" right is automatically incorporated, as NRA maintains. NRA Pet. 11-12. Instead, the Court's selective incorporation test under the Due Process Clause examines numerous factors, such as the right's purpose, function, and efficacy; its origins in English and American jurisprudence; and its prevalence in and treatment under state constitutions. See *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). And, in stark contrast to *Heller*'s focus on original intent as of 1791 for purposes of interpreting the words in the Second Amendment, it is "our laws and traditions in the past half century" that "are of most relevance" in determining what liberty interests are protected by the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003); accord *Hurtado v. California*, 110 U.S. 516, 528-29 (1884) (to hold that "settled usage both in England and this country" is "essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement"); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 857-58 (1998) (Kennedy, J., concurring) ("history and tradition are the starting point," but "[t]here is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect").[5] When *Heller* referred to "the Fourteenth Amendment inquiry required by our later cases" (128 S. Ct. at 2813 n.23), this is what it meant.

The right recognized in *Heller* to keep and bear arms in common use is not implicit in the concept of ordered liberty. To begin, this is shown by the very purpose of codifying the Second Amendment. While the Second Amendment conferred an individual right, as against the federal government, to keep and bear weapons in common use, it stands in sharp contrast to other individual liberties in the Bill of Rights because the purpose of the common-use rule was to protect, not individual personal liberties, but the militia-related need for militiamen to possess and be familiar with weapons necessary for their militia service, a purpose that *Heller* recognized as the very reason for the right's codification, as well as determinative of its scope (see 128 S. Ct. at 2801, 2815-16).

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[5] For this reason, the panel in *Nordyke* erred in limiting its examination of the historical treatment of the right to arms only up through the "post-Civil War period" (563 F.3d at 450), although the decision is non-precedential in any event.

Also unlike other enumerated rights—like free speech and religious exercise—the right to keep and bear arms carries an inherent risk of danger to the liberty and interests of others. "Homicides are most often committed with guns, especially handguns," and nearly 60% of those homicides take place in large cities. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* (available at https://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm). In 2008 alone, handguns were used in 402 homicides in Chicago. See Chicago Police Department, *2008 Murder Analysis in Chicago* 22 (available at www.cityofchicago.org, by following links to Police Department, News, Statistical Reports, and Homicide Reports). Thus, in urban environments, where handgun abuse is so rampant, the protection of a right to handguns simply because they are in common use undermines, rather than guarantees, ordered liberty. It is, instead, the very governmental power to protect residents that is critical to the concept of ordered liberty, since enforcing handgun control laws can make an enormous difference in curbing firearms violence. See, *e.g.*, Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-*

Regulated Militias, and Criminal Street Gangs, 41 Urb. Law. 1, 30-44 (2009) (discussing studies showing New York City crime reduction correlating to police tactics directed at handguns); Philip J. Cook, *et al.*, *Underground Gun Markets*, 117 Economic J. F558, F581-82 (2007) (important contributing factor to the high transaction costs of underground gun markets is that handguns are illegal in Chicago, and "law enforcement efforts targeted at reducing gun availability at the street level seem promising"); Colin Loftin, *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) (District's handgun ban coincided with abrupt decline in firearms-caused homicides with no comparable decline elsewhere in the region).

Indeed, during Reconstruction, the same federal government that adopted the Fourteenth Amendment demonstrated an understanding that the right to bear arms could be restricted to maintain order in a turbulent post-war environment, including prohibiting the "sale of pistols and knives" and even the carrying of "guns, pistols, or other weapons of War." Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621 (2006). Thus, "[t]he disarming of freedmen was indeed troubling, but the federal government was not beyond disarming those whom it deemed a threat to public safety." *Ibid.* In short, while the federal government sought to expand the right to keep and bear arms for militia service to freedmen, whose assistance was needed to quell civil unrest during reconstruction, it was nevertheless willing to allow restrictions on civilian use. See *id.* at 622.

Moreover, the scope of arms rights under state constitutions confirms that the right to keep and bear arms in common use is not so firmly entrenched that it is implicit in the concept of ordered liberty. While, over time, most States have adopted constitutional provisions protecting a right to arms in one form or another, those constitutions, and state court interpretations of them, do not reflect a "uniform and continuing acceptance" of a right to weapons in common use as is required before the right "enjoys 'fundamental principle' status." *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996).[6] State court decisions do not typically turn on whether a particular firearm is one that is in common use, but whether the regulation is reasonable, meaning that it is valid so long as it is not a "total prohibition against the use and possession of firearms" (*People v. Williams*, 377 N.E.2d 285, 286-87 (Ill. App. Ct. 1978)), or does not "functionally disallow the exercise of the rights" (*State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003)); see also Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597, 599-612 (2006) (discussing reasonable regulation standard among state courts). Under tests such as these, state courts have routinely upheld bans on particular categories of weapons, including handguns. See *id.* at 604-05.

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[6] It is, at best, ironic that so many Attorneys General urge this Court to assist in their role "as guardians of their citizens' constitutional rights." *Amicus* Brief of Thirty-Three States 1; see also *Amicus* Brief of California 1. States, of course, remain free to adopt their own constitutional provisions; and all of the *amici* States, except Minnesota and California, have done so. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Politics 191, 194-200 (2006). And residents are equally able to seek greater gun rights under state law. If a State or its residents determine that it is appropriate, based on local conditions, to provide the same protection as the Second Amendment, then the state constitution can be amended or legislation passed to achieve that end, without stripping other States of their ability to craft arms protections appropriate to the public welfare in their localities.

Thus, even if the protection of arms rights under state constitutions shows some level of protection of a right to arms for purposes of self-defense in the home, that protection does not automatically extend to particular categories of weapons simply because they are in common use; and so the Due Process Clause should not provide automatic protection, either.

The due process inquiry also entails a close examination of the purpose to be served by a particular right, and takes into account the existence of other means to the same ends. See *Hurtado*, 110 U.S. at 531-32, 537-38 (holding that "maxims of liberty and justice" "guaranty, not particular forms of procedure, but the very substance of individual rights," and determining that Fifth Amendment right to indictment by grand jury is not required of states where charging by information sufficiently "considers and guards the substantial interest of the prisoner"). This, too, supports at most a due process right only to some type of firearms for self-defense in the home, and Chicago and Oak Park preserve that right by allowing residents to possess rifles and shotguns. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); accord *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (not all burdens on voting rights are constitutional infringements). Laws that do not make self-defense in the home impossible are valid, and the ordinances challenged here, which allow possession of rifles and shotguns, do not make self-defense in the home with firearms impossible. Indeed, there is a wealth of authority that long guns are a better option than handguns when it comes to self-defense. See, e.g., Josh Sugarmann, *Every Handgun Is Aimed At You: The Case For Banning Handguns* 58-59 (2001); Violence Policy Center, *Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense* (2001) (available at www.vpc.org/studies/unincont.htm). Without even an allegation that handguns are necessary to protect a right to armed self-defense, petitioners have alleged nothing that would suggest a ban on that category of weapons infringes a general right to armed self-defense in the home. To the extent that the Second Amendment embraces a broader right to weapons in common use, whether or not they are necessary to self-defense, that broader right should not be incorporated.

The States thus have, and should continue to have, the greatest flexibility to create and enforce firearms policy, including the ban of particular types of weapons that have proven to be highly dangerous in a particular location. Indeed, the power to regulate according to the needs of varying local conditions is a hallmark of federalism that is as much a part of the constitutional design as the individual rights provisions of the Bill of Rights. See U.S. Const. Art. IV, § 4; U.S. Const. Amend. X. As the court of appeals observed, "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." NRA Pet. App. 9a. Firearms regulation is a quintessential issue on which state and local governments can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (internal citation omitted); see also *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (under "the theory and utility of our federalism . . . States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). Restrictions that are appropriate in densely populated urban centers with severe gang problems, drug problems, and rampant armed violence may not be desirable or necessary in other parts of the country. So long as regulation does not render nugatory the right to arms for self-defense in the home, state and local governments should remain free to impose firearms regulations as they deem necessary for the safety and welfare of their citizens. The right to keep and bear arms in common use should not also, therefore, be imposed upon the States.

4. While the posture of this case would allow the Court to decide the issue of selective incorporation under the Due Process Clause, the record is not adequate for decision on the merits of the specific challenges petitioners make to Chicago's and Oak Park's ordinances. See NRA Pet. i; McDonald Pet. 28. Judgment was entered on the pleadings below; there has been no discovery; and Chicago and Oak Park do not accept all of petitioners' allegations as true. Moreover, the lower courts relied solely on stare decisis and did not reach any other legal issue. This Court normally refrains from deciding legal issues in the first instance, or on an undeveloped factual record. See, *e.g.*, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988); *Community Communications Co. v. City of Boulder*, 455 U.S. 40,

59-60 (1982) (Stevens, J., concurring). Thus, if the Court determines to grant *certiorari* to decide the nature and extent of a liberty interest in armed self-defense under the Due Process Clause, it should not entertain petitioners' arguments on the invalidity of the ordinances. Those issues should be left to the lower courts on remand, if any.

II. THE COURT'S REPEATED HOLDINGS THAT THE PRIVILEGES OR IMMUNITIES CLAUSE DOES NOT INCORPORATE THE BILL OF RIGHTS SHOULD NOT BE REVISITED.

This Court has repeatedly held that Bill of Rights provisions are not imposed upon the States through the Privileges or Immunities Clause. The Court first construed the Fourteenth Amendment phrase "privileges or immunities of citizens of the United States" in the seminal *Slaughter-House Cases,* 83 U.S. 36 (1872). The Court ruled that this Clause includes only those rights that "are dependent upon citizenship of the United States, and not citizenship of a State." *Id.* at 80. These national citizenship rights include the right to "free access to its seaports," to "use the navigable waters," to "peaceably assemble and petition for redress of grievances," and to "become a citizen of any state." *Id.* at 79-80. In *Presser*, the Court held that a pre-existing right like the Second Amendment right "to keep and bear arms" is not a privilege or immunity of United States citizenship because it is not "in any manner dependent upon [the Constitution] for its existence." 116 U.S. at 265. Similarly, the right to peaceably assemble, when detached from the purpose of petitioning the government for redress of grievances, is not a privilege or immunity of "national citizenship," but of state citizenship. *Id.* at 267 (citing *Cruikshank*, 92 U.S. at 551, 560). In *Maxwell v. Dow*, 176 U.S. 581 (1900), overruled on other grounds by *Williams v. Florida*, 399 U.S. 78 (1970), the Court applied the same rationale to reject imposing on the States the Fifth Amendment right to indictment by a grand jury and the Sixth Amendment right to jury trial in criminal cases. See *id.* at 602. The Court explained that under *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the protection of the privileges and immunities of state citizenship "still remains with the state," and the Privileges or Immunities Clause of the Fourteenth Amendment protects only those rights that "aris[e] out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." *Maxwell*, 176 U.S. at 593. Similarly, in *Twining v. New Jersey*, 211 U.S. 78 (1908), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964), the Court again reaffirmed that civil rights "which, before the War Amendments, were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the [Fourteenth Amendment]" (*id.* at 96), and that the Privileges or Immunities Clause "did not forbid the states to abridge the personal rights enumerated in the first eight amendments" (*id.* at 100); see also *In re Kemmler*, 136 U.S. 436, 446-49 (1890) (Eighth Amendment prohibition against cruel and unusual punishment not a privilege or immunity of national citizenship); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (Seventh Amendment right to jury trial in civil cases not a privilege or immunity of national citizenship). Finally, in *Adamson v. California*, 332 U.S. 46 (1947), the Court reaffirmed this settled construction of the reach of a "privilege or immunity of the citizens of the United States," again holding that the right against self-incrimination was a privilege or immunity of state, rather than national, citizenship. *Id.* at 52-53.

Given this unbroken chain of authority, it is no wonder that petitioners admit "this Court rejected incorporation under the Privileges or Immunities Clause" (NRA Pet. 21) and the Court would have to "undo an error . . . within *The Slaughter-House Cases*" (McDonald Pet. 29) and conclude it was "wrong the day it was decided" (*id.* at 22), in order to incorporate the Second Amendment under the Privileges or Immunities Clause.[7] Yet petitioners do not support their demand that the Court should revisit, much less overrule, this long line of cases. Despite claiming a (presently resolved) split in the circuits on incorporation into the Due Process Clause, petitioners can point to no split in the circuits on the issue of incorporation under the Privileges or Immunities Clause. Given the clarity and number of this Court's precedents on the issue, it is no wonder that no circuit has felt free to assess incorporation under this Clause.

Nor do petitioners build a case for reconsideration of this Court's privileges or immunities rulings under the usual principles of *stare decisis* that guide the Court when deciding whether to overrule settled precedent. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood*, 505 U.S. at 854. Adhering to precedent "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The disturbance of settled precedent is not taken lightly, and the Court first considers various factors to assess the costs and benefits of overruling or affirming prior cases. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009). Those factors include whether the decision has proved unworkable; whether there has been individual or societal reliance on the rule; whether the evolution of the law or premises of fact have changed in a way that undermines the original rationale (see *Planned Parenthood*, 505 U.S. at 854-55), and "whether the decision was well reasoned" (*Montejo*, 129 S. Ct. at 2089); see also *Lawrence*, 539 U.S. at 576-77 (examining erosion of prior decisions and individual and societal reliance on former precedent in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Petitioners offer no explanation about how any of these factors favors overruling *Slaughter-House Cases*. That failure alone is a reason for the Court to refuse to consider the privileges or immunities question. And when these factors are analyzed, they counsel resoundingly against reconsideration.

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[7] Some *amici* disagree, arguing that incorporation into the Privileges or Immunities Clause would not require overruling *Slaughter-House Cases*. See, *e.g.*, *Amicus Curiae* Brief of the American Civil Rights Union in Support of Petitioners 19; Brief of *Amicus Curiae* Gun Owners of America, *et al.* in Support of Petitioners 23. But even they do not argue that the Court could reach such a holding without overruling the other cases—from *Presser* to *Adamson*—following the *Slaughter-House Cases* rationale and expanding upon it to reject incorporation under that clause.

1. While the rule of law developed in *Slaughter-House Cases* and its progeny has its critics, petition-

ers rightly make no claim that it has proven unworkable. The *Slaughter-House* rule is easy to apply; under it, no Bill of Rights provisions are incorporated. Nor does the Court need to overturn the rule in order to free its hand to find additional rights protected against state infringement—a test has developed under the Due Process Clause that has worked quite well as a means of incorporating Bill of Rights provisions when those rights are deemed "fundamental to the American scheme of justice" or "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 & n.14. Petitioners claim that the Second Amendment contains just such a fundamental right. See NRA Pet. 9-11; McDonald Pet. 15-16. We disagree, of course, that the Second Amendment right recognized in *Heller*—to keep and bear arms in common use, including handguns—is fundamental; but if that premise were correct, the Due Process Clause would impose that right upon the States. Incorporation into the Privileges or Immunities Clause would be unnecessary. In fact, the Court has already considered selective incorporation under the Due Process Clause of every individual right in the Bill of Rights except the Second Amendment, the Third Amendment, and the Eighth Amendment right against excessive fines (see Erwin Chemerinsky, *Constitutional Law* 545 (3d ed. 2009)), and has found all but two incorporated (see, *e.g.*, *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211 (1916) (Seventh Amendment civil jury trial); *Hurtado*, 110 U. S. at 534-38 (Fifth Amendment grand jury indictment)).[8] Thus, for fundamental rights, the

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[8] The Court recently reaffirmed that these rights are not incorporated. See *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (Fifth Amendment grand jury indictment).

Court's existing jurisprudence on selective incorporation has, for many decades, adequately served to protect individual constitutional rights against state intrusion. And there is certainly no reason to upset *Slaughter-House Cases* and its progeny to protect non-fundamental rights.

2. Petitioners also ignore the impact upon a society that has relied upon this Court's holdings that Bill of Rights protections are not automatically imposed upon the States by the Privileges or Immunities Clause, and will not be incorporated at all if they are not among the fundamental rights that are protected under the Due Process Clause. *Stare decisis* has added force when the rule of law was settled long ago and "eliminating it would . . . upset expectations." *Montejo*, 129 S. Ct. at 2089.

Petitioners identify no limiting principle under which the meaning of "privileges or immunities" could encompass the Second Amendment, but not the Fifth and Seventh Amendment grand jury and civil jury rights. To the contrary, McDonald petitioners readily admit that the first eight Amendments must be incorporated wholesale. McDonald Pet. 23. For more than a century, States have been free to adopt constitutional provisions and statutes regulating whether and when to indict by grand jury proceedings and the nature of their civil jury systems, all based on this Court's repeated holdings that these laws need not meet the same standards required in federal cases under the Fifth and Seventh Amendments. Petitioners make no effort to explain how *Slaughter-House Cases* can be overruled in favor of a regime of total incorporation without seriously upsetting the reliance interests of the States.

The deep impact of wholesale incorporation of the Bill of Rights is most obvious where the Fifth Amendment grand jury requirement is concerned. Since *Hurtado*, the Court has consistently held that the constitution does not prevent a State from doing away with grand jury indictments entirely (see *Beck v. Washington*, 369 U.S. 541, 545 (1962)), and the States have relied upon this. In *Beck*, for example, the State of Washington had eliminated mandatory grand jury practice in 1909, convening grand juries only on special occasions and instead instituting prosecutions by information. See *ibid*. Today, most other States also use procedures other than grand jury indictment to initiate prosecutions: only eighteen States require grand juries to return felony charges. See U.S. Department of Justice, Bureau of Justice Statistics, *State Court Organization 2004* at 215-17 tbl. 38. Incorporation of the Grand Jury Clause would be seriously destructive of the States' institutional frameworks for charging criminals.

3. Neither the evolution of the law nor any misperception of fact underlying *Slaughter-House Cases* supports revisiting its rationale, either. Petitioners do not, and cannot, point to any such changes to justify reconsideration. As for the law, petitioners identify no decision by this Court demonstrating an erosion of the legal theory underlying *Slaughter-House Cases* and its progeny of the kind that this Court has held justifies overruling precedent. There have not been, for example, any "more recent cases" that "have undermined the assumptions upon which [the Court] relied." *Agostini v. Felton*, 521 U.S. 203, 222 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)). Nor has any "analytical underpinning" been "substantially weakened" by subse-

quent Court decisions. *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997) (overruling *Albrecht v. Harold Co.*, 390 U.S. 145 (1968)).

While the Court's approach to selective incorporation under the Due Process Clause may have evolved, there has been no comparable departure from *Slaughter-House Cases*. From *Slaughter-House Cases* to *Adamson*, a majority of this Court has consistently rejected incorporation of Bill of Rights provisions under the Privileges or Immunities Clause because those rights pre-dated the Constitution; and, as pre-existing rights protected by state governments, they are not rights that flow from national citizenship. The Court has remained steadfast in this approach to the Privileges or Immunities Clause. Moreover, the legal development of selective incorporation under the Due Process Clause counsels against reconsideration of incorporation under the Privileges or Immunities Clause, precisely because that course is unnecessary to achieve incorporation of a fundamental right.

Unable to invoke any erosion of the *Slaughter-House Cases* rationale, petitioners instead emphasize a quote, taken out of context, from Justice Thomas's dissent in *Saenz v. Roe*, 526 U.S. 489 (1999). See NRA Pet. 24; McDonald Pet. 27-28. Justice Thomas stated that he "would be open to reevaluating [the] meaning" of the Privileges or Immunities Clause "in an appropriate case." *Saenz*, 526 U.S. at 528. But the dissent was responding to the majority's determination that the right to "become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State," is a privilege of national citizenship (*id.* at 503) (citation omitted) and that a California law capping welfare benefits to citizens who had resided in the State for less than twelve months was unconstitutional under the Privileges or Immunities Clause (see *id.* at 504-11). Justice Thomas expressed the concern that, without consideration of original intent and the relationship between the Privileges or Immunities Clause and the Equal Protection Clause, "the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be Members of this Court." *Id.* at 528 (internal quotation marks omitted).

Justice Thomas's dissent, which was concerned with an unintended expansion of individual rights, contains no hint of a view that the Court should again consider wholesale incorporation of the Bill of Rights. To the contrary, the dissent cited *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), as reflecting the meaning of "privileges" and "immunities," and the list of rights set forth in *Corfield* refers to neither the first eight amendments, nor to the Second Amendment in particular. See *Saenz*, 526 U.S. at 525 (citing *Corfield*, 6 F. Cas. at 551-52). Thus, petitioners' theories of incorporation do not fall in line with Justice Thomas's interest in defining the Clause according to *Corfield*.

Petitioners also fail to show any changes in the factual premises underlying *Slaughter-House Cases* and its progeny. Petitioners rely on the historical record, with a central focus on congressional debates surrounding enactment of the Fourteenth Amendment. See NRA Pet. 18-21; McDonald Pet. 24-25. But that record was scoured in *Adamson*, when Justice Black urged incorporation of the Bill of Rights through the Privileges or Immunities Clause. See 332 U.S. at 68 (Black, J., dissenting). Justice Black's dissenting opinion relied heavily upon many of the same statements of Rep. Bingham and Sen. Howard that petitioners cite. See *id.* at 93-120. Justice Black also reviewed debates surrounding the Civil Rights Act of 1866 and the Freedmen's Bureau Act (see *ibid.*), which the NRA relies upon (see NRA Pet. 17-18). The majority rejected the argument for incorporation based on that record (see 322 U.S. at 52-53), as did Justice Frankfurter's concurrence (see *id.* at 61-64). Of course, the congressional record for the Fourteenth Amendment has not changed since then. Thus, instead of any great change in the premises of fact, petitioners simply urge another review of that same record. That is not the kind of changed circumstances that justifies upsetting settled precedent.

4. In lieu of discussing principles of *stare decisis*, McDonald petitioners stress that *Slaughter-House Cases* has been heavily criticized by scholars who, they claim, agree that, "at a minimum, [privileges or immunities] include the individual rights secured by the first eight amendments." McDonald Pet. 23. That is simply false. There is nothing approaching a consensus on this issue. Numerous scholars have found support lacking for the notion that the first eight Amendments were understood to have been incorporated *in toto* through the Privileges or Immunities Clause. See, *e.g.*, William Nelson, *The Fourteenth Amendment: From Political Principle To Judicial Doctrine* 123 (1988) ("[o]nly one historical conclusion can . . . be drawn: namely, that Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well"); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived*

Cat, 42 Ohio St. L. J. 435 (1981) (refuting arguments for incorporation of the entire Bill of Rights); David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008) (finding support in the legislative history for "no fewer than four interpretations of the . . . Privileges [or] Immunities Clause"); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 139 (1949) (concluding that "the record of history is overwhelmingly against" the view that the Fourteenth Amendment "was intended and understood to impose Amendments I to VIII upon the states"); Rosenthal, *supra*, 41 Urb. Law. at 77 (finding historical evidence that the public understood "privileges or immunities" to include the Bill of Rights "sufficiently unreliable" for that to be "a satisfactory basis for adjudicat[ing incorporation]"); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L. J. 1627, 1628 (2007) (finding historical evidence of incorporationist meaning "sketchy, inconclusive, and subject to various plausible interpretations"). Indeed, five distinguished scholars filed an *amicus* brief in support of Chicago and Oak Park in the Seventh Circuit, arguing that "the historical record does not support appellants' argument about incorporation under the Privileges or Immunities Clause." *Amicus* Brief of Historians and Legal Scholars Saul Cornell, Jonathan Lurie, William Merkel, William Nelson, and George Thomas at 3, Nos. 08-4241, 08-4243, 08-4244 (consol.) (7th Cir.).

When the historical evidence is reviewed, it is easy to see why so many scholars reject the view that the Privileges or Immunities Clause was meant to impose the entire Bill of Rights on the States. *Heller* holds that the meaning of constitutional provisions must be discerned from the "public understanding" of the words (128 S. Ct. at 2805), which entails accepting the "[n]ormal meaning" of words and not meanings that "would not have been known to ordinary citizens in the founding generation" (*id.* at 2788) (citations omitted). There is little evidence to support an understanding by "ordinary citizens" that the Fourteenth Amendment imposed the Bill of Rights on States.

In fact, even petitioners do not hew to this approach, instead focusing almost exclusively on the views of a few members of Congress. See NRA Pet. 18-19; McDonald Pet. 24-25. But as *Heller* warns, "[i]t is dubious to rely on [legislative] history to interpret a text" if it is "widely understood" to mean something else. 128 S. Ct. at 2804. And whether viewed through the lens of *Heller*'s public understanding approach or by focusing more narrowly on legislative intent, it is perilous to rely on a few expressions of an incorporationist intent, or the expressed desire to secure arms rights for freed slaves (see NRA Pet. 13-16), where the statements of other members of Congress suggest a lack of clarity and uniformity on what the Fourteenth Amendment meant. A few examples include the statement of one Senator who denied that there was any settled meaning of the words "privileges and immunities" (see Cong. Globe, 39th Cong., 1st Sess. 3039 (1866) (Sen. Hendricks)); a Representative who described the Amendment as "open to ambiguity and . . . conflicting constructions" (*id.* at 2467 (Rep. Boyer)); and a Senator who expressed an alternative view that the Amendment only "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all" (*id.* at 2459 (Rep. Stevens)).

And there is little evidence that the views of Rep. Bingham and Sen. Howard were "clearly, publicly, and candidly conveyed . . . to the country" (Thomas, *supra*, 68 Ohio St. L.J. at 1657), while there is a "mountain of evidence" that the Amendment was conveyed by the press to protect fundamental rights, natural rights, and equal protection, but without mentioning the Bill of Rights (George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1*, 18 J. Contemp. Leg. Issues (forthcoming 2009) (available at https://ssrn.com/abstract=1392961, at 4)). Nor do the Court's decisions decided in the wake of ratification—including *Slaughter-House Cases* and *Cruikshank*—hint at any such commonly understood incorporationist meaning. See Rosenthal, *supra*, 41 Urb. Law. at 69-72. As for the leading treatises of the day, some reflected an incorporationist understanding of the Amendment, and others did not. See Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp. Leg. Issues (forthcoming 2009) (available at https://ssrn.com/abstract=1354404, at 19-99). Of course, an amendment that imposed the Bill of Rights upon the States would have radically altered the balance of power between the federal and state governments and surely would have been prominently featured in all of these sources if there had been a public understanding that such a monumental change was afoot. The evidence that the framers or the public attributed an incorporationist meaning to the Privileges or Immunities Clause is thin, or at best mixed, and should serve as no basis to upset longstanding precedent. For this reason, as well as the lack of any other valid justification for breaking with prior cases, the Court should refuse to consider the privileges or immunities issue.

CONCLUSION

If the Court wishes to address whether the Second Amendment binds the States, the petitions should be granted, but limited to the issue whether the Second Amendment right to weapons in common use, including handguns, is incorporated into the Due Process Clause of the Fourteenth Amendment. The petitions should be denied with respect to whether the Privileges or Immunities Clause imposes the Second Amendment on the States.

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REPLY
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OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

◆

REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent concedes that this case presents a good vehicle for resolving the question of the Second Amendment's incorporation, a question it admits is one this Court has never addressed under the modern Due Process Clause analysis. Respondent's Br., 6-8. Critically, Respondent acknowledges that the court below did not address this question at all. *Id.*, 5. And Respondent correctly points out that the selective incorporation analysis has never turned on whether a right is "substantive" or "procedural," an argument not advanced by Petitioners. *Id.*, 10.

Other points raised by Respondent require response.

◆

ARGUMENT

I. This Case Remains A Logical Vehicle For Resolving The Question Of The Second Amendment's Incorporation.

Respondent observes that since the Petition's filing, the Ninth Circuit vacated the panel opinion in *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009) and ordered the case be re-heard en banc, thus vitiating the circuit split. Respondent's Br., 8. Yet Respondent declares that "no [lower] court should feel free to reach the issue" of the Second Amendment's incorporation, *id.*, at 8 n.4, arguing that a circuit split on this question ought never arise again.

Petitioners do not agree that the question of the Second Amendment's incorporation is beyond the powers of the lower federal courts to determine. To the contrary, this Court relies upon the lower courts to develop the landscape of constitutional law, including questions of Fourteenth Amendment incorporation. Historically, this has been the role of the lower courts. *See, e.g. United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (2d Cir. 1965) (incorporating Fifth Amendment Double-Jeopardy Clause); *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599 (3d Cir. 1969) (en banc) (incorporating Sixth Amendment public trial right).

But the time to insist on this point may have passed. Many lower federal court judges, including all four judges who passed on this case and at least two of the three circuits in which Second Amendment enforcement is most urgently needed, are of a different view, agreeing with Respondent that the very question of the Second Amendment's incorporation must be refused.[1] A true circuit split – one in which at least some courts address and develop the issue rather than avoid it entirely – might never reappear.

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[1] It is unknown whether the Ninth Circuit voted to re-hear *Nordyke* en banc owing to the panel's decision on incorporation, or the panel's decision on one of the other significant issues raised in that case. Indeed, it is unclear whether the judges who will eventually re-hear *Nordyke* are the same ones who voted for taking the case en banc. *See* 9th Cir. R. 35-3.

Yet the incorporation question remains vitally important. A Second Amendment right valid only against the federal government is meaningless to Americans disarmed by state officials – the very circumstance that encouraged the Fourteenth Amendment's ratification in the first instance.

Indeed, incorporating the Second Amendment as against state actors may be the only way to preserve its impact upon federal actors. For example, the District of Columbia, not yet reconciled to this Court's opinion in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), argues "that the Second Amendment should not apply to the District if it is not incorporated as against the States, as the District argued in *Heller*." Def. Mot. for Summary Judgment, *Heller* v. *District of Columbia*, U.S. Dist. Ct. D.C. No. 08-1289 at 16 n.14 (Aug. 5, 2009).[2] At least some federal actors are unimpressed by a constitutional right that state officials are free to ignore.

If the absence of a circuit split reflected uniformity on the question of whether the Second Amendment is incorporated against the States, such absence might be a factor counseling against the petition. However, the loss of a circuit split might instead reflect a uniformity of opinion that the question is, as Respondent and the court below assert, a question only this Court can answer. That fact would strongly favor the granting of certiorari, both because the lower court's position reflects a refusal to follow this Court's precedent in conducting the required due process analysis, and raises a profound question of federal law touching upon the fundamental enumerated rights of almost all Americans. Sup. Ct. R. 10(c).

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[2] The District advanced no such argument in *Heller*.

Respondent is wrong in asserting that the record is inadequate for a decision on the merits. Respondent's Br., 17. In *Heller*, the D.C. Circuit granted Plaintiff's motion for summary judgment filed barely a month after the initiation of litigation, a decision affirmed by this Court, because there was no conceivable relevant factual dispute. Petitioners' motion should likewise be granted, as the handgun ban in this case is, contrary to Respondent's claims, identical to that struck down in *Heller*.[3] The other challenged provisions likewise require no factual development. Appellate courts routinely grant summary judgment motions in cases lacking meaningful factual disputes. *See, e.g. Jones* v. *Wilhelm*, 425 F.3d 455 (7th

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[3] That Chicago has no functional firearms ban, Respondent's Br., 3 n.2, is irrelevant. At issue in *Heller* were three distinct statutes: a functional firearms ban, a ban on unlicensed carrying of a handgun applied within the home, and a handgun ban that operated by forbidding the registration of handguns within a regime criminalizing the possession of unregistered guns. That handgun ban struck down by this Court, former D.C. Code § 7-2502.02(a)(4) was indeed identical to Chicago Mun. Code § 8-20-050(c) in forbidding the necessary registration of handguns. Respondent seeks discovery and trial on the question of whether handguns are unreasonably dangerous, but that is precisely the adventure foreclosed by *Heller*.

Cir. 2005); *KenAmerican Resources* v. *International Union, UMW*, 99 F.3d 1161 (D.C. Cir. 1996).

II. Respondent's Brief Contains Multiple Internal Contradictions.

Respondent's first internal contradiction rests between its second Question Presented and its argument. Respondent opens its brief by asking this Court to consider "[w]hether the Court should refuse to revisit" its Privileges or Immunities Clause precedents. Respondent's Br., i. Yet by the end of the brief, Respondent argues that "[t]he petitions should be denied with respect to whether the Privileges or Immunities Clause imposes the Second Amendment on the States." *Id.*, 31.

Obviously, were the Court to accept the question of whether it "should refuse to revisit" its Privileges or Incorporation doctrine, it might determine that the topic should indeed be revisited, and thus decide the question of "whether the Privileges or Immunities Clause imposes the Second Amendment on the States." While Respondent's question would be more directly-stated in the positive, the concept embodied by this question – that the Court should revisit the Privileges or Immunities Clause – is one enjoying greater support in the Petition.

A more serious, substantive contradiction lies between Respondent's Due Process and Privileges or Immunities arguments with respect to the nature of the Second Amendment. Arguing against the Second

Amendment's incorporation under the Due Process Clause, Respondent asserts that the right to bear arms is not fundamental. Respondent's Br., 11. Yet the logic of this Court's Privileges or Immunities doctrine, which Respondent endorses, rests upon the fact that the Second Amendment is indeed an ancient, established right pre-dating the Constitution. *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876). The logical needle Respondent would thread treats the right to arms as natural and inherent in the Constitution's absence, yet somehow not "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.*, 150 n.14. The tension between these two conditions cannot be resolved.

Although both of Respondent's claims cannot be true, assuredly, they are each false. In contrast, there is nothing inconsistent about Petitioners' arguments: the Second Amendment secures a fundamental right, as recognized in *Cruikshank*, and that right is therefore incorporated pursuant to the Due Process Clause just as it should be incorporated under a proper understanding of the Privileges or Immunities Clause.

Finally, Respondent echoes the lower court's argument that federalism interests somehow sanction the wanton violation of fundamental rights. Respondent's Br., 16-17. Petitioners have already addressed this error, Pet. 19-20, as have their amici. *See, e.g.* Br. of Texas, et al., at 22. But Respondent frames the federalism theory in a new, self-defeating condition: states and localities should be left free to experiment with gun regulations "[s]o long as regulation does not render nugatory the right to arms for self-defense in the home." Respondent's Br., 17.

Leaving aside Respondent's erroneous limitation of the right to arms to the home, *contra Heller*, 128 S. Ct. at 2793 (defining "bear arms"), and the suggestion that only laws wholly "nugatory" of an enumerated right are unconstitutional, *contra Heller*, 128 S. Ct. at 2818 & n.27, Petitioners have no quarrel with gun regulations that respect constitutional limitations. But if the Second Amendment is not incorporated as against the States and local governments, how are courts to enforce Respondent's proposed condition regarding so-called "nugatory" laws?

Respondent argues it should be free to enact laws that do not violate the Constitution, and for this reason, it should not be bound by constitutional standards. But if some gun regulations might "render nugatory the right to arms," this would be a reason to embrace, not reject, the Second Amendment's incorporation.

III. The Privileges Or Immunities Clause Cannot Be Avoided.

Respondent's proposal to divorce the Fourteenth Amendment's text from its history, by limiting consideration of incorporation to the ahistorical rubric of substantive due process, is neither practical nor logical. Regardless of whether this Court ultimately accepts Petitioners' arguments, one can hardly engage in an historical analysis of the Fourteenth Amendment's original public meaning without considering the Privileges or Immunities Clause.

Contrary to Respondent's claims, the case for incorporation through the Privileges or Immunities Clause is overwhelming. Yet should the Court not invoke the Privileges or Immunities Clause to incorporate the Second Amendment, *Heller* nonetheless demonstrates that historical analysis is critical to the interpretation of constitutional text. If one point unified this Court in *Heller*, it was the maxim that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

Whether the Court would follow the approach of the *Heller* majority, and favor examining the Fourteenth Amendment's original public meaning, or instead follow the approach of the *Heller* dissenters, and look to discover the Fourteenth Amendment's original intent, the analysis would inexorably focus on the Privileges or Immunities Clause. That, after all, is the incorporating vehicle understood and intended by the Fourteenth Amendment's framers and their public. Respondent's proposal pre-judges the outcome of an historical analysis on the merits. It is simply not possible to examine the Fourteenth Amendment's history without confronting these words.

Indeed, Respondent dedicates a great portion of its brief responding to a Privileges or Immunities argument it wishes the Court not to consider. The argument is unavailing.

Respondent correctly notes there is no complete "consensus" on whether the Privileges or Immunities Clause incorporates the Bill of Rights. Respondent's Br., 27. The nation's faculty of over 200 law schools generates many interesting and provocative views, but the notion that *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) correctly decided this issue lies decidedly outside the mainstream of modern legal thought. *See* Pet., 22; Br. of Constitutional Scholars. This is one debate worthy of this Court's engagement.

Several scholars have undertaken exhaustive study of just how publicly the debate over the Fourteenth Amendment was conducted. The results overwhelmingly refute Respondent's claim that the public was unaware of the Amendment's incorporationist effect. The newspapers of the day were replete with Congressional speeches describing incorporation, and consequently, letters to the editor and editorial commentary on the topic, to say nothing of magazine expositions and the views of every single notable constitutional scholar writing from before ratification until the time of *Slaughter-House*. David Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (2009); Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the*

Original Understanding of the Fourteenth Amendment in 1866-67, 68 Ohio St. L.J. 1509 (2007); Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993). Again, this is the sort of evidence this Court would not ignore in reviewing the Fourteenth Amendment's meaning.

Finally, to the extent this Court may consider original intent, Respondent's dismissal of the "few members of Congress," at 29, cited by Petitioners, is unavailing. These "few" individuals were the leaders of the House and Senate who formed the Joint Committee on Reconstruction, and wrote and sponsored the Fourteenth Amendment. None of their statements were ever contradicted. If intent is a benchmark, theirs is the most relevant.

IV. Overruling *Slaughter-House* Remains Imperative.

Respondent oddly claims that overruling *Slaughter-House* is "unnecessary" because most enumerated rights have been incorporated under the Due Process Clause. Respondent's Br., 22. But incorporating the Second Amendment, the right at issue in this case, is, in fact, "necessary" – and in the manner intended and understood by the Fourteenth Amendment's framers.

The Second Amendment aside, it is also untrue that "the Court's existing jurisprudence on selective incorporation has, for many decades, adequately [protected] individual constitutional rights." *Id.*, 22-23. As the Fourteenth Amendment's chief Senate sponsor famously declared, the Fourteenth Amendment's Privileges or Immunities Clause reached the same rights described by Justice Washington in *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. 1823). Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (Sen. Howard). Many such rights are today vigorously protected under Article IV, Section 2 from residence-based infringement, *see, e.g. Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985), but enjoy no meaningful protection when otherwise violated.

Despite manifesting complete resistance to *Heller*'s common use test, *e.g.*, Respondent's Br., 9, Respondent insists the Privileges or Immunities precedent must be preserved as a matter of *stare decisis*. But *stare decisis* is not a compelling consideration when plainly erroneous precedent deprives individuals of their fundamental civil rights. "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role than that which was contemplated by its framers when they added the Amendment to our constitutional scheme." *Malloy* v. *Hogan*, 378 U.S. 1, 5 (1964).

When "[m]embers of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding" of constitutional text, this Court has been open to doing so. *Crawford* v. *Washington*, 541 U.S. 36, 60 (2004). And in the process, this Court affords no weight to deeply entrenched, yet wholly illegitimate regulatory frameworks. *See, e.g. Brown* v. *Board of Education*, 347 U.S. 483 (1954). That the Bill of Rights naturally burdens government officials is no reason for ignoring it. *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2540 (2009); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). True, it "is easy to apply" a rule under which people enjoy almost no rights under the Fourteenth Amendment's opening directive to the States. Respondent's Br., 22. But that is hardly a point in such a rule's favor.

Simply put: States have no legally cognizable reliance interests in violating constitutional rights.

Unlike the obligations to provide counsel to indigents and to produce adverse witnesses for confrontation, respecting Second Amendment rights might reduce governmental burdens associated with enforcing unconstitutional laws and responding to criminal violence averted by the availability of self-defense. But the debate over whether the right to arms is a net boon or burden to government is irrelevant. The statutes at issue here are of more recent vintage than those struck down in *Heller* without regard to any improper reliance placed upon them by District of Columbia officials. And it makes no sense to deny an individual the means of self-defense to which she is otherwise constitutionally entitled, merely because others have historically been denied that right.

Nor would possible incorporation of the Grand Jury Clause or civil jury right prove problematic. When the Fourteenth Amendment was ratified, seventy-eight percent of the states guaranteed a grand jury right, and approximately eighty-nine percent of Americans lived in states that at least utilized the grand jury. Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp. Leg. Issues __, http://ssrn.com/abstract=1354404 at 59-61 (forthcoming 2009). In contrast, at the time this Court applied the exclusionary rule to state courts pursuant to the Fourth Amendment, twenty-four to twenty-eight states had rejected it. *Id.*, n.181 (citation omitted).

The District of Columbia's courts operate under the Seventh Amendment without issue, and the federal courts are not lacking for criminal indictments.[4] If these constitutional requirements prove unduly burdensome, the people may remove them in the usual way. U.S. Const. art. V.

Finally, Petitioners are constrained to respond to the claim made by some that this Court can be simultaneously faithful to *Slaughter-House* and incorporate the Bill of Rights through the Privileges or Immunities Clause. Respondent's Br., 20 n.7. That is more of a policy than a legal argument, as neither the plain words nor logic of *Slaughter-House* permit such a construction. Were it plausible, the theory might have been raised in *Cruikshank*, decided by eight of the nine *Slaughter-House* justices just three years after that opinion. But *Cruikshank* accurately followed *Slaughter-House* in excluding rights that preexist the Constitution from the Privileges or Immunities Clause, and this Court subsequently engaged in over a century of debate over substantive due process without re-imagining *Slaughter-House*. Nothing in the text or history of the Fourteenth Amendment points to selective incorporation of Privileges or Immunities.

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[4] The Grand Jury requirement is significantly limited to "capital, or otherwise infamous crime[s]," U.S. Const. amend. V.

Instead of adopting an ever-more tortured interpretation of the Privileges or Immunities Clause, this Court should apply the Fourteenth Amendment in accordance with its original meaning.

◆

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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Nos. 08-1497 and 08-1521 (Consolidated)

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,
Petitioners,
v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ARMS KEEPERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus is a volunteer organization that supports reasonable regulation of handguns and rifles, instead of prohibition.[1] Formed in 2009, *Amicus* is an unincorporated association headquartered in Monroe, Connecticut and registered there with the town government. Membership is free, and *Amicus* communicates with its members, potential members, and the general public primarily via electronic means including the web site www.ArmsKeepers.org. *Amicus* believes that an individual's right to keep and bear arms is constitutionally protected not only by the Second Amendment but also by the Privileges or Immunities Clause of the Fourteenth Amendment. While the government can regulate in this area, it cannot legitimately disarm the American people. People have a right to use weapons to defend themselves, and also to keep weapons so as to be of service in the event of civil unrest. We support instant background checks, as well as a ban on weapons for indiscriminate killing. Arms Keepers is nonpartisan, and its business is conducted and transacted solely within the United States.

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[1] Pursuant to Supreme Court Rule 37.2, *amicus* provided timely notice of intent to file this brief to counsel of record for both petitioners and respondents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

Amicus is filing this brief in support of the petitioners because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Incorporation of the right to keep and bear arms is a constitutional issue touching upon matters of deep concern nationwide. Regardless of whether the court below was correct to forgo the analysis that the Supreme Court said is "required" in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2813 n. 23 (2008), the fact is that the court below did forgo it. For that reason and others, a writ of certiorari is warranted

Instead of using a type of substantive due process inquiry developed in recent Supreme Court cases, the court below rejected incorporation of the right in question based upon several nineteenth century cases. However, a full analysis of those old cases shows that they do not preclude selective (rather than en bloc) incorporation under the Privileges or Immunities Clause, they correctly rejected the notion of substantive due process, and therefore they should not be overturned.

Those old cases said that the Second Amendment does not apply against the states, and no one disputes that. As Justice Thurgood Marshall once explained: "By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions." *Oliver v. United States,* 466 U.S. 170, 186 n. 3 (1984)(Marshall, J., dissenting, joined by Brennan and Stevens, JJ.)(citations omitted).

There is a key distinction between en bloc incorporation of the Bill of Rights, versus selective incorporation of Bill of Rights provisions, and the Supreme Court has never rejected selective (rather than en bloc) incorporation of the right to keep and bear arms under the Privileges or Immunities Clause. Revivification of this Clause would not allow courts to apply an unlimited range of restrictions against the states, because something cannot be a "privilege or immunity of citizens of the United States" unless it already restrains the federal government in federal jurisdictions such as the nation's capital. Even then, the Privileges or Immunities Clause cannot protect claimed rights beyond those that are fundamental.

The Court's due process jurisprudence is in disarray, and this case offers an opportunity to start setting it right. Virtually no one disputes that the phrase "due process of law" means process owed according to the "law of the land." The latter phrase uses plain words, and was not meant to have any technical meaning. The Court may wish to review the advisability of inserting into that particular phrase the Court's own notions of fairness, or the Court's own balancing of various traditional values.

In contrast to unenumerated rights enforced using the judicially invented doctrine of substantive due process, the right to keep and bear arms is actually enumerated in the Constitution. This right is already enforceable in federal jurisdictions, it is a fundamental right, and it should therefore be construed as a privilege or immunity of citizens of the United States. This question is ripe for decision.

REASONS FOR GRANTING THE WRIT

A writ of certiorari would be warranted here even if there were no circuit split.[2] Handgun availability or unavailability is a matter of widespread concern in the United States. More importantly, the court below says that Supreme Court decisions on this subject are "obsolete," and therefore a fresh look by this Court would be most appropriate. Additionally, this case presents an opportunity for the Court to reevaluate its tangled Fourteenth Amendment jurisprudence.

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[2] Unlike the court below, a panel of the Ninth Circuit has held that the right to keep and bear arms applies to the states. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). As of this writing, it is unknown if the Ninth Circuit will review *en banc*.

I. The Court Below Declined To Use The Type Of Substantive Due Process Analysis That Recent Supreme Court Cases Have Required

The court below declined to do what the Supreme Court has said is necessary: "engage in the sort of Fourteenth Amendment inquiry required by our later cases." *District of Columbia v. Heller*, 128 S.Ct. at 2813 n. 23 (2008). Regardless of whether the court below was correct to not do what the Supreme Court "required," the undisputed truth is that the court below did not do so, and therefore issuance of the writ of certiorari is warranted.

The Ninth Circuit recently outlined the main issue here: "There are three doctrinal ways the Second Amendment might apply to the states: (1) direct application; (2) incorporation by the Privileges or Immunities Clause of the Fourteenth Amendment; or (3) incorporation by the Due Process Clause of the same amendment." *Nordyke v. King*, 563 F.3d 439, 446 (9th Cir. 2009). Direct application would be illegitimate under *Barron ex. rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and incorporation via a substantive reading of the Due Process Clause would transgress the original meaning of the Constitution. However, the Court could very plausibly incorporate the right to keep and bear arms selectively via the Privileges or Immunities Clause.

A. The Court Below Followed *Presser* and *Miller* Which Correctly Rejected Substantive Due Process

The court below declined to use any of the various substantive due process inquiries that have been developed in modern cases such as *Washington v. Glucksberg,* 521 U.S. 702 (1997), and *Lawrence v. Texas*, 539 U.S. 558 (2003). The court below also correctly noted that the Court's modern approach is "hard to predict" and "subjective."

The court below followed *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas,* 153 U.S. 353, 539 (1894), instead of pursuing the sort of inquiry required by *Glucksberg* or *Lawrence*. According to *Presser,* incorporation of the right to keep and bear arms into the Due Process Clause "is so clearly untenable as to require no discussion." *Presser*, 116 U.S. at 268. *Miller* correctly reached a similar conclusion, holding that, "[a]s the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law." *Miller,* 153 U.S. at 539.

The rejection by *Presser* and *Miller* of due process incorporation was correct and ought to be reaffirmed, even though such reaffirmation would be against our interest as gun owners, and against the more recent type of due process inquiry in *Glucksberg* and *Lawrence*. Incorporation via the Privileges or Immunities Clause is another matter, and is addressed in a separate section herein.

Regarding due process, the court below said it was also following *United States v. Cruikshank*, 92 U.S. 542 (1875). However, that decision is not relevant to the present due process issue, because the *Cruikshank* Court correctly held that the Due Process Clause "adds nothing to the rights of one citizen as against another." *Cruikshank*, 92 U.S. at 554. In other words, there was no state action.

The *Cruikshank* Court also held, *id.* at 553, that the First and Second Amendments do not apply against the states, which of course is undisputed.[3] The *Cruikshank* Court "never specified whether the First Amendment contains 'fundamental rights' protected by the Fourteenth Amendment against state action." DAVID RABBAN, FREE SPEECH IN ITS

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[3] *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 186 n. 3 (1984)(Marshall, J., dissenting, joined by Brennan and Stevens, JJ.)("the provisions of the Bill of Rights curtail only activities by the Federal Government...."). *See also Nordyke v. King*, 563 F.3d at 446 (9th Cir. 2009)("The Bill of Rights directly applies only to the federal government"). *See also Presser*, 116 U.S. at 265 (the right may apply against the states even laying the Second Amendment "out of view").

FORGOTTEN YEARS 148 (Cambridge University Press 1999). No one, including the court below, knows what the *Cruikshank* Court would have done on the due process issue if there had been state action.

James Madison originally introduced the right to keep and bear arms and the right to due process together in a single proposed amendment. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789). Congress then split those rights into the Second and Fifth Amendments respectively. JOHN VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 202 (ABC-CLIO 2003). The separateness of these simultaneous amendments is a structural feature of the Constitution that signifies that the two rights are "distinct" as Roger Sherman put it,[4] and "unconnected" as Madison put it.[5] The states were invited to ratify one right and reject the other at the same time, at their pleasure. The Court should not now join together what the framers split asunder, even if the Court has made similar errors in the past.

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[4] *Letter from Roger Sherman to Simeon Baldwin* (Aug. 22, 1789) reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1375 (Charlene Bickford et al., eds., 2004)("each may be passed upon distinctly by the states").

[5] *Letter from James Madison to Alexander White* (Aug. 24, 1789) reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287-288 (Helen E. Veit, et al., eds., 1991)("The several propositions will...go forth as so many amendments, unconnected with one another").

Past errors do not require yet another error, especially where — as here — repetition of the error would require the Court to overturn venerable precedents such as *Miller* and *Presser*. The Due Process Clause in the Fourteenth Amendment has the same basic meaning as the same language in the Fifth Amendment,[6] and in neither instance does it include a right to keep and bear arms. That right can only apply against the states via the Privileges or Immunities Clause.

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[6] *Hurtado v. California*, 110 U.S. 516, 535 (1884) ("when the same phrase was employed... it was used in the same sense and with no greater extent"). *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905) (same); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329 (1901) (assuming "that the legal import of the phrase 'due process of law' is the same in both Amendments" although different constructions may be proper); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("the same constitutional standards apply against both the State and Federal Governments"). The primary author of the Fourteenth Amendment's Due Process Clause was John Bingham, and he only wanted to enforce pre-existing federal rights against the states. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088-1089 (1866). *See also* William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court").

B. The Court's Modern Due Process Jurisprudence Has Increasingly Gone Astray

The Due Process Clause is the centerpiece of Magna Carta.[7] One should not assume that the Court's fundamental transformation of due process jurisprudence during the past century has produced a Magna Carta Version 2.0 that is better than the original. Even if the new version were better, *Amicus* respectfully submits that the amendment process would be necessary to so fundamentally change the meaning of this Clause. The court below correctly turned back the clock on due process, and this Court should do so as well.

There are two primary alternative interpretations of due process that could conceivably replace the prevailing interpretation. First, there is a completely objective due process jurisprudence that simply requires compliance with the other laws that are in force. In recent times, the leading advocate on the Court for this objective interpretation was Justice Black. *See In Re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) quoted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting). The second alternative interpretation is a purely procedural due process jurisprudence having subjective recourse to "fundamental fairness." *See generally Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring). The purely procedural interpretation is typified by *Miller v. Texas,* 153 U.S. 353 (1894), and the purely objective interpretation by *Walker v. Sauvinet*, 92 U.S. 90 (1875). The objective interpretation is the most credible, as a matter of original meaning, and other deeply rooted values.

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[7] *See Regina v. Paty*, 92 Eng. Rep. 232 (K. B. 1704):

> [L]ex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority.

Paty, 92 Eng. Rep. at 234.

The objective interpretation would still constrain legislators. For example, it would allow the federal courts to formulate the following remedy for deprivation of enumerated procedural rights: the government could then be stopped from taking life, liberty, or property.[8]

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[8] *See Chapman v. California*, 386 U.S. 18, 22 (1967)("we cannot leave to the States the formulation of ... remedies designed to protect people from infractions by the States of federally guaranteed rights"). *See also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)("We must examine the constitution itself, to see whether this process be in conflict with any of its provisions....") *See also* Andrew Hyman, "The Little Word Due", 38 *Akron Law Rev.* 1, 30 (2005)("Congress must either respect all of the accused persons' process rights, or let them have their liberty").

American colonists equated the phrases "due process of law" and "law of the land." *See Pacific Mutual v. Haslip,* 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855). On its face, the phrase "law of the land" does not suggest any distinction between procedural law and substantive law, and indeed no one has ever suggested that Magna Carta allowed the king to define and prosecute whatever crimes and punishments he wanted so long as he followed certain procedures. These facts argue strongly against a purely procedural interpretation.

Neither the American colonists nor the highest legal authorities in England attributed any sort of technical meaning to the critical phrase "law of the land."[9] That phrase simply referred to the rules of the country or region. *See generally* SAMUEL

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[9] *Cf.* Alexander Hamilton, *Remarks on an Act for Regulating Elections* (1787), *reprinted in* 4 PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett ed., Columbia Univ. Press 1962). Hamilton saw technical meanings in the terms "law of the land" and "but by due process of law." His view was disputed. *See generally* James Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process* 16 CONST. COMMENTARY 315 (1999)("it is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations").

JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (e.g., defining the word law as a "rule of action," defining the word land as a "country; a region," defining the word due as "exact; without deviation," defining the word process as "course," and defining the word course as "uncontrolled will" or "consequences" or "settled rule"). The ordinary meaning of the phrase "law of the land" was confirmed by the King's Bench in *Regina v. Paty*,[10] and also by legal luminaries such as Sir Edward Coke. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 45 (Brooke 1797). Coke wrote that, "no man be taken or imprisoned, but per legem terrae, that is, by the common law, statute law, or custom of England" (notice the conjunction "or" used by Coke).

Lord Coke also wrote that the due process clause in a particular statute was "declaratory of the old law of England." *Id.* at 50. Consider very carefully what Coke meant. He was saying that the statute reiterated what was already contained in a clause of Magna Carta, rather than saying that the statute incorporated various other old rules aside from that particular clause in Magna Carta. *See id.* at Proeme ("the prudent reader may discern...whether the statute be introductory of a new law, or declaratory of the old....”). *See also* GILES JACOB, LAW-DICTIONARY 117 (Riley 1811)(“Statutes are ... either declaratory of the Common Law, or remedial of some defects therein; or to speak more strictly, they are either declaratory of the old law, or introductory of a new law”).

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[10] *See* note 7 *supra*.

The Court correctly explained in *Hurtado v. California,* 110 U.S. 516, 531 (1884), that “bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land.”[11] When Coke referred to a particular aspect of due process such as a right to a grand jury, he was not referring to an intrinsic aspect of due process, but rather was merely giving “an example and illustration of due process of law as it actually existed in cases in which it was customarily used.” *Hurtado*, 110 U.S. at 523.

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[11] *Cf. Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)(“As to the words from *Magna Charta*, incorporated into the constitution of Maryland...they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice”). This quote from *Okely* is a classic instance of accurately stating original intent rather than original meaning; by analogy, the original intent was also to promote wisdom and make people very happy, but that is no basis for using this clause of Magna Carta to overturn laws that merely lack wisdom or do not make people sufficiently happy.

Recent substantive due process cases have required that laws be fair, independently of what legislators may think about fairness, and independently of what later members of the Court may think about fairness. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 861, 870 (1992). However, the court below correctly observed that even a "deeply rooted" historical due process inquiry invites subjectivity, because principles like "privacy" and "justice" and "federalism" and "democracy" are all ancient rights that are often at odds with each other. *Cf. Washington v Glucksberg*, 521 U.S. 702 (1997)("we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"). The right to keep arms might flourish under that sort of historical due process inquiry, but such an inquiry bears no relation to what the Constitution says.

It would be inconsistent with the constitutional text if the courts were to now say that state statutes infringing upon gun ownership are not sufficiently rooted in history to be "laws" within the meaning of the Due Process Clause.[12] The Constitution prescribes what "shall be a law." U.S.

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[12] *See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768)("LAW...1. A rule of action. *Dryden* 2. A decree, edict, statute, or custom, publicly established. *Davies*").

Const. art. I, § 7, cl. 2. The Constitution also prescribes what "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The judiciary does not generally have carte blanche to counteract those prescriptions.

Blackstone defined municipal law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." WILLIAM BLACKSTONE. COMMENTARIES ON THE LAWS OF ENGLAND 44 (Bell 1771). Blackstone elaborated that the declaratory part of the law, which declares "the rights to be observed, and the wrongs to be eschewed....depends not so much upon the law of revelation or of nature as upon the wisdom and will of the legislator." *Id.* at 53-54. To the extent that our Constitution does not declare which laws are right and wrong, that is a job for legislators as Blackstone said; otherwise, there is no separation of powers except temporarily, in matters that the Court has not yet decided.

The Constitution belongs to the people.[13] Therefore, the people should be able to debate how we can use the republican and federal form of government that the Constitution painstakingly set up, in order to resolve even sensitive and fundamental matters. The present case is one of the relatively rare instances where the matter has already been resolved by specific applicable constitutional provisions.

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[13] *See* testimony of Associate Justice Anthony M. Kennedy, *Judicial Security and Independence, Hearing Before the Committee on the Judiciary, United States Senate*, 110th Cong. 10 (2007)("The Constitution doesn't belong to a bunch of judges and lawyers. It belongs to the people").

Of course, it is painful for judges to allow minorities to be wronged by majorities, but there can be a greater good. In any event, the wronged minority has the advantage here in this case, because of the specific constitutional provisions protecting a right to keep and bear arms, quite apart from the Due Process Clause.

II. The Extent Of Protection Offered By The Privileges Or Immunities Clause For The Right To Keep And Bear Arms Is An Important Federal Question That Needs To Be Settled

As the court below correctly pointed out, *Slaughter-House*, 83 U.S. (16 Wall.) 36 (1873) has been interpreted as holding that the Privileges or Immunities Clause "does not apply the Bill of Rights, en bloc, to the states" (emphasis added). However, the Supreme Court has never rejected selective (rather than en bloc) incorporation under the Privileges or Immunities Clause. *See generally* Akhil Amar, *The Bill of Rights and the Fourteenth*

Amendment, 101 YALE LAW JOURNAL 1193 (1992) (proposing a "refined incorporation" of some but not all enumerated rights into the Privileges or Immunities Clause).

Revivification of this Clause would not allow the Court to apply an unlimited range of restrictions against the states, because the plain text of this Clause indicates that something cannot be a "privilege or immunity of citizens of the United States" unless it already restrains the federal government in federal jurisdictions such as the nation's capital.[14] Congress is likewise unable to expand the protected privileges or immunities. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Moreover, the Privileges or Immunities Clause cannot protect any claimed constitutional right of a citizen beyond those that are "fundamental," and the Court would therefore be able to determine that some constitutional rights (e.g. the grand jury right) are not fundamental even though they restrain the federal government in federal jurisdictions such as the nation's capital.[15] The "fundamental" rights inquiry under the Privileges or Immunities Clause would be somewhat subjective, but it would be closely cabined by the requirement that a proposed privilege or immunity must already be protected nationwide against federal infringement.

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[14] *See* ROBERT LEVY, SHAKEDOWN: HOW CORPORATIONS, GOVERNMENT, AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS 145 (Cato Institute 2004). *See generally* speech by John Bingham, CONG. GLOBE, 39th Cong., 1st Sess., 1088, 1095 (Feb. 28, 1866) commenting on a draft of the Fourteenth Amendment ("The proposition pending before the House is simply a proposition to arm the Congress...with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—no more....If the State laws do not interfere, those immunities follow under the Constitution").

A. Selective Incorporation Of The Right To Keep And Bear Arms Under The Privileges Or Immunities Clause Is An Issue Of First Impression Despite *Cruikshank*, *Presser* and *Miller*

Neither *Cruikshank*, nor *Presser*, nor *Miller* rejected selective incorporation of the right to keep and bear arms via the Privileges or Immunities Clause. *Miller* merely said that, "we think it was fatal to this claim that it was not set up in the trial court." *Miller,* 153 U.S. at 538. And *Cruikshank* — which involved no state action — merely said that the counts in the indictment referencing the

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[15] *See Corfield v. Coryell*, 6 Fed. Cas. 546, 551 no. 3,230 (C.C.E.D.Pa. 1825)("We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental"); *Baldwin v. Montana Fish and Game Comm'n* 436 U.S. 371, 388 (1978)(same). These citations involve the Privileges *and* Immunities Clause. *See* U.S. Const., Art. IV, Sec. 2.

Privileges or Immunities Clause were "too vague and general." *Cruikshank*, 92 U.S. at 559.

As for *Presser*, although that opinion said that the Second Amendment only applies against the federal government, it also stated that there are other constitutional provisions protecting a right to keep and bear arms from state infringement: "the states cannot, even laying the constitutional provision in question [i.e. the Second Amendment] out of view, prohibit the people from keeping and bearing arms", in a manner inimical to the federal government. *Presser*, 116 U.S. at 265.

Presser did not involve home possession of weapons as in the present case, but rather involved formation of military organizations that train and parade in public. The *Presser* decision said that the state's ban on such military activities does "not infringe the right of the people to keep and bear arms" even if that right applies against the states, *id.* at 264, and would not infringe that right even if the ban were imposed by the federal government. *See id.* at 267. Thus, nothing in *Presser* rejected application of the right to keep and bear arms, via the Privileges or Immunities Clause.

B. Selective Incorporation Of The Right To Keep And Bear Arms Under the Privileges Or Immunities Clause Is An Issue Of First Impression Despite *Slaughter-House*

Slaughter-House did not directly involve any enumerated constitutional right.[16] If *Slaughter-House* had been dealing with fundamental enumerated rights that are constitutionally protected in federal jurisdictions, then the Court might or might not have applied those rights against the states via that Clause.

Professor John Hart Ely, for example, believed that the import of *Slaughter-House* "seems unmistakable: if it's a right guaranteed elsewhere in the Constitution — if, in particular, it's a right previously guaranteed only against the federal government -- then it belongs on the list of privileges or immunities protected against state denial by the Fourteenth Amendment." JOHN HART ELY, DEMOCRACY AND DISTRUST, 196 n. 59 (Harvard

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[16] *See Adamson v. California*, 332 U.S. 46, 76 (1947)(Justice Black dissenting)("The state law under consideration in the Slaughter-House cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was 'no direct constitutional provision against a monopoly'").

University Press 1980). Ely's reading of *Slaughter-House* is especially plausible if the rights at issue are not just enumerated in the Constitution but are also "rights which are fundamental," as the Court said in *Slaughter-House*, 83 U.S. at 76.

According to scholars such as Professor Nelson Lund, it may be that *Slaughter-House* "left open the possibility of incorporation under the Privileges or Immunities Clause." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE LAW REV. 185, 190 (2008). This possibility becomes a probability if one considers selective incorporation of "fundamental" enumerated rights, instead of total (i.e. en bloc) incorporation of every enumerated right. After all, the Court in *Slaughter-House* specifically said that the Clause only protects "those rights which are fundamental." *Slaughter-House*, 83 U.S. at 76.

The right to keep and bear arms is one of those fundamental rights that is already protected within federal jurisdictions.[17] This right should therefore be selectively incorporated into the Privileges or Immunities Clause, and *Slaughter-House* is no obstacle. This in no way implies that the

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[17] Even before the Civil War, the Court indicated that the right to arms is fundamental. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856). Note that the dissent of Justice Curtis discussed due process at length, while declining to cite or follow any prior Supreme Court case on that topic. *Id.* at 626.

Fifth Amendment's grand jury right, or the Seventh Amendment's right to a jury in civil cases, need to be incorporated, if they are not "fundamental."

As of now, the Supreme Court does not use the Privileges or Immunities Clause to protect any right whatsoever. In the case of *Saenz v. Roe*, 526 U.S. 489 (1999), the Court did construe that clause as protecting an aspect of the right to travel:

> Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

Saenz, 526 U.S. at 503 (emphasis added). However, this statement in *Saenz* was an inexact characterization of what the *Slaughter-House* opinion actually said: "One of these privileges is conferred by the very article under consideration." *Slaughter-House*, 83 U.S. at 80 (emphasis added). The *Saenz* Court acknowledged that its decision "rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence." *Saenz*, 526 U.S. at 506. The Privileges or Immunities Clause was unnecessary to the result in *Saenz*, and thus that Clause continues to be treated by American jurisprudence as a nullity. That status quo can and should change, without overturning *Slaughter-House*.

The purported power to constitutionalize the most important substantive political issues under the Due Process Clause is clearly untenable, as the Court recognized in cases like *Presser*. That old decision should stand. However, the Privileges or Immunities Clause is a legitimate vehicle for selectively incorporating enumerated rights like the one in question.[18] The Constitution, as amended, does not allow the American people to be disarmed.

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[18] The Constitution guards some unenumerated rights. Madison called them the "great residuum" of rights that result from having a federal government of limited powers. *See* 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1789). *See generally United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947). Those rights are not enforceable where federal power is plenary, and so they are not privileges or immunities of citizens of the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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June 18, 2009

AMICUS
CURIAE
BRIEF

⑨ ⑥

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In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, INC., ET AL.,
PETITIONERS,
v.
CITY OF CHICAGO, ILLINOIS, ET AL., RESPONDENTS.

OTIS McDONALD, ET AL., PETITIONERS,
v.
CITY OF CHICAGO, ILLINOIS, ET AL., RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Pursuant to Rule 37.4, the consent of the parties to file this brief is not required. California provided notice on July 6, 2009, that it would file this brief and believes that no party will be prejudiced by the filing.

QUESTION PRESENTED

Whether the right of the People to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting the possession of handguns in the home.

INTEREST OF *AMICUS CURIAE*

California has a strong interest in protecting the constitutional rights of its citizens. But unlike many states, California has no state constitutional counterpart to the Second Amendment. Unless the protections of the Second Amendment extend to citizens living in the States as well as to those living in federal enclaves, California citizens could be deprived of the constitutional right to possess handguns in their homes as affirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

INTRODUCTION

This Court recently held that the Second Amendment prevents the federal government from denying citizens the right to possess handguns in their homes. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). But the decision did not resolve the more important question of whether this limitation applies to the States through the Fourteenth Amendment. The petitions in these cases should be granted so the Court may address this question. In granting the petitions and ruling upon the merits, the Court should extend to the states *Heller*'s core Second-Amendment holding that the government cannot deny citizens the right to possess handguns in their homes, but also provide guidance on the scope of the States' ability to reasonably regulate firearms.

REASONS FOR GRANTING THE PETITIONS

The Court should grant review for two reasons. First, the Court should grant review to resolve the split in the circuits on the important question of whether the Second Amendment applies to the states. This question is particularly important because certain states, such as California, have no state constitutional counterpart to the Second Amendment. Second, the Court should grant review because further guidance is needed to define the scope of the States' legitimate interests in reasonably regulating firearms.

I. THESE PETITIONS SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE CIRCUITS ON THE IMPORTANT QUESTION OF WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES.

The Ninth Circuit Court of Appeals has held that the individual right guaranteed by the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). The Second Circuit has concurred with the Seventh Circuit in reaching the opposite conclusion. *Maloney v. Cuomo*, 554 F.3d 56 (2nd Cir. 2009). This split has created confusion regarding the nature of citizens' Second-Amendment rights and the power of States to enact reasonable regulations governing firearms. These petitions should be granted to resolve the lower-court split and the confusion it has engendered.

II. THESE PETITIONS SHOULD BE GRANTED TO AFFIRM THE APPLICABILITY OF THE SECOND AMENDMENT TO THE STATES AND TO PROVIDE GUIDANCE ON THE SCOPE OF PERMISSIBLE FIREARMS REGULATIONS.

In affirming that the Second Amendment guarantees an individual right to keep and bear arms, the Court in *Heller* noted that its ruling permitted reasonable regulation of firearms. It declared that nothing in the decision should "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 128 S. Ct. 2783, 2816-17 (2008). But the Court declined to elaborate on the extent of the government's authority to regulate firearms or to establish a standard of review applicable to asserted Second-Amendment infringements. *Id.* at pp. 2817-19.

Further guidance on these issues is needed in California, which has been a national leader in passing common-sense legislation to regulate firearms. The Unsafe Handgun Act, for example, aims to reduce handgun crime and promote handgun safety. Cal. Penal Code § 12125 et seq. It prohibits the manufacture or sale of any "unsafe handgun" in California, including those that lack certain safety features such as a chamber-load indicator. Cal. Penal Code § 12126(c). This law has furthered important governmental interests while not interfering with the ability of our state's residents to purchase and possess a wide range of handguns: Over 1,300 handguns have been certified by California as meeting the law's requirements. See http://certguns.doj.ca.gov/. Nonetheless, California is presently defending the law against a federal constitutional challenge. *Peña v. Cid*, 2:09-cv-01185-FCD-KJM, 2009 (U.S. Dist., E.D. Cal.).

The petitions in these cases should be granted to provide needed guidance on the scope of the States' ability to reasonably regulate firearms while extending to the states *Heller*'s core Second-Amendment holding that government cannot deny citizens the right to possess handguns in their homes.

Dated: July 6, 2009

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AMICUS
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OTIS MCDONALD, ADAM ORLOV, COLLEEN LAWSON,
DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* is a law professor who has published a book or law review article on the Fourteenth Amendment and the Bill of Rights. Certain of *amici*'s relevant publications are cited in this brief. *Amici* are:

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Amici submit this brief to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case.

Amici do not, in this brief, take a position on whether the particular regulation challenged in this case is constitutional in light of the individual privilege to bear arms, which, as the Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008), may be regulated to a certain extent.

SUMMARY OF ARGUMENT

The *McDonald* petitioners have asked this Court to grant *certiorari* to review the United States Court of Appeals for the Seventh Circuit's ruling that the Second Amendment's individual right to keep and bear arms is not incorporated against the States. Both the court below and the Second Circuit have explained that, while the reasoning of 19th century anti-incorporation precedent has been undermined, it is the prerogative of this Court to authoritatively proclaim the current irrelevance of this line of precedent. *Amici* urge the Court to grant review in this case to clarify its incorporation jurisprudence, and, in particular, precedent that has inappropriately turned the Fourteenth Amendment's Privileges or Immunities Clause—a Clause that was written to be the centerpiece of the

14th Amendment—into a constitutional afterthought.

The textually and historically accurate approach to determining whether the Fourteenth Amendment protects an individual right to keep and bear arms is to look to the Amendment's Privileges or Immunities Clause. However, the *Slaughter-House Cases*, 83 U.S. 36 (1873), read the Privileges or Immunities Clause so narrowly as to render it practically meaningless—completely ignoring the contrary text, history and purpose of the Fourteenth Amendment. Moreover, *Slaughter-House* and its progeny stand for the proposition that the Fourteenth Amendment does not apply the Bill of Rights to the States. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that the First and Second Amendments do not apply to the States). While this line of precedent has been so completely undermined by subsequent Supreme Court incorporation decisions that there no longer remains any justification for its continued application, the lower courts will continue to hew to these precedents, as the Seventh Circuit did below, absent clarification from this Court.

This case presents the Court with a unique opportunity to re-examine *Slaughter-House* and *Cruikshank* and properly cabin the reach of those cases. The history here is clear. The framers of the Fourteenth Amendment sought to constitutionally protect an individual right to keep and bear arms against state infringement, in large part because they wanted the newly freed slaves and unionists to have the means to protect themselves, their families and their property against well-armed former rebels. The history also shows that the Privileges or Immunities Clause was intended to—and understood to—protect this right.

Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court's jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause. *Slaughter-House* read the Privileges or Immunities Clause so narrowly as to essentially read it out of the Amendment, but "[v]irtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001). *Certiorari* is necessary here because the Seventh Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

ARGUMENT

THE COURT SHOULD CLARIFY ITS PRIVILEGES OR IMMUNITIES CLAUSE JURISPRUDENCE TO AVOID FURTHER CONFUSION AMONG THE LOWER COURTS.

In declining to hold that the States must respect an individual right to keep and bear arms, the Seventh Circuit followed this Court's rulings in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller* *v. Texas*, 153 U.S. 535 (1894), which "rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment." Pet. App. 2. Similarly, the Ninth Circuit, while recently finding incorporation of such a right under the Due Process Clause, explained that the court was "barred from considering incorporation through the Privileges or Immunities Clause," *Nordyke v. King*, 563 F.3d 439, 446 (9th Cir. 2009) (citing *Slaughter-House Cases*, 83 U.S. 36 (1873)).

The courts of appeals followed these precedents despite acknowledging that the decisions' anti-incorporation reasoning appears to be outdated and that "judges and academics have criticized *Slaughter-House*'s reading of the Privileges or Immunities Clause." *Id.* at 447 n.5. The confusion of the lower courts is evident: as the Seventh Circuit explained, "[a]lthough the rationale of *Cruikshank*, *Presser*, and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House*" and "[h]ow the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." Pet. App. 6.

Amici urge the Court to grant *certiorari* to clarify the reach of *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* and bring Privileges or Immunities Clause jurisprudence up to date with modern understandings of incorporation under the Fourteenth Amendment and back in line with constitutional text and history.

A. The Court Should Grant Review To Harmonize Incorporation Precedent.

The primary source of the lower courts' confusion as to whether *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* remain binding law on the question of incorporation is the outdated reasoning of those decisions.

After *Heller*, there can be no further doubt that the Constitution protects an individual right to keep and bear arms in self-defense, subject to certain limitations, against federal infringement. The question is now whether such a right may be recognized to protect against *state* infringement. The Seventh Circuit and the Second Circuit understood *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* to preclude incorporation of such a right, and considered these cases binding law absent clarification from the Court.

The Court has already acknowledged that there is a tension between these precedents and modern incorporation doctrine. In *Heller*, the Court noted that:

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois* and *Miller v. Texas*

> reaffirmed that the Second Amendment applies only to the Federal Government.

District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

Modern incorporation doctrine similarly conflicts with *Slaughter-House*. In overruling earlier cases such as *Maxwell v. Dow*, 176 U.S. 581 (1900), *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947),[2] the Court has already rejected the foundation upon which *Slaughter-House* was built—the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look to state governments for the protection of their rights, save only those few rights connected to the workings of the federal government or the Union. In cases incorporating and applying against the States nearly all of the protections in the Bill of Rights, the Court repudiated *Slaughter-House*'s conception of federalism and encouraged citizens to look to the federal government for the protection of a long list of fundamental rights.[3] The reasoning of

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[2] *E.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (overruling *Twining* and *Adamson* and applying Fifth Amendment right against self-incrimination to the States); *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968) (rejecting dicta in *Maxwell*, which refused to apply the Sixth Amendment jury right to the States).

[3] *E.g.*, *Chicago, B. & Q. Ry. Co. v. City of Chicago*, 166 U.S. 226 (1897) (applying to the States the Fifth Amendment right against uncompensated takings); *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment free speech); *Mapp v. Ohio*,

Slaughter-House simply cannot be squared with this long line of incorporation precedent.

Even if the Court does not expressly overrule *Slaughter-House*, as urged by the Petitioner, *e.g.*, Pet. at 4, 22, the Court should clarify that *Slaughter-House*'s general interpretation of the Privileges or Immunities Clause is mere dicta. This dicta, rooted in an ahistoric and now discarded interpretation of the Fourteenth Amendment, does not preclude incorporation of an individual right to keep and bear arms under the Clause. After all, the *Slaughter-House* majority expressly "excused" itself from "defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so." 83 U.S. at 78-79.[4]

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367 U.S. 643 (1961) (Fourth Amendment guarantee against unreasonable search and seizure); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right against double jeopardy); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confront witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process to obtain witnesses); *Robinson v. California*, 370 U.S. 660 (1962) (Eight Amendment ban on cruel and unusual punishment).

[4] The actual decision in *Slaughter-House* is noncontroversial: the Court rejected petitioners' claim that the Louisiana legislature had violated their fundamental rights of citizenship by granting to a single slaughtering company a monopoly on the location where animals could be butchered within the city of New Orleans. But in the process of finding the challenged restrictions justified by the health risks of butchering, the *Slaughter-House* five-Justice majority

In *Heller*, the Court identified the outmoded reasoning of *Cruikshank*. *Amici* urge the Court to take the next logical step and grant review in this case to provide definitive guidance to the lower courts regarding the continuing validity of *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller*.

B. The Court Should Grant Review To Harmonize Its Interpretation Of The Fourteenth Amendment's Privileges Or Immunities Clause With The Clause's Text, History, And Public Meaning.

While the primary source of the lower courts' confusion is the clash between outdated cases like *Slaughter-House* and *Cruikshank* and modern incorporation precedent, there is also a deep conflict between the Court's interpretation of the Fourteenth Amendment in *Slaughter-House* and *Cruikshank* and the Constitution's text and history.

"The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role than that which was contemplated by its framers when they added the

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questioned how much the Fourteenth Amendment changed the federal/state balance and suggested that the Privileges or Immunities Clause could be read so narrowly as to protect only rights attendant to national citizenship, such as the right to access navigable waters, with most fundamental rights protected at the discretion of the States. *Id.* at 74-75.

Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5. Should the Court grant *certiorari*, it is the intent of *amici* to place before the Court the work of a host of leading constitutional scholars who agree that *Slaughter-House*'s interpretation of the Fourteenth Amendment's Privileges or Immunities Clause is wrong as a matter of text and history.[5] The *McDonald* petition presents an ideal opportunity for the Court to grant review and re-examine the Privileges or Immunities Clause and its promise of protection for substantive, fundamental rights because it is clear that one of the privileges covered by the Clause is the individual right to keep and bear arms at issue in this case.

1. Slaughter-House *and* Cruikshank *Conflict with the Text of the Fourteenth Amendment.*

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make former slaves into equal citizens in the new republic, securing for the nation the "new birth of freedom" President Lincoln promised at Gettysburg. In two short sentences, Section One of the Fourteenth Amendment wrote equal citizenship into our constitutional design, mandating that the States abide by fundamental constitutional principles of liberty, equality, and fairness. Its words provide:

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[5] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22-30 (1980); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163-230 (1998); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 7-6, at 1320-31 (2000); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 191-203 (2004); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007).

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, section 1.

The opening words of the Fourteenth Amendment announce a new relationship between federal and state governments and between the people and their Constitution. By affirming U.S. citizenship as a birthright and declaring federal citizenship "paramount and dominant instead of being subordinate and derivative," *Arver v. United States*, 245 U.S. 366, 389 (1918), the Amendment marked a dramatic shift from pre-war conceptions of federalism and overruled *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), which held that a former slave was not a U.S. citizen under the Constitution because of his race.

The framers of the Fourteenth Amendment made sure that the full and equal citizenship they established in the first words of Section One was no empty promise. In the Privileges or Immunities Clause, they explicitly guaranteed that citizens would enjoy all fundamental rights and liberties: "the privileges or immunities of citizens of the United States."[6]

As crafted, the Privileges or Immunities Clause was meant to secure the substantive liberties protected by the Bill of Rights, as well as unwritten fundamental rights. Leading proponents and opponents alike of the Fourteenth Amendment understood the words of the Clause to protect substantive fundamental rights—including the rights enumerated in the Constitution and Bill of Rights.

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[6] This focus on full and equal citizenship did not mean that the Reconstruction framers were unconcerned with the rights of non-citizens. John Bingham, principal author of the Fourteenth Amendment, believed that no state could violate the Constitution's "wise and beneficent guarantees of political rights to the citizens of the United States, as such, and of natural rights to all persons, whether citizens or strangers." Cong. Globe, 35th Cong., 2d Sess. 983 (1859). As explained by Professor Akhil Amar, the "privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles (which Bingham saw as paired if not synonymous) would protect the wider category of persons." AMAR, at 182. *See also* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 68 (1993) ("An examination of the language of the proposed Amendment shows that its 'privileges and immunities' clause would apply only to citizens, whereas its 'life, liberty, and property' clause would apply more expansively to 'all persons.'").

The framers of the Fourteenth Amendment acted against a historical backdrop that required them to protect at least the liberties of the Bill of Rights: they were keenly aware that southern states had been suppressing some of the most precious constitutional rights of both freed slaves and unionists. *See* AMAR, BILL OF RIGHTS, at 160. Starting around 1830, southern states had begun enacting laws restricting freedom of speech and press to suppress anti-slavery speech, even criminalizing such expression; in at least one state, writing or publishing abolitionist literature was punishable by death. *Id.* at 161; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30, 40 (1986). Political speech was repressed as well, and Republicans could not campaign for their candidates in the South. *Id.* at 31. To prevent states from continuing to violate some of the core rights of our original Constitution, the Fourteenth Amendment framers added the Privileges or Immunities Clause to the Constitution.

In addition to providing the textual basis for protection of the liberties in the Bill of Rights, the Clause is "the natural textual home for . . . unenumerated fundamental rights." Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990). It mimics the Ninth Amendment, which provides that there are rights protected by the Constitution not spelled out in the text. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX.

L. REV. 1 (2006). As one member of the Reconstruction Congress observed during the debates on the Fourteenth Amendment:

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of – "life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person," &c; and then lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.

Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye).[7]

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[7] One preeminent constitutional scholar has suggested that the individual right to keep and bear arms, unconnected to militia service, at issue in both *Heller* and this case may have more to do with the Ninth and Fourteenth Amendments than the words of the Second Amendment. *See* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 174-77 (2008). Regardless of whether the individual right to bear arms is protected against state infringement by incorporating the Second Amendment through the Fourteenth

Accordingly, the Privileges or Immunities Clause is the textual hook in the Fourteenth Amendment for protection of unenumerated fundamental rights, as well those substantive fundamental rights articulated in the Bill of Rights, including the Second Amendment right to keep and bear arms.

2. Slaughter-House *and* Cruikshank *Conflict with the History of the Privileges or Immunities Clause.*

The debates in Congress confirm what the text of the Fourteenth Amendment provides: the Privileges or Immunities Clause secures substantive fundamental constitutional rights. In particular, the Clause secures against state infringement an individual, substantive right to keep and bear arms for defense of hearth and home.

Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction, offered the most comprehensive analysis of the Privileges or Immunities Clause in the Senate debates on the Amendment. Relying heavily on *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), an influential

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Amendment or by looking to an unenumerated right to defend person and property protected by the Ninth and Fourteenth Amendments, the textual home for the guaranteed protection of that substantive right is the Privileges or Immunities Clause.

1823 decision interpreting the Privileges and Immunities Clause contained in Article IV, Section Two of the Constitution,[8] Sen. Howard made clear that the Privileges or Immunities Clause of the Fourteenth Amendment would afford broad protections to substantive liberty, encompassing all "fundamental" rights enjoyed by "citizens of all free Governments": "protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F. Cas. at 551).

Sen. Howard also made clear that these substantive "privileges or immunities" included those liberties protected by the Bill of Rights. *See* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1562-63 (2007). He noted the "privileges and immunities" of citizens "are not and cannot be fully defined in their entire extent and precise nature," but to these unenumerated rights

> should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press;

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[8] Article IV, Section Two provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

> the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right pertaining to each and all of the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
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> . . . [T]hese guarantees...stand simply as a bill of rights in the Constitution...[and] States are not restrained from violating the principles embraced in them....The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added).

Representative John Bingham, the principal author of Section One of the Fourteenth Amendment, also made it abundantly clear that the substantive privileges and immunities of citizens encompassed the liberties set forth in the Bill of Rights. In explaining why the Fourteenth Amendment was necessary, Bingham cited the Supreme Court's opinions in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and *Livingston v. Moore*, 32 U.S. 469 (1833), both of which held that the Bill of Rights did not apply to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866). Bingham retained this understanding of what the Privileges or Immunities Clause protected. In 1871, after the ratification of the Fourteenth Amendment, he explained:

> [T]he privileges or immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows. [Bingham read the first eight amendments word for word.] These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.

Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871). *See generally* Aynes, 103 YALE. L.J. at 74.

Other prominent members of the Reconstruction Congress shared the same view of the privileges and immunities of national citizenship held by Sen. Howard and Rep. Bingham. For example, prior to the drafting of the

Fourteenth Amendment, Representative James Wilson, chairman of the House Judiciary Committee, stated that "[t]he people of the free States should insist on ample protection to their rights, privileges and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike." Cong. Globe, 38th Cong., 1st Sess. 1202-03 (1864). *See* CURTIS, at 37-38.

Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that the Privileges or Immunities Clause of the Fourteenth Amendment protected against state infringement substantive, fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single Senator or Representative disputed this understanding of the privileges and immunities of citizenship or Section One. *See, e.g.*, AMAR, BILL OF RIGHTS, at 187; CURTIS, at 91; Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 932 (1986). To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, speaker after speaker affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.

Particularly relevant to the *McDonald* petition is the history of the Clause that shows that an individual right to keep and bear arms was among the privileges and immunities of citizens protected against state infringement under the Fourteenth Amendment.

The framers of the Fourteenth Amendment were particularly concerned with the right of freedmen to bear arms. *See* Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991). The efforts to disarm freed slaves "played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change." *Id.* As constitutional historians have noted, "Reconstruction Republicans recast arms bearing as a core *civil* right. . . . Arms were needed not as part of political and politicized militia service but to protect one's individual homestead." AMAR, BILL OF RIGHTS, 258-59. In fact, far from fulfilling the Founders' vision of state militias as bulwarks of liberty, various southern militias perpetrated rights deprivations in the South: "Confederate veterans still wearing their gray uniforms, . . . frequently terrorized the black population, ransacking their homes to seize shotguns and other property and abusing those who refused to sign plantation labor contracts." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988). *See also* Cong. Globe, 39th Cong., 1st Sess. 40 (1866) (Sen. Wilson) ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them"); *id.* at 914, 941 (Letter from Colonel Samuel Thomas to Major General O.O. Howard, quoted by Sens. Wilson and Trumbull) ("Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the state] militia.").

Central in the minds of the framers were the Black Codes, the South's post-war attempt to re-institutionalize slavery in a different guise.[9] The Black Codes systematically violated the constitutional rights of the newly freed slaves in myriad ways, including by prohibiting the former slaves from having their own firearms. *See* FONER, at 199-201; CURTIS, NO STATE SHALL ABRIDGE, at

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[9] The Reconstruction Congress first acted to explicitly protect the right of the freedmen to keep and bear arms in the re-enacted Freedman's Bureau Bill. Seeking to prevent the Black Codes from perpetuating the wrongs of slavery, the bill provided that African Americans should have "the full and equal benefit of all laws and proceedings for the security of person and property, *including the constitutional right of bearing arms*." Cong. Globe, 39th Cong, 1st Sess. at 654, 743, 1292 (Rep. Bingham) (emphasis added). *See also id.* at 654 (Rep. Eliot) (proposing the addition of the words "including the constitutional right to bear arms"); *id.* at 585 (Rep. Banks) (stating his intent to modify the bill so that it explicitly protected "the constitutional right to bear arms"). Because there was some question over whether Congress had the power to enforce against the states the protections of the Bill of Rights and the fundamental rights articulated in Reconstruction civil rights legislation, the 39th Congress proposed the Fourteenth Amendment, which made explicit the constitutional guarantee of fundamental rights against state infringement.

35.[10] *See also Heller*, 128 S. Ct. at 2841 (noting that "[b]lacks were routinely disarmed by Southern States after the Civil War" and that opponents of "these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms"). These abuses were investigated and reported to Congress by the Joint Committee on Reconstruction, composed of members of both the House and Senate (including Sen. Howard and Rep. Bingham). The Joint Committee drafted the Fourteenth Amendment in Congress, and thus their findings bear directly on the Amendment they constructed. The Committee's conclusions, issued in a June 1866 report, were also distributed widely throughout the country—150,000 copies were issued. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 265 (1914). The Joint Committee's report confirmed through an exhaustive fact-finding effort the systematic violation of constitutional rights in the South and the need for guaranteeing basic human and civil rights.

On the issue of the right to bear arms the Joint Committee reported testimony that, in the South, "[a]ll of the people...are extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property," and noted that "[t]he planters are disposed...to insert into their contracts tyrannical provisions...to prevent the negroes from leaving the plantation...or to have fire-arms in their possession." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION Pt. II, 4 and Pt. II, 240 (1866). Members of the Reconstruction Congress echoed these concerns. Senator Pomeroy explained that the newly freed slaves should be guaranteed the "essential safeguards of the Constitution," including the right of bearing arms, and noted that southern states had denied African Americans the right to keep and bear arms. 39th Cong. Globe, 1st Sess. at 1183, 1837-38. Sen. Pomeroy expressly listed as one of the constitutional "safeguards of liberty" the "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866). Representative Eliot decried a Louisiana ordinance that prevented freedmen not in the military from possessing firearms within town limits without special written permission from an employer. *Id.* at 517. Finally, Sen. Howard defined the privileges or immunities of citizenship protected by the Amendment to include "the personal rights guaranteed and secured by the first eight amendments of the constitution....such as....the right to keep and bear arms." *Id.* at 2765. *See also id.* at 1073 (Sen. Nye) ("As citizens of the United States, [the freedmen] have equal right to protection, and to keep and bear arms for self defense.")

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[10] For discussions of the Black Codes in Congress, *see* Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.

In short, Reconstruction legislative history unequivocally demonstrates that an individual right to keep and bear arms was one of the rights to be protected by the Privileges or Immunities Clause.

3. Slaughter-House *and* Cruikshank *Conflict with the Original Public Meaning of the Fourteenth Amendment.*

There is substantial historical support for reading the words "privileges" and "immunities" to include the liberties in the Bill of Rights. The words privileges and immunities had been extensively used to describe basic Bill of Rights liberties (and their English predecessors) in the years before the framing and ratification of the Fourteenth Amendment, and that meaning appears to have been widely understood. *See, e.g.*, Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000).

From our very beginnings, Americans used the words "privileges" and "immunities" interchangeably with words like "rights" or "liberties." *See* AMAR, BILL OF RIGHTS, at 166-69; Curtis, *Historical Linguistics*, 78 N.C. L. REV. at 1094-1136. As Professor Curtis has noted, "Blackstone's *Commentaries on the Laws of England*, published in the colonies on the eve of the Revolution, had divided the rights and liberties of Englishmen into those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights." CURTIS, NO STATE SHALL ABRIDGE, at 64. In Blackstone's *Commentaries*, "the words *privileges* and *immunities* [were] used to describe various entitlements embodied in the landmark English charters of liberty of Magna Charta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1701." AMAR, BILL OF RIGHTS, at 169. Most of these liberties of Englishmen would later be enshrined in the American Bill of Rights, and they continued to be thought of as the privileges or immunities of citizens. CURTIS, NO STATE SHALL ABRIDGE, at 64.

For example, when James Madison proposed the Bill of Rights in Congress, he spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people," and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because "State governments are as liable to attack these invaluable privileges as the General Government is...." 1 Annals of Congress 453, 458 (1789); *see also id.* at 766 (discussing the proposed Bill of Rights as "securing the rights and privileges of the people of America").

This long-standing understanding of privileges and immunities appears to have held sway at the time of our Second Founding, as well. Certainly, as described above, the drafters of the Fourteenth Amendment "used the words *privileges* and *immunities* as a shorthand description of fundamental or constitutional rights." CURTIS, NO STATE SHALL ABRIDGE, at 64. In the ratification debates in the States, several governors "seem to have treated the words *rights* as equivalent to the words *privileges* or *immunities*." *Id.* at 146.

The general public was well aware that the Fourteenth Amendment was intended to protect the liberties of the Bill of Rights and other fundamental rights against state infringement. Sen. Howard's speech explaining that the Privileges or Immunities Clause included at least the rights guaranteed by the first eight amendments in the Bill of Rights "was reprinted as front page news the next day in the New York Times." Wildenthal, *Nationalizing the Bill of Rights*, 68 OHIO ST. L.J. at 1564. In addition, "[a]t least four other major papers apparently covered the relevant parts of Howard's speech: the Philadelphia Inquirer, the Washington, D.C. National Intelligencer, the front page of the New York Herald, and, with slight ambiguity, the front page of the Boston Daily Advertiser." *Id.* In short, "[t]he newspaper coverage of the Bingham and Howard speeches provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." *Id.* at 1590.

* * *

The lower courts have applied precedent to preclude incorporation of an individual right to bear arms under the Privileges or Immunities Clause. While acknowledging that this precedent runs counter to scholarly consensus and modern views of incorporation, the courts have considered themselves bound to follow these outdated cases until this Court declares otherwise. Because cases like *Slaughter-House* and *Cruikshank* are contrary to modern lines of precedent and established constitutional text and history, the Court should grant review to re-align Privileges or Immunities Clause jurisprudence and settle the question for the lower courts.

CONCLUSION

Amici urge the Court to grant *certiorari* and restore the Privileges or Immunities Clause of the Fourteenth Amendment to its intended place in our constitutional order.

Respectfully submitted,

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AMICUS
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BRIEF

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IN THE
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,
ET AL., *Petitioners*,
v.
CITY OF CHICAGO, ILLINOIS, *ET AL.*, *Respondents*.

OTIS MCDONALD, *ET AL.*, *Petitioners*
v.
CITY OF CHICAGO, ILLINOIS, *Respondent*.

On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC. AND GUN OWNERS FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax as a social welfare organization under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA performs a wide variety of educational services and is a citizens' lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax as an educational organization under IRC section 501(c)(3). GOF is involved in a number of educational and victim-assistance projects relative to federal and state constitutional, statutory, and other legal matters, particularly as they relate to the Second Amendment to the U.S. Constitution.

Each of the *amici curiae* was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution, and each has filed *amicus curiae* briefs in other federal litigation involving such issues, including *amicus curiae* briefs to this Court in cases such as District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008).

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court in deciding whether to grant the petitions for a writ certiorari.

SUMMARY OF ARGUMENT

The petitioners have presented an important question of federal law that has not been, but should be, settled by this Court. By its decision in District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), this Court settled a long-standing controversy by confirming that the Second Amendment protects an individual right to keep and bear arms. Having settled that question, Heller has spawned numerous constitutional challenges to State and local laws banning handguns. At issue is whether the Fourteenth Amendment applies the Second Amendment right to keep and bear arms against the States. As noted in Heller, previous decisions where the Supreme Court touched on this question ruled that the Second Amendment did not apply to the States. But Heller also acknowledged that the Court "did not engage in the sort of Fourteenth Amendment inquiry required by [this Court's] later cases." Heller, 171 L.Ed.2d at 674 n.23. This Court should grant the petitions to resolve this important federal question in the interests of the orderly administration of justice and to provide authoritative resolution of these issues regarding the American people's federal constitutional rights of self defense.

The right to keep and bear arms as secured by the Second Amendment is among the privileges and immunities of United States citizenship. First, as this Court stated in Heller, the right to keep and bear arms is an individual right that belongs to "all Americans." Thus, Heller determined that the Second Amendment right to keep and bear arms belongs to those individual persons who are part of the national polity. If a person is a member of that political community, then he has the constitutional right to keep and bear arms under the Second Amendment. According to Heller, it is a right that belongs to all Americans, not just those who reside in the nation's capital. Because the constitutional right to keep and bear arms inheres in a person by virtue of his American citizenship, the right to keep and bear arms is one of the privileges and immunities of citizens of the United States.

The City of Chicago and Village of Oak Park bans on handguns challenged by petitioners are comparable to the D.C. firearms ban struck down in Heller. Just as the D.C. law was held to infringe upon the right to keep and bear arms, in violation of the Second Amendment, the making and enforcing of an almost identical ban on handguns by the municipalities of Chicago and Oak Park abridge the privilege and immunity of keeping and bearing arms, in violation of the Fourteenth Amendment. The Second Amendment confers upon the citizen parties the right to possess a handgun for self-defense, which Heller determined is central to the Second Amendment right. In contrast, the municipalities of Chicago and Oak Park have taken away that right of self-defense. Those two positions are incompatible and, constitutionally, cannot co-exist.

Each American citizen must enjoy the same privileges and immunities of U.S. citizenship. If the lower courts' rulings were upheld, the Second Amendment's protection of an individual right to keep and bear arms could be effectively nullified by State law or local ordinance. If, as determined in Heller, the right of self-defense is central to the individual's right to keep and bear arms under the Second Amendment, and a total handgun ban limits that right of self-defense, that right as one of the national privileges or immunities of U.S. citizenship is unconstitutionally abridged if a State or one of its political subdivisions, in which an American citizen resides, bans the possession and use of handguns for lawful self-defense. In short, a law made or enforced by a State or political subdivision that would infringe upon the right to keep and bear arms under the Second Amendment — and the laws challenged by petitioners herein would so infringe — abridges that right under the Fourteenth Amendment.

ARGUMENT

I. THE PETITIONS PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

On June 26, 2008, this Court handed down its decision in District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*, at 683. By so ruling, this Court settled a decades-long controversy as to whether the Second Amendment protects an "individual right" or only a "collective" one. *See* United States v. Emerson, 270 F.3d 203, 218-20 (5th Cir. 2001). As Justice Breyer's dissent forecasted, the Heller decision sparked a flurry of Second Amendment litigation challenging "the constitutionality of gun laws throughout the United States."[2] *See* Heller, 171 L.Ed.2d at 736 (Breyer, dissenting).

Paramount among these many challenges is the question presented by petitioners: whether the Fourteenth Amendment Due Process Clause or Privileges or Immunities Clause "incorporates" the Second Amendment right to keep and bear arms and applies that right against the States. If the Fourteenth Amendment applies to the States the right to keep and bear arms, as stated in the Second

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[2] *See* Adam Winkler, "The New Second Amendment: A Bark Worse Than Its Right," The Huffington Post, January 2, 2009.

Amendment, it would constrict the firearm laws of every State, county, city, and town in the United States. If it does not, then the Second Amendment limits only the power of Congress to enact firearm laws and regulations.

Petitioners' question was anticipated specifically by this Court last year in its discussion of the statement in United States v. Cruikshank, 92 U.S. 542 (1876), that "[s]tates ... were free to restrict or protect the [Second Amendment] right under their police powers." Heller, 171 L.Ed.2d at 674. While Heller found Cruikshank supportive of "the individual-rights interpretation," it raised doubts about "Cruikshank's continuing validity on incorporation, a question not presented by this case...." Heller, 171 L.Ed.2d at 674 n.23.

Without question, then, the petitioners present to this Court "an important question of federal law," under Rule 10(c) of the Rules of this Court. And, as Judge Easterbrook's opinion for the Seventh Circuit below demonstrates, it is a question that has not been, but should be, settled by this Court. *Id.* Referring to footnote 23 of the Heller majority opinion — which acknowledged that on three previous occasions the Supreme Court had affirmed "that the Second Amendment applies only to the Federal Government"[3] — the Seventh Circuit panel refused to address the

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[3] McDonald v. City of Chicago, Pet. App. 4. (Citations to the lower court's decision are to the opinion as reproduced in pages App. 1 – App. 10 of the petitioners' appendix ("Pet. App.") in No. 08-1521.

"incorporation" question, because, as the district court had previously ruled, "only the Supreme Court may change course"[4]:

> Repeatedly ... the Justices have directed trial and appellate courts to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. [Pet. App. 3.]

Indeed, as Heller stated of Cruikshank,[5] on which the Seventh Circuit relied, the Supreme Court had "not engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." Heller, 171 L.Ed.2d at 674 n.23.

These are reasons enough for this Court to grant the petitions. Otherwise, the lower federal courts may very well follow the Seventh Circuit's lead and decline to address the question presented by these petitioners for no other reason than outworn "precedent,"[6] or for lack of authoritative guidance from this Court.

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[4] *Id.*, Pet. App. 2.

[5] 92 U.S. 542 (1876).

[6] As Sam Walter Foss parodied in "The Calf-Path":

A hundred thousand men were led,
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For thus such reverence is lent,
To well-established precedent.

There is, however, more at stake than just the orderly administration of justice. In compliance with Heller, the District of Columbia, however reluctantly, took steps to modify its handgun ban to appear to conform to the Second Amendment principles articulated by this Court.[7] Thus, the District of Columbia has apparently taken some steps to restore to its "law-abiding, responsible citizens" to their constitutional right of self-defense of "hearth and home" — "and, [hence, to] the *core component* of the right" to keep and bear arms. *See* Heller, 171 L.Ed.2d at 683. In Heller's aftermath, some Illinois towns, in response to threatened litigation, have repealed their handgun bans so that citizens residing in those municipalities apparently have been restored to their constitutional right of self-defense.[8] But Chicago and Oak Park, the municipal defendants-respondents in these consolidated cases, have chosen not to respond to Heller, and thus have not agreed to make any effort to restore that right of self-defense to the law-abiding, responsible citizens who reside there.

Although the issue in Heller, and here, involves the "individual citizen's right to self-defense" (171 L.Ed.2d.

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[7] Brian Westley, "D.C. Votes New Gun Restrictions Into Law," Associated Press (July 15, 2008); Michael Neibauer, "Council eases D.C. gun laws," Washington Examiner (Sept. 17, 2008); Jacob Sullum, "Back to Court: Heller v. D.C. II," Reason (Nov. 2008).

[8] *See, e.g.*, Robert Channick, "Morton Grove repeals 27-year-old gun ban," Chicago Tribune, July 28, 2008; Deborah Horan, "Evanston latest suburb to repeal handgun ban in wake of high court ruling," Chicago Tribune, Aug. 12, 2008.

at 664), it must be remembered that the Second Amendment's preservation of that right is also necessary to ensure that the people would be "better able to resist tyranny" and thus, in the language of the Second Amendment, to "secur[e] a free state." *Id.*, at 661. As Heller observed, "history [has] show[n] that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms...." *Id.*

The Seventh Circuit suggests, however, that the disparity between the right to keep and bear arms in Washington, D.C. versus that in Chicago and Oak Park exists because the United States "Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."[9] But if the Second Amendment applies to the States under the Fourteenth Amendment, this is not true. Currently, recognition of that right appears to depend upon the risks and costs of litigation. Whether the Second Amendment applies to the States and their local subdivisions ought not be subject to such vagaries of litigation and settlement. Rather, this Court should grant the petitions, and render an authoritative decision that the Second Amendment right to keep and bear arms applies to the States via the Fourteenth Amendment.

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[9] Pet. App. 9.

II. THE CHICAGO AND OAK PARK HANDGUN BANS ABRIDGE ONE OF THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES — THE RIGHT TO KEEP AND BEAR ARMS — IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

In Heller, this Court ruled that a District of Columbia ordinance, which "totally bans handgun possession in the home," violated the Second Amendment. *Id.*, 171 L.Ed.2d at 679. Like the D.C. ordinance, the City of Chicago and Village of Oak Park ordinances constitute an absolute ban on possession of handguns within their respective city limits. *See* Petition for a Writ of Certiorari, National Rifle Association, *et al.* v. City of Chicago, *et al.*, pp. 2-3, and Petition for a Writ of Certiorari, McDonald, *et al.* v. City of Chicago, pp. 5-6.[10] Had the courts below found that the Second Amendment applies to the States and their political subdivisions, there would be no doubt that the total gun bans in Chicago and Oak Park would have been found unconstitutional under Heller. Because the Second Amendment right recognized in Heller is one of the "privileges or immunities of citizens of the United States," and because the Chicago and Oak Park ordinances "abridge" that right by imposing an absolute ban on handgun possession, the two ordinances are unconstitutional.

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[10] The McDonald Petition also concerns Chicago's gun regulations as they relate to "long arms" (*see* McDonald Petition, p. 6).

A. The Right to Keep and Bear Arms Is a Right Belonging to American Citizens.

Because the Second Amendment text specifies that the right to keep and bear arms belongs to "**the people**," Heller concluded that the right to keep and bear arms was not only an individual right, but one that belonged to "**all Americans**." Heller, 171 L.Ed.2d at 651 (emphasis added). In explanation, the Court found "the people" — as employed in the First, Second, Fourth, Ninth, and Tenth Amendments, as well as in the Constitution's Preamble and Article I, Section 2 — to be a "term [that] unambiguously refers to all members of the **political** community...." *Id.* at 650 (emphasis added). Recalling its analysis of the meaning of "the people" in an earlier case, the Court repeated that "'[T]he people' seems to have been a term of art employed in select parts of the Constitution," as a reference "to a **class of persons** who are part of a **national community** or who have otherwise developed sufficient connection with **this country** to be considered part of that community." *Id.* at 650 (emphasis added), citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

Accordingly, Heller found that the Second Amendment right to keep and bear arms belonged to those individual persons who were part of the **national polity**. Thus, it may be inferred that only **Americans** have the constitutional right to keep and bear arms. It is not a right that can be claimed by an alien, even an alien on American soil,[11] because an alien is not among the "class of persons who are part of [the American] national community."[12] On the other hand, if a person is a member of that political community, then he has the constitutional right to keep and bear arms under the Second Amendment because, according to Heller, it is a right that belongs to "all Americans."[13]

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[11] While such an alien may claim a right to self-defense under an applicable statute or the common law, the Second Amendment does not protect that right as it would if the person were a citizen. After all, an alien has no political standing to claim any right to resist a tyrannical government of which he is not a constituent. Thus, his right of self-defense — unlike a citizen's right — is not a "central component" of a right, the ultimate purpose of which is, as the Second Amendment states, "the security of a free state." *See* Heller, 171 L.Ed.2d at p. 661-62.

[12] Throughout the majority opinion, Heller repeatedly stressed that the right to keep and bear arms, whether it appeared in a State constitution, or in the Second Amendment, or in related documents and materials, secured a "right of citizens." *See id.*, 171 L.Ed.2d at 653, 659, 664, 667-68, and 670-72. It may be inferred, therefore, that a person who claims a right to keep and bear arms, whether under the Second Amendment or under a comparable State constitutional provision, must be a citizen. With respect to the Second Amendment, the person must be a U.S. citizen.

[13] In Heller, the Court repeatedly emphasized the universality of the citizen's right to keep and bear arms. Thus, in recounting the English history of the "suppress[ion] [of] political dissidents in part by disarming their opponents," the Court concluded that "[b]y the time of the founding [of America], the right to have arms had become fundamental for **English subjects**," without discrimination among classes of citizens. Heller, 171 L.Ed.2d at 657-59 (emphasis added). The right to keep and bear arms,

B. The Second Amendment Individual Right to Keep and Bear Arms Is One of the "Privileges or Immunities of Citizens of the United States," as Provided for in the Fourteenth Amendment.

Because the constitutional right to keep and bear arms does not inhere in a person simply by virtue of his existence as a human being dwelling in the United States, but by virtue of his American citizenship[14] —

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therefore, was found to be "a right 'of **all** free citizens,'" including those newly-endowed Fourteenth Amendment citizens who, as slaves, had been denied that right. *Id.*, 171 L.Ed.2d at 670-72 (emphasis added). To be sure, the Court cautioned that it had "not undertak[en] an exhaustive historical analysis ... of the **full scope** of the Second Amendment," and thus, its "opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.*, 171 L.Ed.2d at 678 (emphasis added). It should be noted, however, that the Court did not provide any Second Amendment rationale for such prohibitions. As pointed out by these *amici* in their amicus brief in Heller, such limits as may be placed on convicted felons and the mentally ill must relate to their status as citizens, not to their "perceived danger to community safety or general unfitness," as had been the rationale supporting the "black codes" enacted, in part, by some states to prohibit blacks from possessing firearms. *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, pp. 33-34 in District of Columbia v. Heller, No. 07-290.

[14] In contrast with the Second Amendment right, which belongs only to members of the American political community, the Fifth Amendment rights with respect to grand jury indictment, double jeopardy, self-incrimination, due process and government taking may be asserted by any person regardless of citizenship. United States v. Verdugo-Urquidez, 494 U.S. at 264. Such is not the case here, where the claimants have alleged in their complaints that they are United States Citizens, and as such citizens are entitled

his being a part of the national political community — the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." Prior to the ratification of the Fourteenth Amendment, the United States Constitution contained no specific reference to the privileges and immunities of citizens of the United States, but that did not mean that none existed. In the Slaughterhouse Cases, 83 U.S. 36, 79-80 (1873), this Court pointed to a number of such privileges and immunities "dependent upon citizenship of the United States," that would not be available to a noncitizen.

Further, in reference to the citizenship clause of the Fourteenth Amendment,[15] the Court noted that, unless a person is a citizen of the United States, he cannot "of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein...." *Id.*, 83 U.S. at 80. One does not have the right to become a citizen of a State just because he is a person. He may do so only "'by virtue of [his already] being [a U.S.] citizen." *Id.*, 83 U.S. at 77. Thus, the right to become a citizen of a State is a privilege and immunity of United States citizenship.

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to the right to keep and bear arms. McDonald v. Chicago, Complaint (N. Dist. of Ill., No. 08-cv-3645), p. 1; NRA v. Chicago, Complaint (N. Dist. of Ill., No. 08-cv-3697), p. 2.

[15] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Fourteenth Amendment, Section 1, Clause 1.

In like manner, a person who is not a member of the polity of the United States may not, merely by his own volition, lay claim to the individual right to keep and bear arms, as provided in the Second Amendment. For, as the Heller Court has established, the constitutional right to keep and bear arms belongs to Americans, *i.e.*, to "members of the political community" of the United States of America. *See* Heller, 171 L.Ed.2d at 650-51. This ruling, in turn, was based upon the Second Amendment pronouncement that the right to keep and bear arms is a "right of the people," not a right belonging to a person *qua* person. Thus, the right to keep and bear arms is one of the "privileges or immunities of a citizen of the United States;" that is, it is an individual right accruing by virtue of one being a member of the American polity,[16] not by virtue of one being a member of the human race.

In United States v. Cruikshank, Chief Justice Waite explained that "[t]he right ... of 'bearing arms for a lawful purpose' ... is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." 92 U.S. at

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[16] As a right of citizenship, however, it is no less an individual right than a right based upon personhood. As Justice Scalia carefully explained, the rights of citizenship are not "'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.*, 171 L.Ed.2d at 650. Therefore, Heller concluded that the Second Amendment protected an individual right, having identified its subject, as "the right of the people to keep and bear arms not to [be] infringed," not as the collective power of the people, acting through a "well-regulated militia" to "secur[e] a free state." *Id.*, 171 L.Ed.2d at 650-51.

553. Similarly, he explained that the "right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States [and] was not, therefore, a right granted to the people by the Constitution of the United States. In fact, it is, and has always been, one of the **attributes of citizenship** under a free government." 92 U.S. at 551 (emphasis added). Just as with the right to assemble, the lawful bearing of arms was a right of the people recognized by, not created by, the United States Constitution. As the people's right of assembly is one of the Privileges and Immunities of U.S. citizenship, so is the people's right to keep and bear arms. *See generally* Paul B. Paskey, "The Right of the Individual to Keep and Bear Arms as a Federally Protected Right," p. 127 (Safeguarding Liberty, Gun Owners Foundation (Larry Pratt, ed., 1995)).

C. The Chicago and Oak Park Handgun Bans Unconstitutionally Abridge the Privileges and Immunities of Petitioners as United States Citizens.

As noted above, the Chicago and Oak Park bans on handguns are comparable to the D.C. ban struck down in Heller. The Heller Court eschewed the invitation to employ a balancing test to determine whether the D.C. handgun ban unconstitutionally "infringed" the plaintiff D.C. resident's right to keep and bear arms. This Court should likewise decline to employ any such balancing test to determine whether the Chicago and Oak Park bans unconstitutionally abridge that right as a privilege and immunity of U.S. citizenship. If the

D.C. law **infringes** the right to keep and bear arms in violation of the Second Amendment, then the making and enforcing of an almost identical ban on handguns **abridges** the privilege and immunity of keeping and bearing arms in violation of the Fourteenth Amendment. There is no middle ground.

As Justice Kennedy observed in his concurring opinion in U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), American citizens "have two political capacities, one state and one federal, each protected from incursion by the other":

> The resulting Constitution created a legal system ... establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. [*See id.*, at 838 (1995) (Kennedy, J., concurring).]

As a consequence of this dual citizenship, the American people enjoy privileges and immunities of both State and United States citizenship. From time to time, however, the powers granted by the people of a State to the government of that State may interfere with "rights that stem from sources other than the State." *Id.*, at 843 (Kennedy, J., concurring). Such is the case here. The Second Amendment confers upon the citizen parties the right to possess a handgun for self-defense, "a right [that] has been central to the Second Amendment right." *See* Heller, 171 L.Ed.2d at 679. In contrast, the municipalities of Chicago and Oak Park have taken away that right of self-defense, relegating the occupants of those cities to other, less effective, means for the defense of their hearth and home. Those two positions are incompatible and, constitutionally, cannot co-exist.

Because the Second Amendment's codification of the right to keep and bear arms "owes its existence to the act of the whole people who created" the national government, "'each individual [American] citizen **everywhere** [must] enjoy[] the same national rights, privileges, and protection'... The Federalist No. 2...." Thornton, 514 U.S. at 839 (Kennedy, J., concurring) (emphasis added). Thus, "national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself." *Id.*, at 842. While "[f]ederal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship,"[17] there is no way to limit the national privilege and immunity to keep and bear arms in this case without obliterating it.

To be sure, since the Slaughterhouse Cases, it has been assumed that there would be no State abridgement of a privilege or immunity of U.S. citizenship unless the U.S. citizen is engaged in an activity specifically related to his national citizenship.

For example, prior to adoption of the Fourteenth Amendment, the privileges and immunities of United

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[17] *See* Thornton, 514 U.S. 779 at 844 (Kennedy, J., concurring).

States citizenship set forth in the First Amendment did not constrain the states. *See* United States v. Cruikshank, 92 U.S. 542, 552 (1876). Following the Fourteen Amendment's ratification, however, the Court stated in the Slaughterhouse Cases that "[t]he right to peaceably assemble and petition for redress of grievances ... are rights of the **citizen** guaranteed by the Federal Constitution." *Id.*, 83 U.S. at 79 (emphasis added). Thus, Justice Owen J. Roberts (writing also for Chief Justice Hughes and Justice Black) concluded that the action of the Jersey City mayor to prevent a peaceable assembly from taking place "to disseminate information concerning the provisions of the National Labor Relations Act" was an unconstitutional abridgment of First Amendment rights:

> [I]t is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them ... is a **privilege inherent in citizenship of the United States** which the Amendment protects. [Hague v. CIO, 307 U.S. 496 (1939) at 512 (emphasis added).]

In explanation, Justice Roberts stated that "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss **national** legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *Id.*, 307 U.S. at 513. According to this line of precedent, however, the privilege and immunity extended by the Fourteenth Amendment to citizens of the United States would **not** include an assembly for just any "peaceful and lawful purpose"; rather, it would be limited only to assemblies and petitions having to do with the business of the national government. *See* United States v. Cruikshank, 92 U.S. at 552-53.

While one might be able to slice and dice the right to assemble and petition in this fashion, there is no way to bifurcate the Second Amendment. If, as Heller has held, the right of self-defense is "central to the Second Amendment right," and a total handgun ban "infringes" upon that right of self-defense, that right cannot be preserved as a national privilege and immunity of U.S. citizenship if a state or political subdivision, in which an American citizen resides, may ban the possession and use of handguns for lawful self-defense. One either has the constitutional right of access to handguns for the purpose of self-defense or he does not. In short, any law made or enforced by a state or political subdivision that would **infringe** upon the right to keep and bear arms under the Second Amendment necessarily would **abridge** that right under the Fourteenth Amendment.

III. COURT REVIEW IS ALSO SUPPORTED BY A CONFLICT AMONG THE CIRCUITS.

One of the bases for review set out by petitioners was a conflict between the Seventh Circuit's decision below and the Ninth Circuit's decision in Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).[18] These *amici* agree that review is supported due to this conflict, as provided in Rule 10(b) of the Rules of the Supreme Court. But, even though affirmation of the decision in Nordyke would favor the petitioners, these *amici* do not believe that it was properly decided.

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[18] *See* NRA Pet., pp. 4-7, 15-16; McDonald Pet., pp. 10, 15-16.

A. Nordyke Rests upon a Misreading of the Slaughterhouse Cases.

Nordyke ruled that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments." Nordyke, 563 F.3d at 457. Before reaching that conclusion, however, the Nordyke court decided that it was:

> barred from considering incorporation through the Privileges or Immunities Clause.... Under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), [the Clause] protects only those rights that derive from United States citizenship, but not those general civil rights independent of the Republic's existence, *see id.* at 74-75. The former include only those rights the Federal Constitution grants or the national government enables, but not those preexisting rights the Bill of Rights merely protects from federal invasion. *Id.* at 76-80. The Second Amendment protects a right that predates the Constitution; therefore, the Constitution did not grant it. [*Id.*, 563 F.3d at 446-47 (footnote omitted).]

This is a misreading of the Slaughterhouse Cases. That opinion contains no requirement that the "rights that derive from United States citizenship ..." are limited to "rights the Federal Constitution grants ... but not those preexisting rights the Bill of Rights merely protects," as the Nordyke court concluded. Rather, in an effort to demonstrate that the Court's reading of "privileges or immunities of citizens of the United States" would not render the clause a nullity, Justice Miller gave numerous examples of those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Slaughterhouse Cases, 83 U.S. at 79. One of those examples was "[t]he right to peaceably assemble and petition for redress of grievances" (*id.*), a right that three years later the Court identified to have "existed long before the adoption of the Constitution of the United States ... as one of the attributes of citizenship under a free government." *See* United States v. Cruikshank, 92 U.S. at 551.

As Cruikshank explained, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.*, 92 U.S. at 552. It had no difficulty finding that "the right of the people peaceably to assemble for the purpose of petitioning Congress ... is an **attribute of national citizenship** and, as such, under the protection of and guaranteed by, the United States." *Id.*, (emphasis added). In short, because the "Federal government" was constituted by the people as a "free government," then its "national character" embraced the preexisting right of the people to assemble and to petition the government for redress of grievances as a privilege and immunity of a citizen of the United States.

Thus, properly understood, the Slaughterhouse Cases presents no bar to considering the right to keep and bear arms, which antedated the federal constitution, and then expressly was recognized and protected by the Second Amendment, among the "privileges or immunities of citizens of the United States."

B. The Slaughterhouse Cases Need Not Be Overruled.

Also misreading Slaughterhouse Cases, the McDonald Petition criticizes the case as "wrong the day it was decided and today stands indefensible" (McDonald Pet., p. 22), erroneously believing it is an impediment to recognition of the Second Amendment as among the "privileges or immunities of citizens of the United States." The McDonald Petition presents this case as a "logical starting point" for the "[c]omplete restoration of the Privileges or Immunities Clause" by "incorporating" the first eight amendments of the federal Bill of Rights and applying them to the States. McDonald Pet., p. 28. As discussed in Section II, *supra*, however, granting review under the Privileges or Immunities Clause of the Fourteenth Amendment does not require reversing Slaughterhouse Cases, or adopting the McDonald Petition's expansive view of that Clause; nor does granting this Petition require application of the Due Process "incorporation" doctrine.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

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NATIONAL RIFLE ASSOCIATION OF AMERICA, et al.,
Petitioners,
v.
CITY OF CHICAGO, et al.,
Respondents.

◆

OTIS MCDONALD, et al.,
Petitioners,
v.
CITY OF CHICAGO, et al.,
Respondents.

◆

On Petition For Writs Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

◆

BRIEF OF THE INSTITUTE FOR JUSTICE AND CATO INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

◆

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INTEREST OF AMICI CURIAE[1]

Founded in 1991, the Institute for Justice is a public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring appropriate constitutional limits on the power of government. It seeks a rule of law under which individuals can control their destinies as free and responsible members of society. Through strategic litigation and outreach, the Institute works to promote economic liberty, private property rights, free speech, educational choice, and the principles of self-determination and limited government. This case presents a unique opportunity to revisit the Privileges or Immunities Clause and restore it as the primary embodiment of those principles in the Fourteenth Amendment.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because the issue of the Second Amendment's "incorporation" implicates not only the right to keep and bear arms – important enough by itself – but the larger debate over the origin, nature, and extent of *all* our natural rights and how the Constitution protects them.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

◆

SUMMARY OF ARGUMENT

Last summer this Court confirmed what the Framers of the Constitution, most scholars, and a substantial majority of Americans believe: that the Second Amendment protects an individual right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Whether the Fourteenth Amendment protects that right against infringement by state and local governments is the question presented by the consolidated petitions for certiorari involving Chicago's handgun ban ("Chicago petitions").

This Court's initial encounters with the Fourteenth Amendment in the 1870s yielded a profound misreading of its Privileges or Immunities Clause that has haunted the Court's rights jurisprudence for more than a century. The Chicago petitions present the Court with an unprecedented opportunity to reach back to the very source of that misreading, the 1873 *Slaughter-House Cases*, and correct it once and for all. There are three compelling reasons why the Court should seize that opportunity now.

First, the only disagreement among circuit courts so far in the wake of *Heller* is whether they are bound by this Court's pre-incorporation decisions refusing to apply the right to keep and bear arms against the states. More cases will not shed further light on that question. Second, case law and scholarly commentary together form a kind of constitutional conversation. After much give-and-take, that conversation has arrived at a clear consensus about *Slaughter-House* that merits the Court's consideration. Third and finally, the Constitution is not merely a blueprint for government, but a charter of liberty. Accurately placing the Fourteenth Amendment within that tradition – which this Court has yet to do – would be a virtue in itself and would sharpen the national dialogue regarding the source, nature, and limits of our constitutional rights.

◆

ARGUMENT

The Fourteenth Amendment was enacted to cure a specific and well-documented evil: namely, the systematic violation of civil liberties by state and local governments determined to keep newly freed blacks in a state of constructive servitude while marginalizing and terrorizing their white supporters. But that purpose was frustrated by the Court's initial failure to give the Amendment its intended effect. *E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). As a result, states remained free to deprive people – black and white – of their basic civil rights, and many did.

Over time, and in the face of such outrages as Jim Crow, the fiction that state governments could be counted upon to adequately protect civil liberties became increasingly unsustainable. The Court thus reconsidered its understanding of the Fourteenth Amendment and began a process of identifying and enforcing specific rights through the Due Process Clause that came to be known as "selective incorporation." Today, nearly every substantive right listed in the first eight amendments has been held to apply against the states, with a particularly notable exception: the right to keep and bear arms. The Chicago petitions present the Court with the opportunity to correct that omission in a manner consistent with original understanding by using the Privileges or Immunities Clause instead of the Due Process Clause.

I. Further Consideration By Lower Courts Will Not Clarify Whether The Right To Keep And Bear Arms Should Apply Against The States.

Since *Heller*, three federal circuit courts have considered whether the right to keep and bear arms should apply against state and local governments. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443 (7th Cir. June 2, 2009); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009); *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). The Second and Seventh Circuits considered themselves bound by this Court's pre-incorporation precedents not to apply that right against the states. But the Ninth Circuit read those cases differently and conducted its own analysis, concluding that the Fourteenth Amendment's Due Process Clause incorporates the right to keep and bear arms against the states. *Compare Chicago*, 2009 WL 1515443, at *2, *and Maloney*, 554 F.3d at 58-59, *with Nordyke*, 563 F.3d at 447-58.

Given the profusion of state and local gun laws, the need for guidance from this Court to ensure a uniform understanding of the federal right to keep and bear arms is self-evident and urgent. Moreover, while some issues may benefit from "percolating" in the lower courts,[2] this is not one of them. The primary disagreement among lower courts is whether they are bound by this Court's pre-incorporation decisions concerning the right to keep and bear arms.[3] Since lower

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[2] Or not – see *Comment: Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. Pitt. L. Rev. 861, 891 (1993) (empirical study concluding that "percolation does not lead to demonstrably better statutory decisions from the Supreme Court").

[3] Besides *Nordyke*, other courts directly considering the application of the right to keep and bear arms against the states in

(Continued on following page)

courts are unable to shed meaningful light on that question, it is difficult to see any point in waiting for more of them to weigh in.

II. There Is A National Consensus That *Slaughter-House* Misinterpreted The Privileges Or Immunities Clause Of The Fourteenth Amendment.

As noted above, case law and scholarly commentary together form a constitutional conversation in which this Court plays two roles, participant and arbiter. When that conversation produces a consensus at odds with precedent, it falls to this Court to determine both the validity of the consensus and whether to act upon it. The Court must decide, in other words, when the practical virtues of *stare decisis* should yield to the higher duty of fidelity to constitutional text.

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the wake of *Heller* have uniformly declared the issue foreclosed by this Court's precedents. *See, e.g.*, *Young v. Hawaii*, No. 08-540, 2009 U.S. Dist. LEXIS 28387, at *13 (D. Haw. Apr. 1, 2009) ("Accordingly, *Heller* did not overrule the longstanding precedent that states are not bound by the Second Amendment."); *Livingston v. Francis*, 2009 U.S. Dist. LEXIS 24503 No. 09-10357, at *8-*9 (E.D. Mich. Mar. 26, 2009) ("[T]he State of Michigan is not constrained by the Second Amendment. . . ."); *United States v. Lewis*, 2008 U.S. Dist. LEXIS 103631, at *9-*10 (D.V.I. Dec. 24, 2008) (citing cases); *Crespo v. Crespo*, Nos. A-0202-08T2, A-0203-08T2, 2009 N.J. Super. LEXIS 138, at *20-*21 (N.J. Super. Ct. App. Div. June 18, 2009) (same); *State v. Turnbull*, No. A-08-0532, 2009 Minn. App. LEXIS 93, at *4-5 (Minn. Ct. App. June 2, 2009) (same); *State v. Hunter*, 147 Wn. App. 177, 191 (Wash. Ct. App. Oct. 20, 2008) (same).

Amici respectfully submit that for the Privileges or Immunities Clause of the Fourteenth Amendment, that time has come.

The doctrine of *stare decisis* is particularly inapt with respect to the *Slaughter-House Cases*, not only because of the extreme violence that opinion did to constitutional text and history, but because the purposes of the doctrine would not be served by refusing to revisit this particular mistake. The "principal purposes of *stare decisis* . . . are to protect reliance interests and to foster stability in the law." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment). Those interests have no application here; individuals today have not altered their activities or expectations in reliance on a series of Supreme Court decisions that initially erased the Privileges or Immunities Clause from the Constitution but, shortly thereafter, enlisted the Due Process Clause to do much of what the erased clause had been designed to accomplish.

The Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* has inspired an extraordinary body of scholarship and commentary. Indeed, few if any questions of constitutional law have received more scholarly attention than the meaning of the Fourteenth Amendment, including specifically its command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States." U.S. Const. amend. XIV, § 1. That scholarship may be briefly summarized as follows.

Congress declared the Fourteenth Amendment ratified on July 21, 1868.[4] On April 14, 1873, this Court handed down the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), involving the constitutionality of a Louisiana law that created a private monopoly on the sale and slaughter of livestock in New Orleans. Writing for a 5-4 majority, Justice Miller upheld the law as a valid public health measure that did not deprive New Orleans butchers "of the right to exercise their trade." *Id.* at 60. Undertaking the Court's first analysis of the Fourteenth Amendment's Privileges or Immunities Clause, Justice Miller concluded that it was meant to protect only rights of national – as opposed to state – citizenship, which did not include the right to earn a living in a marketplace free of state-chartered monopolies. *Id.* at 78-79. Nor, according to this Court's later gloss, did the Privileges or Immunities Clause protect other substantive provisions in the Bill of Rights.[5]

The decision was immediately controversial, and public opinion seems to have been decidedly with the dissenting Justices.[6] Still, the issue lay relatively dormant[7] until Justice Black's famous dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), in which he argued that "one of the chief objects . . . of the [Fourteenth] Amendment's first section, separately and as a whole . . . was to make the Bill of Rights[ ] applicable to the states." *Id.* at 71-72. Justice Frankfurter rejected that conclusion in a concurring opinion, *id.* at 59-68, setting the stage for a vigorous academic debate that continues to this day.

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[4] *E.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 629 & n.10 (1994).

[5] *See United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876) (no federally protected right of assembly); *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (same).

Two of the leading figures in the early stages of the debate were Charles Fairman, a protégé of

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[6] *See, e.g.*, Akhil Reed Amar, THE BILL OF RIGHTS 209-10 (1998); (discussing contemporary legal opinion); Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 503 (1988) (arguing that the *Slaughter-House* majority's conclusions "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."); Michael Kent Curtis, NO STATE SHALL ABRIDGE 171-73 (1986) (noting widespread support among lower courts prior to *Slaughter-House* for "a libertarian reading of the amendment"); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 31-34 (2007) (arguing that, "[f]rom the beginning, Slaughter-House was intensely criticized," and providing examples); Aynes, *Constricting Freedom*, 70 Chi.-Kent L. Rev. at 679-81; Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1, 33 (1998).

[7] The Privileges or Immunities Clause did enjoy a brief resurrection in *Colgate v. Harvey*, 296 U.S. 404 (1935), but that case was soon overruled by *Madden v. Kentucky*, 309 U.S. 83 (1940).

Justice Frankfurter and a leading proponent of his anti-incorporationist views,[8] and William Crosskey, an iconoclastic Chicago law professor who challenged Fairman's scholarship, particularly his handling of the Amendment's legislative history. Fairman's and Crosskey's seminal law review articles "were considered, as late as 1968, to be 'the only full dress discussions of [the incorporation debate] in legal periodicals' and 'far more comprehensive than any of the United States Supreme Court cases on this point.' "[9] The next generation of scholarship was led by Professors Raoul Berger and Michael Kent Curtis, whose academic duel over the meaning of the Fourteenth Amendment and the Privileges or Immunities Clause spanned nearly two decades.[10] Many other respected

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[8] *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 5 (1949).

[9] Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 Chi.-Kent L. Rev. 1197, 1251 (1995) (quoting Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 Harv. J. on Legis. 1, 3 (1968)).

[10] *See, e.g.*, Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that the Fourteenth Amendment was not intended to incorporate the Bill of Rights against the states); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. Cin. L. Rev. 1 (1993); Michael Kent Curtis, NO STATE SHALL ABRIDGE (1986) (arguing that Framers of the Fourteenth Amendment intended to apply the Bill of Rights against the states and rebutting Fairman, Berger, and others); Michael Kent Curtis, *John A. Bingham and the Story of American Liberty*, 36 U. Akron L. Rev. 617 (2003); *see also* Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul*

(Continued on following page)

scholars, including Laurence Tribe[11] and Akhil Amar,[12] have expressed their views on the subject as well.

Somewhat surprisingly given the ideological diversity of its participants, the debate has yielded a clear consensus about the *Slaughter-House* majority's interpretation of the Privileges or Immunities Clause: It was wrong. Professor Aynes, for example, has observed that "'everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause," and Professor McAffee considers this "one of the few important issues about which virtually every modern commentator is in agreement."[13] Professors Tribe and Amar have described *Slaughter-House* as "incorrectly

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Berger's Reply on Application of the Bill of Rights to the States, 62 N.C. L. Rev. 517, 518 n.5 (1984) (providing chronology of Berger-Curtis debate to that point).

[11] Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1320-31 (3d ed. 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection against state rights-infringement is very powerful indeed.").

[12] Akhil Reed Amar, THE BILL OF RIGHTS 213 (1998) (explaining "[t]he obvious inadequacy – on virtually any reading of the Fourteenth Amendment – of Miller's opinion" in *Slaughter-House*).

[13] Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994); Thomas McAffee, *Constitutional Interpretation – the Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986).

gutting" and "strangling the privileges or immunities clause in its crib."[14]

An error of such magnitude (or even just the widespread perception of such an error) must be addressed eventually. The Chicago petitions offer a unique opportunity to reconsider *Slaughter-House* from a fresh perspective and with the benefit of extensive scholarship that was not available when the Court developed the doctrine of incorporation through the Due Process Clause.

III. Interpreting The Privileges Or Immunities Clause According To Its Original Public Meaning Would Benefit The Court's Fourteenth Amendment Jurisprudence.

The *Slaughter-House* majority's failure to interpret the Privileges or Immunities Clause consistent with original understanding caused a dislocation in this Court's rights jurisprudence that has never been satisfactorily addressed, let alone corrected. Meanwhile, Justice Miller's analysis of the Privileges or Immunities Clause, never persuasive, has grown even less so over time, and it is no accident that his ultimate conclusion – that the Fourteenth Amendment provides no meaningful protection against state and local governments – was so short-lived.

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[14] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1121, 1297 n.247 (1995); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992).

The fundamental tension is this: the term "privileges or immunities" was plainly understood by mid-19th-century Americans as synonymous with "rights." *See, e.g.*, Curtis, NO STATE SHALL ABRIDGE 64-65 (noting that the "words *rights, liberties, privileges*, and *immunities*, seem to have been used interchangeably"). In fact, that is how Article IV's Privileges and Immunities Clause was defined by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), the most authoritative pre-Civil War opinion defining that clause. *See, e.g.*, Bernard Siegan, THE SUPREME COURT'S CONSTITUTION at 55-65 (1987); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temple L. Rev. 361 (1993). But under the original Constitution, as amended by the Bill of Rights, the rights set forth in the Bill of Rights applied only against the federal government, which left the states free to disregard them. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). It was to rectify that problem, as they repeatedly said, and to fundamentally change the relationship between the federal and state governments, that the Framers of the Fourteenth Amendment drafted it the way they did.

Indeed, the Amendment's principal author, Rep. John Bingham, later publicly explained how he carefully chose the words of Section 1 in order to achieve that precise effect. Akhil Reed Amar, THE BILL OF RIGHTS 164-65 (1998) (quoting Cong. Globe, 42d

Cong., 1st Sess., 84 app. (1871)). Finally, the whole point of the Fourteenth Amendment was to enable the federal government to stamp out a culture of oppression whose very hallmark was the wholesale disregard of basic civil rights – including particularly free expression, armed self-defense, and economic self-sufficiency.

In short, the Privileges or Immunities Clause was meant to rectify what its Framers saw as a serious limitation with then-current constitutional doctrine by giving the *federal* government the power (and the duty) to protect individuals from *state* actions that violated their rights. The *Slaughter-House* majority, far from respecting that purpose, in fact repudiated it. The crux of the majority's argument is overtly consequentialist – Justice Miller expresses deep concern that reading the Clause to protect individual civil rights would "radically change[ ] the whole theory of the relations of the State and Federal governments to each other. . . ." *Slaughter-House Cases*, 83 U.S. 36, 78 (1873). Indeed, this reasoning – a judgment that the Fourteenth Amendment marked an improvident change in federal-state relations that was best ignored – is reflected in 19th-century legal scholar Christopher Tiedeman's praise of the majority opinion for having "dared to withstand the popular will as expressed in the letter of the amendment." David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93, 121 (1990) (quoting Christopher G. Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES:

A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 102-03 (1890)).

Of course, the "radical[ ] change[ ]" so feared by Justice Miller has in part come to pass by virtue of this Court's due process jurisprudence. But that approach has been the subject of substantial criticism, colorfully illustrated by John Hart Ely's characterization of "substantive due process" as reminiscent of "green pastel redness." John Hart Ely, DEMOCRACY AND DISTRUST 18 (1978).

Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would have the advantage of tethering this Court's rights—protecting jurisprudence much more closely to the Constitution's text and history.[15] *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting); *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988) ("[I]t would be more conceptually elegant to think of these substantive rights as 'privileges or immunities of citizens of the United States'. . . ."). The debates over the framing and ratification of the Fourteenth Amendment make clear that the Privileges or Immunities Clause was meant to correct what John Bingham in another context called an "ellipsis" in the Constitution by providing for substantive federal protection of certain rights inherent in the Framers' understanding of what it meant to be a citizen and a free person.[16] Because the debates and contemporaneous public documents are replete with references to specific court cases that Congress and the ratifying states sought to overturn and specific evils they meant to prevent, the rights protected by the Clause can be rooted solidly in that history, as can their limits. *Cf. Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy") (internal citation omitted).

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[15] This is not to say that this Court must entirely reject the doctrine of substantive due process in order to give proper weight to the Privileges or Immunities Clause. Powerful arguments have, of course, been offered in favor of the substantive due process doctrine, if not the name. *See, e.g.*, Randy E. Barnett, RESTORING THE LOST CONSTITUTION 207-08 (2004); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315 (1999). The virtue of properly interpreting the Privileges or Immunities Clause does not lie in purging substantive due process altogether – rather, it would more firmly ground substantive rights in the text, history, and original public meaning of the Constitution, and in doing so provide greater clarity and credibility to the Court's jurisprudence of rights.

This case presents a unique opportunity to begin to correct the mistake of *Slaughter-House* – a mistake that continues to distort both this Court's Fourteenth

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[16] Cong. Globe, 35th Cong., 2d Sess., 984 (1859) (statement of Rep. Bingham). *See also* Reinstein, *Completing the Constitution,* 66 Temple L. Rev. at 362-63 (1993) (describing the Framers' intention to "complete" the Constitution by applying the principles of the Declaration of Independence and the Bill of Rights to the states).

Amendment jurisprudence and the constitutional dialogue in general. A proper analysis of the Privileges or Immunities Clause is long overdue, not just in the interest of fidelity to popular will, but in the interest of establishing a solid foundation and clearly delimited framework for the Court's jurisprudence of rights.

◆

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to grant the Chicago petitions and consider the proper meaning of "privileges or immunities" in the Fourteenth Amendment.

Respectfully submitted,

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Nos. 08-1497 & 08-1521

In The
Supreme Court of the United States

◆

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, ET AL.,
Respondents.

◆

OTIS MCDONALD, ET AL.,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS,
Respondent.

◆

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF THE STATES OF TEXAS, GEORGIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

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INTEREST OF AMICI CURIAE[1]

Texas, Georgia, and the other amici States have a profound interest in this case as guardians of their citizens' constitutional rights. As our Founding Fathers recognized, and as this Court reaffirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the right to keep and bear arms secured by the Second Amendment is a critical liberty interest, essential to preserving individual security and the right to self-defense. Yet federal courts of appeals are divided over whether this right fully extends to the vast majority of citizens who live not in a federal enclave, but in one of the several States. Without this Court's review, millions of Americans may be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case.

Moreover, the States have an additional interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law. Interpretive guidance from this Court, and from other federal courts, would help the States as they construe and enforce their own, analogous state-law protections—including the 44 state constitutions that guarantee a right to keep and bear arms. *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 194 n.113 (1983) ("'In a community that perceives the Supreme Court to be the primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base.'") (citation omitted).[2]

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[1] Counsel of record received notice that Texas, Georgia, and the other amici States intended to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

INTRODUCTION

Over the last century, the Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to the States through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment). Under the doctrine of selective incorporation, these rights have been applied to the States because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The right to keep and bear arms under the Second Amendment is not just a "fundamental" liberty interest. In the Anglo-American tradition, it is among the *most* fundamental of rights because it is essential to securing all our other liberties. The Founders well understood that, without the protections afforded by the Second Amendment, all of the other rights and privileges ordinarily enjoyed by Americans would be vulnerable to governmental acts of oppression. As St. George Tucker wrote, the right protected by the Second Amendment "may be considered as the true palladium of liberty" because "[t]he right to self-defence is the first law of nature," and wherever "the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." St. George Tucker, *View of the Constitution of the United States, in* WILLIAM BLACKSTONE, 1 COMMENTARIES app., at 300 (Philadelphia, Birch & Small 1803) (1765).

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[2] The relevant state constitutional and statutory provisions concerning firearms are attached in the Appendix to this brief.

Two familiar events in our Nation's history are particularly instructive in illustrating this point. The very first battle of the Revolutionary War was sparked by British efforts to disarm American colonists. As news spread of these efforts, colonists formed militias to secure their arms. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976). These tensions culminated in April 1775, when British General Sir Thomas Gage sent a column of Redcoats to destroy arms and ammunition stored by colonists in Lexington and Concord, triggering the first battle of the Revolutionary War. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 145-46 (1994). In forming these militias, the colonists were expressly aware that their right to bear arms was critical to the protection of their other liberties. When George Mason (in conjunction with George Washington and others) began organizing a militia in Fairfax County, Virginia, he noted that the colonists were being "threat'ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen." 1 THE PAPERS OF GEORGE MASON 1725-1792, at 210-11 (Robert A. Rutland ed., 1970). After raising the militia company, Mason praised it as necessary "for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors." *Id.* at 229.

Nearly one hundred years later, in the aftermath of the Civil War, the Southern States engaged in a brutal campaign to disarm and thereby oppress the recently freed slaves. Those efforts included enactment of the so-called "Black Codes" prohibiting the possession of firearms by African-Americans. *See Heller*, 128 S. Ct. at 2810. Disarmament was frequently followed by acts of lawlessness perpetrated on defenseless African-Americans. *See, e.g.*, Report of the Joint Comm. on Reconstruction, H.R. REP. NO. 39-30, pt. 4, at 49-50 (1866) (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them"); CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (statement of Sen. Wilson) ("There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description."); *see also McDonald* Pet. at 20-21. When the Reconstruction Congress attempted to remedy these injustices through the Fourteenth Amendment, the Freedmen's Bureau, and the Civil Rights Act, it did so with the clear understanding that an "indispensable" "safeguard[] of liberty . . . under the Constitution" is a man's "right to bear arms for the defense of himself and family and his homestead." *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

The common thread in these transformative events in our Nation's history was the fundamental importance of the right to keep and bear arms as the ultimate guarantor of all the other liberties enjoyed by Americans. The source of the threat to liberty shifted from the British Crown during the Founding to oppressive local governments in the post-Civil War era, but the cure remained the same: protection of the individual right to keep and bear arms, arising from the natural right of self-preservation and the right of "resistance . . . to the violence of oppression." WILLIAM BLACKSTONE, 1 COMMENTARIES 139 (Legal Classics Library 1983) (1765).

As history has proven, the right to bear arms provides the foundational bulwark against the deprivation of all our other rights and privileges as Americans—including rights that have already been incorporated against the States by this Court. Accordingly, the Court should grant the petitions and hold that the Second Amendment also secures a "fundamental" right that can no more be abrogated by local government than by the federal government.

STATEMENT

1. Petitioners challenge the constitutionality of two local handgun bans. The City of Chicago's Municipal Code prohibits possession of unregistered firearms. CHICAGO, ILL., MUN. CODE § 8-20-040(a). The code also provides that no registration certificates will be issued for handguns. *Id.* § 8-20-050(c). If a handgun owner in Chicago does not have a registration certificate, it is "presumptive evidence that he is not authorized to

possess such firearm" and "shall also be cause for the confiscation of such firearms." *Id.* § 8-20-150.

The Village of Oak Park, Illinois, also prohibits possession of handguns. Specifically, the Oak Park Municipal Code provides: "It shall be unlawful for any person to possess or carry, or for any reason to permit another to possess or carry on his/her land or in his/her place of business any firearm." OAK PARK, ILL., MUN. CODE § 27-2-1. The Code defines firearms to include "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1. As the court of appeals noted, the Chicago and Oak Park firearms ordinances effectively "ban the possession of most handguns." Pet. App. 1.[3]

2. Petitioners include individuals who have attempted to register handguns in Chicago and have been denied because of the ban, *see McDonald* Pet. at 5; Pet. App. 34-45; individuals who own handguns but must store them outside these jurisdictions, *see NRA* Pet. at 3; and individuals who wish to obtain handguns but have been chilled from doing so as a result of the Chicago and Oak Park handgun prohibitions, *see id.* All Petitioners wish to own handguns for lawful and reasonable purposes of self-defense. For example, as the complaint filed in *McDonald* recounts, Otis McDonald, a community activist, lives in a high-crime Chicago neighborhood. His efforts to make his neighborhood a

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[3] Citations to "Pet. App.__" refer to the appendix to the petition filed in No. 08-1521, *Otis McDonald, et al. v. City of Chicago, Illinois*.

better place to live have subjected him to violent threats from drug dealers, and he wishes to own a handgun for self-protection.[4] Similarly, Colleen Lawson is a Chicago resident whose home has been targeted by burglars. She too would like to own a handgun for self-defense.[5]

Petitioners filed lawsuits in federal district court challenging the validity of the Chicago and Oak Park ordinances under the Second Amendment. Pet. App. 11-13, 17-18. The district court held that Petitioners' claims were foreclosed by circuit precedent upholding the constitutionality of handgun bans and rejecting the argument that the Second Amendment applies to the States. Pet. App. 13-14, 17-18 (citing *Quilici v. Village of Morton Grove*, 695 F.3d 261 (7th Cir. 1982)).

The court of appeals concluded that it was bound by both this Court's precedent and circuit precedent holding that the Second Amendment is not incorporated against the States. Pet. App. 2-4. The court of appeals noted that in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), this Court held that the Second Amendment applies only to the federal government, a holding later adopted by the court of appeals in *Quilici*. Pet. App. 2-3. Based on this precedent, the court of appeals affirmed the district court's decision dismissing Petitioners' Second Amendment challenges. Pet. App. 2-4, 9-10.

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[4] *See McDonald* Petitioners' Complaint, at 1-2, *available at* http://www.chicagoguncase.com/wpcontent/uploads/2008/06/com-plaint.pdf (last visited June 29, 2009).

[5] *See id.*

DISCUSSION

I. THE PETITIONS PRESENT AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ON WHICH THERE IS A SPLIT AMONG THE LOWER COURTS.

In *Heller*, the Court confirmed that the Second Amendment "confer[s] an individual right to keep and bear arms." 128 S. Ct. at 2799. It still remains to be seen, however, whether this right will be realized in practice by millions of Americans nationwide.

If the Second Amendment applies exclusively to the federal government, many Americans may find their constitutional right to arms severely compromised or entirely abrogated by local regulations. Indeed, that is precisely what has occurred here. Petitioners' Second Amendment rights are effectively nullified by the Chicago and Oak Park firearms prohibitions—no less so than if the federal government imposed the very same ban, as occurred in *Heller*.

The similarities between the ban invalidated in *Heller* and those upheld by the court of appeals below are striking. For one, like the ordinances at issue in *Heller*, the Chicago and Oak Park regulations "totally ban[] handgun possession." *Id.* at 2817. These municipalities have thus accomplished precisely what *Heller* forbade the District of Columbia from doing: Each has enacted a handgun ban that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id.* Further, as in *Heller*, the prohibitions at issue here extend to the home, "where the need for defense of self, family, and property is most acute." *Id.*

Accordingly, all of the Second Amendment concerns expressed by the Court in *Heller* apply equally here. And if the court of appeals decision stands, the right to arms of the *McDonald* and *NRA* Petitioners—and the nearly three million residents of the third largest city in the United States—will be effectively nullified by the very same type of firearms prohibition that the Court rejected in *Heller*. The practical implications of the decision below argue strongly for this Court's review.

Contrary to the decision below, Pet. App. 2-4, the issue of Second Amendment incorporation has not been entirely resolved by the Court's earlier decisions. To be sure, this Court held in *Cruikshank* that the Second Amendment does not, by its own force, apply to the States. 92 U.S. at 553; *see also Miller*, 153 U.S. at 538 (concluding that the Second and Fourth Amendments "operate only upon the federal power"); *Presser*, 116 U.S. at 265 (concluding that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the State"). But when *Cruikshank* and its progeny were decided, the same was true of the Bill of Rights in its entirety; all of these decisions pre-dated the Court's adoption of the doctrine of selective incorporation. Under that doctrine, developed through a series of decisions over the last century, the Court has made clear that "fundamental" individual rights found in the first eight amendments to the Constitution are applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Duncan*, 391 U.S. 145 (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause). Indeed, the

Court specifically noted this fact in *Heller*, stating that, in determining that the Second Amendment did not apply to the States, *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

Moreover, the selective incorporation question presented in this case was not ripe until now because, until *Heller* was decided, it was not established that the Second Amendment actually secured an individual right to keep and bear arms. In the wake of *Heller*, the question of incorporation has assumed great importance for the States, as reflected by the filing of this amicus brief. It has also generated conflict among the lower courts. The Seventh Circuit and the Second Circuit have held that the Second Amendment applies only to the federal government. *See Nat'l Rifle Assoc. of Am., Inc. v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443, at *1 (7th Cir. June 2, 2009); *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d Cir. 2009). Several state courts have reached the same conclusion. *See, e.g.*, *State v. Turnbull*, No. A08-0532, 2009 WL 1515301, at *2 (Minn. Ct. App. June 2, 2009); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806-07 & n.4 (Cal. Ct. App. 2008). By contrast, the Ninth Circuit has concluded that the Second Amendment applies to the States through the Due Process Clause. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009).

This split of authority, encompassing both federal and state courts across the country, including the nation's three largest population centers, on a matter of great importance to the States, is now ripe for review. The Court should therefore grant the petitions so that it can "engage in the sort of Fourteenth Amendment inquiry required by [its] later cases," *Heller*, 128 S. Ct. at 2813 n.23, and provide needed guidance to the lower courts as to whether the Second Amendment applies to the States.

II. THE COURT SHOULD REVERSE THE COURT OF APPEALS AND HOLD THAT THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The Due Process Clause Incorporates "Fundamental" Rights.

The Due Process Clause of the Fourteenth Amendment bars "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has recognized that this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Rather, due process also encompasses "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The doctrine of selective incorporation is premised on the Court's conclusion that any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Applying this doctrine in a series of decisions over the last century, the Court has held that the Due Process Clause of the Fourteenth

Amendment incorporates most of the Bill of Rights against the States.[6]

In the doctrine's initial formulation, as expressed in *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969), the Due Process Clause incorporated against the States only those rights "implicit in the concept of ordered liberty." *Id.* at 325. The analysis has since been refined to focus on the Anglo-American historical background of the right. The incorporation inquiry now turns on whether a right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. Applying this test in *Duncan* to determine that the Sixth Amendment right to jury trial in criminal cases applied to the States, the Court reviewed the history of the right in English law, as well as its place in the Founding era. *See id.* at 151-54. The Court also reviewed the current state systems for criminal trials, noting that every State "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* at 149 n.14. Because the Second Amendment also secures a fundamental right with a well-established and necessary place in the Anglo-American regime of ordered liberty, it too applies to the States.

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[6] *See, e.g.*, *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Excessive Bail Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Speedy Trial Clause); *Pointer*, 380 U.S. 400 (Confrontation Clause); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (free assembly); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech).

B. The Right to Keep and Bear Arms Was Considered "Fundamental" Under English Law and During the Founding Era.

As the Court observed in *Heller*, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. In reaching this conclusion, the Court cited Blackstone, "whose works, we have said, 'constituted the preeminent authority on English law for the founding generation.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Blackstone explained that "having" arms was among the five basic rights of every Englishman, those rights which secured the "primary rights" of each individual. WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139 (Legal Classics Library 1983) (1765). Indeed, Blackstone saw the right to bear arms as a natural right because it arose from the natural right of self-preservation, and the right of "resistance . . . to the violence of oppression." *Id.* at 139. And as *Heller* also noted, Blackstone's view was shared by his contemporaries. 128 S. Ct. at 2798 (citing several eighteenth century authorities). The right to arms recognized by Blackstone was also part of the English Declaration of Right (codified as the English Bill of Rights) of 1689, the relevant portion of which "has long been understood to be the predecessor to our Second Amendment." *Id.*

The American colonists likewise viewed the right to arms as fundamental, derivative of their rights as Englishmen. During the 1760s and 1770s, as relations between the colonists and the British Crown deteriorated, King George III "began to disarm the inhabitants of the most rebellious areas." *Id.* at 2799. This forced disarmament "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Id.* Indeed, the right to keep and bear arms must have been nothing less than "fundamental" to colonists faced with the prospect of a prolonged struggle against the most accomplished standing military force in the eighteenth century. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6 (2000) ("Taken together, the British army and navy constituted the most powerful military force in the world, destined in the course of the succeeding century to defeat all national competitors for its claim as the first hegemonic power of the modern era."). "For the colonists, the importance of the right to bear arms 'was not merely speculative theory. It was the lived experience of the [] age.'" *Nordyke*, 563 F.3d at 453 (quoting AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998)).

Given the colonists' experience before and during the Revolutionary War, it is unsurprising that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms] and declares only that it 'shall not be infringed.'" *Heller*, 128 S. Ct. at 2797. The Framers were well aware of the central importance of this right, recognizing "the advantage of being armed, which the Americans possess over the people of almost every other nation." THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

The Framers also understood that the right to arms was essential to preserving all the other "fundamental" liberties enjoyed by the American people. Alexander Hamilton articulated this understanding in his Federalist No. 29:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

The Federalist No. 29, at 145 (Alexander Hamilton) (G. Carey & J. McClellan eds., 1990).

Finally, the actions of the States themselves during the Founding era establish that they too viewed the right to keep and bear arms as "fundamental." *See* Stephen P. Halbrook, The Founders' Second Amendment 126-69 (2008) (State-by-State analysis). For example, after the adoption of the Declaration of Independence in 1776, several of the colonies adopted written constitutions of their own. The constitutions of Massachusetts, Pennsylvania, North Carolina, and Vermont all included provisions that guaranteed the right to bear arms. Mass. Const. pt. 1, art. 17; Pa. Const. of 1776, Declaration of Rights, cl. 13; N.C. Const. of 1776, Declaration of Rights § XVII; Vt. Const. of 1777, ch. 1, art. XV. And when the States voted on the ratification of the Constitution, several of them recommended amendments securing the right to keep and bear arms. 4 Bernard Schwartz, The Roots of the Bill of Rights 912 (1980) (noting that New Hampshire, New York, North Carolina, Rhode Island, and Virginia recommended including a provision on the right to keep and bear arms); *see also* 1 Elliott's Debates on the Federal Constitution 326-28 (Jonathan Elliott ed., 1859).

The States' understanding of the fundamental nature of the right to arms was further demonstrated in the decades after the adoption of the Constitution. As the Nation admitted more States to the Union, the right to keep and bear arms was recognized by a growing number of state constitutions. By 1868, twenty-two state constitutions explicitly guaranteed a right to bear arms. *See* App. The judicial opinions of state courts during this time also consistently recognized the importance of the right to arms. *See, e.g., Cockrum v. State*, 24 Tex. 394, 401-02 (1859) ("The right of a citizen to bear arms, in the lawful defence of himself . . . is absolute . . . . A law cannot be passed to infringe upon it or impair it . . . ."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (the right to bear arms is "calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (stating that the right to keep and bear arms protects the "*natural* right of self-defence" and that the Second Amendment secured a right "originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!").

In sum, the historical record, much of it detailed by this Court in *Heller*, demonstrates that the right to keep and bear arms was understood as a fundamental right of English subjects at the time of the Founding. Throughout this period the Framers, and Americans generally, considered the right to arms to be essential to preserving the other "fundamental" liberties enjoyed by our citizens at the birth of the Nation.

C. The Right to Keep and Bear Arms Was Considered "Fundamental" at the Time the Fourteenth Amendment Was Adopted, and It Remains So to This Day.

As it was during the Founding era and in the succeeding decades leading up to the Civil War, the right to keep and bear arms continued to be considered "fundamental" at the time the Fourteenth Amendment was adopted. The Court described this period in *Heller*, noting that, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S. Ct. at 2809-10. A significant concern in these debates was the disarming of newly freed African-Americans in the Southern States by statute as well as by vigilantism. *See id.* at 2810 (citing generally STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998)).

The Framers of the Fourteenth Amendment acted to end these oppressions, which included the drafting of the Amendment itself, as well as the passage of the Freedmen's Bureau Acts and the Civil Rights Act of 1866. A prominent constitutional scholar has noted that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of African-American citizens who had been stripped of their arms and subjected to violent attacks, and to "affirm the full and equal right of every citizen to self-defense." AMAR, *supra*, at 264. Indeed, "more evidence exists that the framers of the Fourteenth Amendment intended to protect the right to keep and bear arms from state infringement than exists for any other Bill of Rights guarantee." HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 188.

The debates of the Thirty-Ninth Congress, which drafted the Fourteenth Amendment, are replete with evidence that the Second Amendment was considered a fundamental right. For example, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" one's "right to bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S. Ct. at 2811. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms" as inherent in a "republican government." CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866). In fact, even the opponents of these Reconstruction measures acknowledged that the right to keep and bear arms was fundamental; they disagreed only as to whom that right extended and whether the federal government should enforce it. *See, e.g.*, *id.* at 371 (statement of Sen. Davis) (objecting to the Freedmen's Bureau bill but agreeing that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"); *Id.* at 914-15 (Sen. Saulsbury) (objecting to a bill to disband white southern militias, arguing that such a measure by Congress would violate the Second Amendment).

The results of these debates further confirm the critical importance of the Second Amendment in the

Reconstruction period. The Freedmen's Bureau bill specifically declared that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." Act of July 16, 1866, ch. 200, sec. 14, 14 Stat. 173, 176 (1866) (emphasis added). Notably, the same two-thirds-plus members of Congress who voted for the proposed Fourteenth Amendment also voted for this language in the Freedmen's Bureau bill. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 42. "No other guarantee in the Bill of Rights was the subject of this official approval by the same Congress that passed the Fourteenth Amendment." *Id.*

The state constitutions adopted during the Reconstruction period, including those adopted by States that had joined the Confederacy, likewise demonstrate that the right to arms was considered fundamental by the States that ratified the Fourteenth Amendment. *See, e.g.*, ARK. CONST. of 1868, art. II, § 5 ("The citizens of this state shall have the right to keep and bear arms for their common defense."); MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); TEX. CONST. of 1869, art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State . . . .").

In sum, at the time the Fourteenth Amendment was drafted and ratified, as during the Founding era, the right to keep and bear arms remained central to the American conception of liberty. The post-Civil War disarmament of the freed slaves in the Southern States—followed swiftly by the deprivation of other basic liberties—powerfully demonstrated that the Second Amendment preserves a right essential to securing all the other rights and privileges of free citizens. The Fourteenth Amendment, Freedmen's Bureau Acts and Civil Rights Act, designed to remedy these injustices, were predicated on the recognition that the right to arms is "fundamental."

Events since the adoption of the Fourteenth Amendment further confirm that the right to arms remains of central importance to the States. Now 44 state constitutions expressly secure an arms-bearing right,[7] and the legislatures of all 50 States uniformly reject bans on private handgun ownership. Every State in the Union permits private handgun ownership. *See* App. In *Heller*, thirty-two States submitted an amicus brief to the Court arguing that the Second Amendment secures a "fundamental" right that is "properly subject to incorporation." Brief for the State of Texas et al. as Amici Curiae Supporting Respondent, at 23 n.6, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). Finally, the submission of this amicus brief provides further evidence of the States' understanding of the fundamental importance of the arms-bearing right guaranteed by the Second Amendment.

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[7] In addition to the 44 States that expressly protect a right to bear arms in their constitutions, three other States protect a right to self-defense and defense of property. CAL. CONST. art. I, § 1 (originally adopted in 1849); IOWA CONST. art. I, § 1 (originally adopted in 1846); N.J. CONST. art. I, ¶ 1 (originally adopted in 1844). As the Court has noted, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. Only Maryland, Minnesota, and New York have neither guarantee in their state constitutions.

III. THE FEDERALISM CONCERNS INVOKED BY THE COURT OF APPEALS ARE MISPLACED.

The decision below that the Second Amendment does not apply to the States was based in part on the court's reasoning that incorporation would raise federalism concerns. *See Nat'l Rifle Assoc.*, 2009 WL 1515443, at *3-4. But those concerns are misplaced and do not justify applying the Second Amendment to only the federal government.

The lower court's federalism concerns start off on the wrong foot. The court begins by observing that, because "[o]ne function of the second amendment is to prevent the national government from interfering with state militias," incorporation could implicate problematic federal interference with state decisions on what weapons "best serve the public interest in an effective militia." *Id.* at *3. But this premise mistakenly presumes that the Second Amendment is, in part, a federalism provision. *Heller* expressly rejected the argument that the Second Amendment addressed any concern about federal control over state militias. As the Court explained, "[t]he Second Amendment right, protecting *only* individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia." 128 S. Ct. at 2804 (emphasis added). The Founders sought to address their fear of federal abolition of state militias not through the Second Amendment, but "in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so." *Id.*

The court of appeals further suggests that incorporation may be incorrect because "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Nat'l Rifle Assoc.*, 2009 WL 1515443, at *4. To be sure, amici States agree that "[i]t is one of the happy incidents of the federal system" that each State may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cited in *Nat'l Rifle Assoc.*, 2009 WL 1515443, at *4). But the discretion of state and local governments to explore legislative and regulatory initiatives does not include "the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights." *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring). As the Court stated in *Heller*, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 128 S. Ct. at 2821. Just as local governments cannot constitutionally act as "laboratories" for initiatives to abrogate their citizens' right to free speech or their freedom from unreasonable searches and seizures, nor can they nullify the fundamental right to keep and bear arms secured by the Second Amendment.

State and local experimentation with reasonable firearms regulations will continue under the Second

Amendment. As noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 2816. Many firearms regulations would plainly survive Second Amendment scrutiny, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17. For example, in *Nordyke*, the Ninth Circuit applied the Second Amendment to the States, but nonetheless upheld an Alameda County, California ordinance prohibiting firearms on county property. 563 F.3d at 457, 460.

As "independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the amici States are particularly concerned when the Court engages in constitutional or statutory interpretation that implicates federalism issues. The incorporation of the Second Amendment presents no such concerns. Denying local governments the power to nullify the Amendment will not increase federal power, mandate any state action pursuant to federal directives, or preclude reasonable state and local regulation of firearms. It will simply prevent local governments, like the federal government, from abrogating the fundamental, individual right to keep and bear arms.

CONCLUSION

The petitions should be granted.

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STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS:[1] GUARANTEED AT THE FOUNDING (1776–1790s)

STATE	PROVISION
Kentucky	KY. CONST. of 1792, art. XII, § 23 (Minor edits made in 1799)
Massachusetts	MASS. CONST. pt. I, art. XVII (1780)
North Carolina	N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII
Pennsylvania	PA. CONST. of 1790, art. IX, § 21 (Prior provision adopted in 1776)
Tennessee	TENN. CONST. of 1796, art. XI, § 26
Vermont	VT. CONST. ch. I, art. 16 (1793) (Prior provisions adopted in 1786, 1777)

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[1] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192-217 (2006) (further detailing the statutory and jurisprudential history of these provisions).

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: GUARANTEED AT THE ADOPTION OF THE FOURTEENTH AMENDMENT (1868)

STATE	PROVISION
Alabama	ALA. CONST. of 1868, art. I, § 28 (Prior provisions adopted in 1865, 1861, and 1819)
Arkansas	ARK. CONST. of 1868, art. II, § 5 (Prior provisions adopted in 1864, 1861, and 1836)
Connecticut	CONN. CONST. of 1818, art. I, § 15
Florida	FLA. CONST. of 1868, DECLARATION OF RIGHTS § 22 (Prior provisions adopted in 1838 and 1861, but deleted in 1865)
Georgia	GA. CONST. of 1868, art. I, § 14 (Prior provision adopted in 1865)
Indiana	IND. CONST. art. I, § 32 (1851) (Prior provision adopted in 1816)
Kansas	KAN. CONST., Bill of Rights § 4 (1859)
Kentucky	KY. CONST. of 1850, art. XIII, § 25

STATE	PROVISION
Maine	ME. CONST. of 1819, art. I, § 16
Massachusetts	MASS. CONST. pt. I, art. XVII (1780)
Michigan	MICH. CONST. of 1850, art. XVIII, § 7 (Prior provision adopted in 1835)
Mississippi	MISS. CONST. of 1868, art. I, § 15 (Prior provisions adopted in 1832 and 1817)
Missouri	MO. CONST. of 1865, art. I, § 8 (Prior provision adopted in 1820)
North Carolina	N.C. CONST. of 1868, art. I, § 24
Ohio	OHIO CONST. art. I, § 4 (1851) (Prior provision adopted in 1802)
Oregon	OR. CONST. art. I, § 27 (1857)
Pennsylvania	PA. CONST. of 1838, art. IX, § 21
Rhode Island	R.I. CONST. of 1843, art. I, § 22
South Carolina	S.C. CONST. of 1868, art. I, § 28
Tennessee	TENN. CONST. of 1835, art. I, § 26

STATE	PROVISION
Texas	TEX. CONST. of 1866, art. I, § 13 (Prior provisions adopted in 1861, 1845, and 1836)
Vermont	VT. CONST. ch. I, art. 16 (1793)

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: CURRENTLY GUARANTEED

STATE	PROVISION
Alabama	ALA. CONST. art. I, § 26 (1901) (Prior provision adopted in 1875)
Alaska	ALASKA CONST. art. I, § 19 (1994) (Prior provision adopted in 1959)
Arizona	ARIZ. CONST. art. II, § 26 (1912)
Arkansas	ARK. CONST. art. II, § 5 (1874)
California	None
Colorado	COLO. CONST. art. II, § 13 (1876)
Connecticut	CONN. CONST. art. I, § 15 (1965) (Prior provision adopted in 1955)
Delaware	DEL. CONST. art. I, § 20 (1897)
Florida	FLA. CONST. art. I, § 8 (1990) (Prior provisions adopted in 1968, 1885)
Georgia	GA. CONST. art. I, § 1, para. VIII (1983) (Prior provisions adopted in 1976, 1945, and 1877)

STATE	PROVISION
Hawaii	HAW. CONST. art. I, § 17 (1978) (Prior provision adopted in 1959)
Idaho	IDAHO CONST. art. I, § 11 (1978) (Prior provision adopted in 1889)
Illinois	ILL. CONST. art. I, § 22 (1970)
Indiana	IND. CONST. art. I, § 32 (1851)
Iowa	None
Kansas	KAN. CONST., Bill of Rights § 4 (1859)
Kentucky	KY. CONST. § 1, cl. 7 (1891)
Louisiana	LA. CONST. art. I, § 11 (1974) (Prior provision adopted in 1879)
Maine	ME. CONST. art. I, § 16 (1987)
Maryland	None
Massachusetts	MASS. CONST. pt. I, art. XVII (1780)
Michigan	MICH. CONST. art. I, § 6 (1963) (Prior provision adopted in 1908)
Minnesota	None
Mississippi	MISS. CONST. art. III, § 12 (1890)

STATE	PROVISION
Missouri	MO. CONST. art. I, § 23 (1945) (Prior provision adopted in 1875)
Montana	MONT. CONST. art. II, § 12 (1972) (Prior provision adopted in 1889)
Nebraska	NEB. CONST. art. I, § 1 (1988) (Right added to preexisting 1875 provision)
Nevada	NEV. CONST. art. I, § 11, cl. 1 (1982)
New Hampshire	N.H. CONST. pt. I, art. 2-a (1982)
New Jersey	None
New Mexico	N.M. CONST. art. II, § 6 (1986) (Prior provisions adopted in 1971, 1912)
New York	None
North Carolina	N.C. CONST. art. I, § 30 (1971) (Prior provision adopted in 1876)
North Dakota	N.D. CONST. art. I, § 1 (1984) (Right added to preexisting 1889 provision)
Ohio	OHIO CONST. art. I, § 4 (1851)
Oklahoma	OKLA. CONST. art. II, § 26 (1907)

STATE	PROVISION
Oregon	OR. CONST. art. I, § 27 (1857)
Pennsylvania	PA. CONST. art. I, § 21 (1968) (Prior provision adopted in 1874)
Rhode Island	R.I. CONST. art. I, § 22 (1986)
South Carolina	S.C. CONST. art. I, § 20 (1971) (Prior provision adopted in 1895)
South Dakota	S.D. CONST. art. VI, § 24 (1889)
Tennessee	TENN. CONST. art. I, § 26 (1870)
Texas	TEX. CONST. art. I, § 23 (1876) (Prior provision adopted in 1869)
Utah	UTAH CONST. art. I, § 6 (1984) (Prior provision adopted in 1895)
Vermont	VT. CONST. ch. I, art. 16 (1793)
Virginia	VA. CONST. art. I, § 13 (1971) (Right added to preexisting 1776 provision)
Washington	WASH. CONST. art. I, § 24 (1889)
West Virginia	W. VA. CONST. art. III, § 22 (1986)
Wisconsin	WIS. CONST. art. I, § 25 (1998)
Wyoming	WYO. CONST. art. I, § 24 (1889)

FIREARMS REGULATIONS BY STATE

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Alabama	ALA. CODE §§ 13A-11-50 to -61.1, 13A-11-70 to -85
Alaska	ALASKA STAT. §§ 18.65.700–.800
Arizona	ARIZ. REV. STAT. ANN. §§ 13-3101 to -3119
Arkansas	ARK. CODE ANN. §§ 5-73-101 to -133, 5-73-301 to -402
California	CAL. PENAL CODE §§ 12000–12040, 12050–12054, 12125–12133
Colorado	COLO. REV. STAT. §§ 18-12-101 to -111, 18-12-201 to -216
Connecticut	CONN. GEN. STAT. §§ 29-27 to -36L
Delaware	DEL. CODE ANN. tit. 11, §§ 1441–1459
Florida	FLA. STAT. ANN. §§ 790.001–.335

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Georgia	GA. CODE ANN. §§ 16-11-126 to -135
Hawaii	HAW. REV. STAT. §§ 134-1 to -27
Idaho	IDAHO CODE ANN. § 18-3302
Illinois	430 ILL. COMP. STAT. 65/1 to /16; 720 ILL. COMP. STAT. 5/24-1 to -10
Indiana	IND. CODE ANN. §§ 35-47-2-1 to -24
Iowa	IOWA CODE ANN. §§ 724.1–.30
Kansas	KAN. STAT. ANN. §§ 75-7c01 to -7c26
Kentucky	KY. REV. STAT. ANN. §§ 237.020–.106, 237.110–.142
Louisiana	LA. REV. STAT. ANN. §§ 40:1379.3, 40:1781–:1792
Maine	ME. REV. STAT. ANN. tit. 25, §§ 2001-A to 2006

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Maryland	MD. CODE ANN., CRIM. LAW §§ 4-201 to -209; MD. CODE ANN., PUB. SAFETY §§ 5-101 to -143, 5-301 to -314
Massachusetts	MASS. GEN. LAWS ch. 140, §§ 129B, 131–131L
Michigan	MICH. COMP. LAWS ANN. §§ 28.421–.435, 750.222–.239a
Minnesota	MINN. STAT. ANN. §§ 609.66–.667, 624.71–.719
Mississippi	MISS. CODE ANN. § 45-9-101
Missouri	MO. REV. STAT. §§ 571.030, 571.070, 571.101–.121
Montana	MONT. CODE ANN. §§ 45-8-316 to -330
Nebraska	NEB. REV. STAT. §§ 28-1202, 28-1204, 69-2401 to -2447
Nevada	NEV. REV. STAT. ANN. §§ 202.3653–.369

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
New Hampshire	N.H. REV. STAT. ANN. §§ 159:1 to :22
New Jersey	N.J. STAT. ANN. §§ 2C:39-3, -5, -6, 2C:58-4
New Mexico	N.M. STAT. ANN. §§ 29-19-1 to -14, 30-7-1 to -16
New York	N.Y. PENAL LAW §§ 265.01–.40, 400.00–.10
North Carolina	N.C. GEN. STAT. ANN. §§ 14-402 to -407, 14-415.10 to -415.26
North Dakota	N.D. CENT. CODE §§ 62.1-02-01 to -04-05
Ohio	OHIO REV. CODE ANN. §§ 2923.12–.1213
Oklahoma	OKLA. STAT. ANN. tit. 21, §§ 1272–1290.26
Oregon	OR. REV. STAT. ANN. §§ 166.180–.297
Pennsylvania	18 PA. STAT. ANN. §§ 6105–6127

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Rhode Island	R.I. GEN. LAWS § 11-47-8 to -60
South Carolina	S.C. CODE ANN. §§ 16-23-10 to -60, 23-31-110 to -240
South Dakota	S.D. CODIFIED LAWS §§ 22-14-9 to -11, 23-7-1 to -46
Tennessee	TENN. CODE ANN. §§ 39-17-1301 to -1362
Texas	TEX. GOV'T CODE ANN. §§ 411.171–.208; TEX. PENAL CODE ANN. §§ 46.01–.06
Utah	UTAH CODE ANN. §§ 53-5-701 to -711, 53-5a-102, 76-10-500 to -530
Vermont	VT. STAT. ANN. tit. 13, § 4003
Virginia	VA. CODE ANN. §§ 18.2-308 to -308.2:01
Washington	WASH. REV. CODE ANN. §§ 9.41.010–.810
West Virginia	W. VA. CODE §§ 61-7-3 to -14

STATE	**HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS**
Wisconsin	WIS. STAT. ANN. §§ 941.23–.237, 941.29, 941.296
Wyoming	WYO. STAT. ANN. § 6-8-104

JOINT APPENDIX

12

No. 08-1521

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO, et al.,
Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

JOINT APPENDIX

◆

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Petition For Certiorari Filed June 9, 2009
Certiorari Granted September 30, 2009

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Letter from City of Chicago to Adam Orlov, May 6, 2008 .... App. 37

Letter from City of Chicago to Otis McDonald, June 13, 2008 .... App. 34

Memorandum Opinion of the United States District Court for the Northern District of Illinois, Nos. 08-3696, 08-3697, December 4, 2008 .... App. 11

Memorandum Opinion of the United States District Court for the Northern District of Illinois, No. 08-3645, December 4, 2008 .... App. 17

Opinion of the United States Court of Appeals for the Seventh Circuit, June 2, 2009 .... App. 1

RELEVANT DOCKET ENTRIES

APPEAL, SCHENKIER, TERMED

United States District Court
Northern District of Illinois – CM/ECF LIVE, Ver 3.2.3 (Chicago)
CIVIL DOCKET FOR CASE #: 1:08-cv-03645

McDonald et al v.
City of Chicago et al
Assigned to:
Honorable Milton I. Shadur
Case in other court: 08-04112
08-04244
Cause: 42:1983 Civil Rights Act

Date Filed:
06/26/2008
Date Terminated:
12/18/2008
Jury Demand:
Defendant
Nature of Suit:
950 Constitutional – State Statute
Jurisdiction:
Federal Question

Date Filed	**#**	**Docket Text**
06/26/2008	1	COMPLAINT filed by Plaintiffs Illinois State Rifle Association, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc.; Filing fee $350.(smm) (Entered: 06/26/2008)
		* * *
07/31/2008	32	MOTION by Plaintiffs Illinois State Rifle Association, Otis McDonald, Adam Orlov, Colleen Lawson, David

		Lawson, Second Amendment Foundation, Inc. for summary judgment (Sigale, David) (Entered: 07/31/2008)
07/31/2008	33	NOTICE of Motion by David G. Sigale for presentment of motion for summary judgment 32 before Honorable Milton I. Shadur on 8/4/2008 at 09:15 AM. (Sigale, David) (Entered: 07/31/2008)
07/31/2008	34	MEMORANDUM by Illinois State Rifle Association, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. in support of motion for summary judgment 32 (Attachments: # 1 Statement of Material Facts, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Declaration of Otis McDonald, # 9 Declaration of Adam Orlov, # 10 Declaration of Colleen Lawson, # 11 Declaration of David Lawson, # 12 Declaration of Alan Gottlieb, # 13 Declaration of Richard Pearson) (Sigale, David) (Entered: 07/31/2008)
08/01/2008	35	Exhibit G to Memorandum in Support of Plaintiffs' Motion for Summary Judgment by Illinois State Rifle Association, Otis McDonald, Adam Orlov, Colleen Lawson, David

		Lawson, Second Amendment Foundation, Inc. (Sigale, David) (Entered: 08/01/2008)
		* * *
09/05/2008	41	*Amended* ANSWER to Complaint with Jury Demand by City of Chicago (Alfert, Rebecca) (Entered: 09/05/2008)
		* * *
10/21/2008	43	MOTION by Plaintiffs Illinois State Rifle Association, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. Narrow Legal Issues Pursuant to FRCivP 16 (Sigale, David) (Entered: 10/21/2008)
10/21/2008	44	NOTICE of Motion by David G. Sigale for presentment of motion for miscellaneous relief 43 before Honorable Milton I. Shadur on 10/28/2008 at 09:15 AM. (Sigale, David) (Entered: 10/21/2008)
		* * *
12/04/2008	49	MINUTE entry before the Honorable Milton I. Shadur: Enter Memorandum Order. MOTION for summary judgment 32 is denied; Motion 43 is denied. Status hearing set for 12/9/2008 at 08:45 AM. Mailed notice (srn,) (Entered: 12/04/2008)

12/04/2008	50	MEMORANDUM Order Signed by the Honorable Milton I. Shadur on 12/4/2008: Mailed notice (srn,) (Entered: 12/04/2008)

* * *

12/09/2008	55	MINUTE entry before the Honorable Milton I. Shadur: Status hearing held on 12/9/2008. Counsel is to submit a draft order for consideration. Status hearing set for 12/18/2008 at 08:45 AMMailed notice (srn,) (Entered: 12/09/2008)
12/18/2008	56	NOTICE of appeal by Illinois State Rifle Association, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. regarding orders 49 Filing fee $ 455, receipt number 0752000000003371470. (Sigale, David) (Entered: 12/18/2008)
12/18/2008	59	MINUTE entry before the Honorable Milton I. Shadur: Status hearing held. Enter order. This Court hereby grants the contested 12/9/08 oral motion of the City of Chicago, pursuant to Fed.R.Civ.P. 12(c) for judgment on the pleadings on Counts I-V of the complaint. Judgment is hereby entered in favor of the City of Chicago and against Plaintiffs on all counts of the complaint. Civil case terminated. (For further detail

		see separate order(s).) Mailed notice (smm) (Entered: 12/22/2008)
12/18/2008	60	ORDER Signed by the Honorable Milton I. Shadur on 12/18/2008. (smm) (Entered: 12/22/2008)
12/18/2008	61	ENTERED JUDGMENT. (smm) (Entered: 12/22/2008)
		* * *
01/30/2009	67	TRANSCRIPT OF PROCEEDINGS held on Au;gust [sic] 18, 2008 before the Honorable Milton I. Shadur. Court Reporter Contact Information: Jesse Andrews, 312 435 6899, Jesse_AndrewsILND/07/USCOURTS.GOV. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 2/20/2009. Redacted Transcript Deadline set for

		3/2/2009. Release of Transcript Restriction set for 4/30/2009. (Andrews, Jesse) (Entered: 01/30/2009)
01/30/2009	68	TRANSCRIPT OF PROCEEDINGS held on December 9, 2008 before the Honorable Milton I. Shadur. Court Reporter Contact Information: Jesse Andrews, 312 435 6899, Jesse Andres, 312 435 6899, Jesse_AndrewsILND/07/USCORTS.GOV. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 2/20/2009. Redacted Transcript Deadline set for 3/2/2009. Release of Transcript Restriction set for 4/30/2009. (Andrews, Jesse) Modified on 1/30/2009 (srn,). (Entered: 01/30/2009)
01/30/2009	69	TRANSCRIPT OF PROCEEDINGS held on December 18, 2008 before the Honorable Milton I. Shadur.

Court Reporter Contact Information: Jesse Andrews, 312 435 6899, Jesse_AndrewsILND/07/USCOURTS.GOV.

IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings.

Redaction Request due 2/20/2009. Redacted Transcript Deadline set for 3/2/2009. Release of Transcript Restriction set for 4/30/2009. (Andrews, Jesse) (Entered: 01/30/2009)

*   *   *

General Docket

United States Court of Appeals for the Seventh Circuit

Court of Appeals Docket #: 08-4244	**Docketed:** 12/19/2008
Nature of Suit: 3950 Constitutionality of State Statutes Otis McDonald, et al v. City of Chicago	**Termed:** 06/02/2009
Appeal From: Northern District of Illinois, Eastern Division	

OTIS MCDONALD, et al.,
Plaintiffs-Appellants

v.

CITY OF CHICAGO,
Defendant-Appellee

12/19/2008	1	Private civil case docketed. Fee paid. Docketing Statement due for Appellant Colleen Lawson, Appellant David Lawson, Appellant Otis McDonald, Appellant Adam Orlov and Appellant Second Amendment Foundation, Incorporated by 12/26/2008. Transcript information sheet due by 01/06/2009. Appellant's brief due on or before 01/28/2009 for Colleen Lawson, David Lawson, Otis McDonald, Adam Orlov and Second Amendment Foundation, Incorporated. Record on Appeal from Northern

		District of Illinois, Eastern Division due by 01/09/2009. [6081436-2] [08-4244]
12/19/2008		THIS CAUSE CONSISTS OF MORE THAN 5 PARTIES FOR EITHER SIDE. The following are those parties to this cause as reflected on the District Court docket, yet are not reflected on the Appellate docket/caption for administrative purposes: APPELLANT: Illinois Rifle Association. [6081441] [6081441-1] [08-4244]

* * *

01/30/2009	11	15 copies Appellant's brief filed by Appellants Colleen Lawson, David Lawson, Otis McDonald, Adam Orlov and Second Amendment Foundation, Incorporated. [6092321] [6092321-1] Disk Filed. [08-4244]

* * *

02/06/2009	15	15 copies Amicus brief filed by Constitutional Law Professors by consent. Disk Filed.[6095139-3] [08-4241, 08-4244, 08-4243] – [Edited 02/06/2009 by RS]
02/06/2009	17	15 copies Amicus brief filed by Amicus Curiae Institute for Justice in 08-4244, 08-4241, 08-4243 by consent. Disk Filed. [6095546-3]

[08-4244, 08-4241, 08-4243] – [Edited 02/09/2009 by JIR]

* * *

02/09/2009 25 15 copies Amicus brief filed by Amicus Curiae State Legislators from Illinois, Indiana & Wisconsin in 08-4243 per order. Disk Filed. [6096720-3] [08-4241, 08-4244, 08-4243]

02/09/2009 26 15 copies Amicus brief filed by Amici Curiae David Bordua, Heartland Institute, Independence Institute, International Law Enforcement Educators and Trainers Association, Law Enforcement Alliance of America and William Tonso in 08-4241, 08-4244, 08-4243 per order. Disk Filed. [6096858-3] [08-4241, 08-4244, 08-4243]

* * *

02/13/2009 28 15 copies Amicus brief filed by Amicus Curiae Congress of Racial Equality, Incorporated in 08-4241 per order. Disk Filed. [6097951-3] [08-4241, 08-4244, 08-4243]

* * *

03/26/2009 37 Order re: "Motion for Leave to Join In and Adopt Amicus Curiae Brief." IT IS ORDERED that the motion is GRANTED. Indiana State Representatives David Yarde, Mike Murphy, Tom Knollman, and Terry

		Goodin are permitted to join in and adopt the brief amici curiae filed by Sixty-Nine State Legislators from Illinois, Indiana, and Wisconsin. IT IS FURTHER ORDERED that counsel file the required disclosure statement. [6110258-2]; [6110258-3] EMW [6111471-1] [08-4241, 08-4244, 08-4243]
		* * *
04/17/2009	45	15 copies Appellee's brief filed by Appellee City of Chicago in 08-4241, 08-4244, Appellee Village of Oak Park in 08-4243. [6120835] [6120835-1] Disk Filed. [08-4241, 08-4244, 08-4243]
		* * *
04/23/2009	47	Filed Appellee City of Chicago in 08-4241, 08-4244 Citation of Additional Authority, per Circuit Rule 28(e). [6122730] [08-4241, 08-4244, 08-4243]
04/24/2009	48	15 copies Amicus brief filed by Amicus Curiae United State Conference of Mayors in 08-4241, 08-4244, 08-4243 by consent. Disk Filed. [6122946-3] [08-4241, 08-4244, 08-4243]
		* * *
04/27/2009	54	15 copies Amicus brief filed by Amici Curiae George Thomas, William Nelson, William Merkel, Jonathan

		Lurie and Sual Cornell in 08-4241, 08-4244, 08-4243 by consent. Disk Filed. [6124745-3] [08-4241, 08-4244, 08-4243] – [Edited 04/29/2009 by JIR]
04/27/2009	55	Filed 10 copies Appendix by Amici Curiae Sual Cornell, Jonathan Lurie, William Merkel, William Nelson and George Thomas in 08-4241, 08-4244, 08-4243. [6124751] [08-4241, 08-4244, 08-4243]

* * *

04/28/2009	53	15 copies Amicus brief filed by Amici Curiae Illinois Municipal League, Village of Skokie and Village of Winnetka in 08-4241, 08-4244, 08-4243, by consent. Disk Filed. [6124478-3] [08-4241, 08-4244, 08-4243]
04/30/2009	57	15 copies Amicus brief filed by Amici Curiae Freedom States Alliance, States United to Prevent Gun Violence, Violence Policy Center, Coalition to Stop Gun Violence/ Educational Fund to Stop Gun Violence, Legal Community Against Violence, Illinois Council Against Handgun Violence, Wayman African Methodist Episcopal Church of Chicago, Institute of Medicine of Chicago and Chicago Board of Education in 08-4241, 08-4244, 08-4243

		by consent. Electronically Transmitted. [6125464-3] [08-4241, 08-4244, 08-4243]

* * *

05/01/2009	59	15 copies CORRECTED Appellee's brief filed by Appellee City of Chicago in 08-4241, 08-4244, Appellee Village of Oak Park in 08-4243. Per Order Dist [6125937] [6125937-1] Disk Filed. [08-4241, 08-4244, 08-4243] – [Edited 05/01/2009 by RS]

* * *

05/14/2009	64	15 copies Appellant's reply brief filed by Appellants Colleen Lawson, David Lawson, Otis McDonald, Adam Orlov and Second Amendment Foundation, Incorporated. [6129647] [6129647-1] Disk Filed. DIST. [08-4244]
05/19/2009	65	Filed Appellee City of Chicago in 08-4241, 08-4244 Citation of Additional Authority, per Circuit Rule 28(e). Dist [6130796] [08-4241, 08-4244, 08-4243]
05/26/2009	66	Case heard and taken under advisement by panel: Frank H. Easterbrook, Chief Judge; William J. Bauer, Circuit Judge and Richard A. Posner, Circuit Judge. [6132074] [08-4241, 08-4244, 08-4243]

05/26/2009	67	Case argued by Mr. Alan Gura for Appellants National Rifle Association of America, Incorporated, Kathryn Tyler, Van F. Welton and Brett Benson, Stephen P. Halbrook for Appellants National Rifle Association of America, Incorporated, Kathryn Tyler, Van F. Welton and Brett Benson and Benna R. Solomon for Appellee City of Chicago in 08-4241. [6132077] [08-4241, 08-4244, 08-4243]
06/02/2009	68	Filed opinion of the court by Chief Judge Easterbrook. The judgments of the district court are AFFIRMED. Frank H. Easterbrook, Chief Judge; William J. Bauer, Circuit Judge and Richard A. Posner, Circuit Judge. [08-4241, 08-4244, 08-4243]
06/02/2009	69	ORDER: Final judgment filed per opinion. With costs: yes. [6134062-3] [08-4241, 08-4244, 08-4243]

* * *

06/15/2009	72	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 08-1521. [6137516] [08-4241, 08-4244, 08-4243]

* * *

10/02/2009	75	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. 08-1497. [6165260-1] [08-4241, 08-4244, 08-4243]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC., and ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs,

v.

CITY OF CHICAGO and MAYOR RICHARD M. DALEY,

Defendants.

Case No.

COMPLAINT

FILED: JUNE 26, 2008
08CV3645
JUDGE SHADUR
MAGISTRATE JUDGE SCHENKIER AEE

COMPLAINT

COME NOW the Plaintiffs, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, by and through undersigned counsel, and complain of the Defendants as follows:

THE PARTIES

1. Plaintiff Otis McDonald is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. McDonald resides in a high-crime neighborhood and is active in community affairs. As a

consequence of trying to make his neighborhood a better place to live, Mr. McDonald has been threatened by drug dealers.

2. Plaintiff Adam Orlov is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Orlov is a former Evanston, Illinois, police officer. As a police officer, Mr. Orlov was entrusted with a handgun for the purpose of defending himself and others from violent crime.

3. Plaintiff Colleen Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Ms. Lawson's home has been targeted by burglars.

4. Plaintiff David Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Lawson's home has been targeted by burglars.

5. Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. SAF brings this action on behalf of itself and its members.

6. Plaintiff Illinois State Rifle Association ("ISRA") is a non-profit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation. ISRA brings this action on behalf of itself and its members.

7. Defendant City of Chicago is a municipal entity organized under the Constitution and laws of the State of Illinois.

8. Defendant Richard M. Daley is the Mayor of the City of Chicago, and as such is responsible for executing and administering the City of Chicago's laws, customs, practices, and policies. In that capacity, Mr. Daley is presently enforcing the laws, customs, practices and policies complained of in this action, and is sued in both his individual and official capacities.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

STATEMENT OF FACTS

11. Mr. McDonald lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. McDonald presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

12. Mr. McDonald applied for permission to possess a handgun within his Chicago home. On June 13, 2008, that application was refused pursuant to the policies complained of in this action.

13. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

14. Mr. McDonald owns a shotgun which he keeps in his Chicago home. This shotgun is lawfully registered pursuant to the Chicago Municipal Code.

15. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess the shotgun in his Chicago home without re-registering it annually as required by the Chicago Municipal Code.

16. Mr. Orlov lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Orlov presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action

17. Mr. Orlov applied for permission to possess the handgun within his Chicago home. On May 6, 2008, that application was refused pursuant to the policies complained of in this action.

18. Mr. Orlov fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

19. Ms. Lawson lawfully owns a handgun, which she keeps outside the City of Chicago. Ms. Lawson presently intends to possess the handgun within her home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

20. Ms. Lawson applied for permission to possess the handgun within her Chicago home. On January 3, 2008, that application was refused pursuant to the policies complained of in this action.

21. Ms. Lawson fears arrest, criminal prosecution, incarceration, and fine if she were to possess a handgun within her home.

22. Mr. Lawson lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Lawson presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

23. Mr. Lawson applied for permission to possess the handgun within his Chicago home. On

January 23, 2008, that application was refused pursuant to the policies complained of in this action.

24. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

25. Mr. Lawson owns various long arms which are kept in his Chicago home and are lawfully registered pursuant to the Chicago Municipal Code.

26. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess these arms in his Chicago home without reregistering them annually as required by the Chicago Municipal Code.

27. On May 4, 2008, the registration for one of Mr. Lawson's rifles, a K31, lapsed. The rifle thus became permanently unregisterable within the City of Chicago. Mr. Lawson removed the rifle from his Chicago home and now keeps it outside the City of Chicago.

28. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the lapsed K31 rifle within his Chicago home. Mr. Lawson presently intends to possess the K31 rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

29. In 2007, Mr. Lawson applied to purchase a rifle from the federal Civilian Marksmanship Program ("CMP"). On October 18, 2007, Mr. Lawson was

informed via email that his application was granted and the rifle would be delivered to his Chicago home. The Civilian Marksmanship Program requires that delivery be made to Mr. Lawson's Chicago home, because that is the address listed both in Mr. Lawson's driving license and Illinois Firearms Owner Identification Card.

30. On October 19, 2007, the CMP rifle arrived at the Lawson home via the U.S. Postal Service. Mr. Lawson thus had approximately a day's notice that he would be receiving the CMP rifle. Only upon receiving the CMP rifle could Mr. Lawson learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm.

31. Mr. Lawson relocated the rifle outside of Chicago and, on November 30, 2007 applied to register the rifle. On December 11, 2007, that application was refused pursuant to the policies complained of in this action.

32. Mr. Lawson presently intends to possess the CMP rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the CMP rifle within his home.

33. The Second Amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the

right of the people to keep and bear Arms shall not be infringed."

34. At a minimum, the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, including a handgun, within the home.

35. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

36. Chicago Municipal Code § 8-20-040(a) mandates that

> All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm which is unregisterable under the provisions of this chapter.

37. Chicago Municipal Code § 8-20-050 provides: "No registration certificate shall be issued for any of the following types of firearms: . . . (c) handguns . . . " While Section 8-20-050(c) provides exceptions for certain handguns owned prior to the law's effective date, and handguns owned by police officers, security personnel, and private detectives, the provision, in conjunction with Section 8-20-040, generally bars the private home possession of handguns by law-abiding adult citizens.

38. Chicago Municipal Code § 8-20-090(a) provides: "A registration certificate shall be obtained prior to any person taking possession of a firearm from any source."

39. Chicago Municipal Code § 8-20-200 provides:

> (a) Every registrant must renew his registration certificate annually. Applications for renewal shall be made by such registrants 60 days prior to the expiration of the current registration certificate.
>
> (b) The application for renewal shall include the payment of a renewal fee as follows:
>
> 1 firearm. . . . $20.00; 2-10 firearms. . . . 25.00; More than ten firearms. . . . 35.00
>
> (c) Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregisterable.

(d) All terms, conditions and requirements of this chapter for registration of firearms shall be applicable to renewal or registration of such firearms.

(e) The renewal fee shall not be applicable to duty-related handguns of peace officers domiciled in the City of Chicago.

40. Many Chicago gun owners fail to re-register their firearms every year. Among these recently was Alderman Richard Mell, whose firearms became unregisterable when he failed to timely renew his registration certificates.

41. Accordingly, Alderman Mell proposed an ordinance amending the law to permit, for one month, lapsed guns to be re-registered if their owners had attempted to re-register their guns between May 1, 2007 and April 1, 2008, a period that would have covered his lapsed firearm registrations.

42. Defendant Mayor Daley endorsed Mell's proposal, stating: "A lot of people go back and forth to their summer homes . . . A lot of people move their shotguns. A lot of 'em are bird hunters, gun collectors. . . . They move 'em back from Wisconsin, Michigan, [other] parts of Illinois."

43. Defendant Mayor Daley added: "It's one time [for] one month . . . You want to have 'em register. There's nothing wrong with that . . . People want to just register. A lot of 'em bring 'em back from hunting trips. So, why not?"

44. Speaking of Alderman Mell's desire to re-register his lapsed guns, Defendant Mayor Daley stated: "He has a home in Wisconsin. He brings 'em back and forth. He's not running out with a shotgun and hurting people."

45. The proposed re-registration amnesty bill was passed by the Chicago City Council, with the amnesty period extended to 120 days. The fee for re-registering a lapsed firearm under the amnesty bill is $60.00.

46. A first violation of Chicago's ban on the ownership or possession of unregistered firearms within the home is punishable by a fine of "not less than $300.00, nor more than $500.00; or [incarceration] for not less than ten days nor more than 90 days or both." Chicago Municipal Code § 8-20-250. Subsequent violations are punishable by a fine of $500.00 and incarceration ranging from ninety days to six months. Id.

FIRST CAUSE OF ACTION – HANDGUN BAN
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

47. Paragraphs 1 through 46 are incorporated as though fully stated herein.

48. The Second Amendment right is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment.

49. The Second Amendment right to keep and bear arms is a privilege and immunity of United States citizenship which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate.

50. Handguns, as a class of weapons, are "arms" whose possession by law-abiding adult citizens is protected by the Second Amendment right to keep and bear arms.

51. By banning handguns, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

SECOND CAUSE OF ACTION – RE-REGISTRATION REQUIREMENT
RIGHT TO KEEP AND BEAR ARMS
U.S. CONST., AMENDS. II AND XIV,
42 U.S.C. § 1983

52. Paragraphs 1 through 51 are incorporated as though fully stated herein.

53. By requiring Plaintiffs to annually re-register each firearm, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

THIRD CAUSE OF ACTION – PRE-ACQUISITION REGISTRATION REQUIREMENT RIGHT TO KEEP AND BEAR ARMS U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

54. Paragraphs 1 through 53 are incorporated as though fully stated herein.

55. By requiring Plaintiffs to register all firearms prior to their acquisition, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore

entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

FOURTH CAUSE OF ACTION – UNREGISTERABLE STATUS PENALTY RIGHT TO KEEP AND BEAR ARMS U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

56. Paragraphs 1 through 55 are incorporated as though fully stated herein.

57. By declaring specific firearms "unregisterable" as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

FIFTH CAUSE OF ACTION – UNREGISTERABLE STATUS PENALTY EQUAL PROTECTION U.S. CONST., AMEND. XIV, 42 U.S.C. § 1983

58. Paragraphs 1 through 57 are incorporated as though fully stated herein.

59. By declaring specific firearms "unregisterable" as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

PRAYER FOR RELIEF

Plaintiffs request judgment be entered in their favor and against Defendants as follows:

1. An order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing Chicago Municipal Code § 8-20-050(c), barring registration of handguns; Chicago Municipal Code § 8-20-200, requiring the annual renewal of firearms registrations; Chicago Municipal Code § 8-20-090,

mandating that registration certificates for firearms be obtained prior to taking possession of a firearm; Chicago Municipal Code § 8-20-040, as applied to prohibiting possession of an unregistered firearm within a period of time reasonably necessary to obtain registration; and any custom, policy, or practice of deeming a firearm "unregisterable" for the sole reason that it has previously been not validly registered.

2. Attorney Fees and Costs pursuant to 42 U.S.C. § 1988;

3. Declaratory relief consistent with the injunction;

4. Costs of suit; and

5. Any other further relief as the Court deems just and appropriate.

Dated: June 26, 2008

Respectfully submitted,

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By: /s/ David G. Sigale/
David G. Sigale
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTIS McDONALD, et al., Plaintiffs, v. CITY OF CHICAGO, Defendant.	Case No. 08-CV-3645 **DECLARATION OF ALAN GOTTLIEB**

DECLARATION OF ALAN GOTTLIEB

I, Alan Gottlieb, am competent to state, and declare the following based on my personal knowledge:

1. I am the Founder and Executive Vice President of the Second Amendment Foundation, Inc.

2. The Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.

3. SAF has individual members and supporters who are adversely impacted by the laws being challenged in this litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 29th day of JULY, 2008

/s/ Alan M. Gottlieb
Alan Gottlieb

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, et al.,	)	Case No. 08-CV-3645
Plaintiffs,	)	**DECLARATION OF COLLEEN LAWSON**
v.	)	
CITY OF CHICAGO,	)	
Defendant.	)	

DECLARATION OF COLLEEN LAWSON

I, Colleen Lawson, am competent to state, and declare the following based on my personal knowledge:

1. I tried to register a handgun for possession inside my Chicago home. Exhibit D is a true and correct copy of the city's rejection of my handgun application (with some personal information redacted).

2 I fear arrest, criminal prosecution, incarceration, and fine if I were to possess a handgun within my home. I presently intend to possess a handgun within the home for self-defense, but am prevented from doing so by the city's active enforcement of the handgun ban as outlined in their letter to me. I have never brought my handgun into Chicago.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 29 day of July 2008

/s/ Colleen Lawson
Colleen Lawson

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, et al.,	)	Case No. 08-CV-3645
Plaintiffs,	)	**DECLARATION OF ADAM ORLOV**
v.	)	
CITY OF CHICAGO,	)	
Defendant.	)	

DECLARATION OF ADAM ORLOV

I, Adam Orlov, am competent to state, and declare the following based on my personal knowledge:

1. I tried to register a handgun for possession inside my Chicago home. Exhibit C is a true and correct copy of the city's rejection of my handgun application (with some personal information redacted).

2 I fear arrest, criminal prosecution, incarceration, and fine if I were to possess a handgun within my home. I presently intend to possess a handgun within the home for self-defense, but am prevented from doing so by the city's active enforcement of the handgun ban as outlined in their letter to me. I have never brought my handgun into Chicago, except during the time I was employed as a police officer in Evanston, and it was my service weapon.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 30 day of July, 2008

/s/ Adam Orlov
Adam Orlov

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, et al., Plaintiffs, v. CITY OF CHICAGO, Defendant.	Case No. 08-CV-3645 **DECLARATION OF RICHARD PEARSON**

DECLARATION OF RICHARD PEARSON

I, Richard Pearson, am competent to state, and declare the following based on my personal knowledge:

1. I am the Executive Director of the Illinois State Rifle Association.

2. The Illinois State Rifle Association ("ISRA") is a non-profit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation.

3. ISRA has individual members and supporters who are adversely impacted by the laws being challenged in this litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 30 day of July, 2008

/s/ Richard A. Pearson
Richard Pearson

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, et al.,) Case No. 08-CV-3645
Plaintiffs,)
v.) **DECLARATION OF DAVID LAWSON**
CITY OF CHICAGO,)
Defendant.)

DECLARATION OF DAVID LAWSON

I, David Lawson, am competent to state, and declare the following based on my personal knowledge:

1. I tried to register a handgun for possession inside my Chicago home. Exhibit E is a true and correct copy of the city's rejection of my handgun application (with some personal information redacted).

2 I fear arrest, criminal prosecution, incarceration, and fine if I were to possess a handgun within my home. I presently intend to possess a handgun within the home for self-defense, but am prevented from doing so by the city's active enforcement of the handgun ban as outlined in their letter to me. I have never brought my handgun into Chicago.

3. I own various guns lawfully registered in the city, which I keep at my home. Exhibit F is a true and

correct copy of my firearm registration certificates (with some personal information redacted).

4. I fear arrest, criminal prosecution, incarceration, and fine if I were to continue possessing these guns in Chicago without re-registering them annually.

5. On May 4, 2008, the registration for one of my rifles, a K31, lapsed. The rifle thus became permanently unregisterable within the City of Chicago. I therefore removed the rifle from my Chicago home and now keep it outside the City of Chicago. I fear arrest, criminal prosecution, incarceration, and fine if I were to possess the lapsed K31 rifle within my Chicago home without benefit of registration.

6. In 2007, I applied to purchase a rifle from the federal Civilian Marksmanship Program ("CMP"). On October 18, 2007, I was informed via email that my application was granted and the rifle would be delivered to my Chicago home. The CMP requires that delivery be made to my Chicago home, because that is the address listed both in my driving license and Illinois Firearms Owner Identification Card.

7. On October 19, 2007, the CMP rifle arrived at my home via the U.S. Postal Service. I thus had approximately a day's notice that I would be receiving the CMP rifle. Only upon receiving the CMP rifle could I learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm.

8. I relocated the rifle outside of Chicago and, on November 30, 2007 applied to register the rifle. I was unable to complete the registration process any earlier on account of travel. On December 11, 2007, that application was refused because I did not effectuate registration of the rifle prior to taking possession of it.

9. I appealed the denial of my CMP rifle registration to the city's Department of Administrative Hearings. The city denied my appeal. Exhibit G is a true and correct copy of the administrative decision in that case (with some personal information redacted).

10. I presently intend to possess the CMP rifle within my home, but am prevented from doing so only by the city's active enforcement of the pre-acquisition registration requirement and now unregisterable status of that firearm. I fear arrest, criminal prosecution, incarceration, and fine if I were to possess this rifle within my home.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 31st day of July, 2008

/s/ David W. Lawson
David W. Lawson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTIS McDONALD, et al.,	)	Case No. 08-CV-3645
Plaintiffs,	)	**DECLARATION OF OTIS MCDONALD**
v.	)	
CITY OF CHICAGO,	)	
Defendant.	)	

DECLARATION OF OTIS MCDONALD

I, Otis McDonald, am competent to state, and declare the following based on my personal knowledge:

1. I tried to register a handgun for possession inside my Chicago home. Exhibit A is a true and correct copy of the city's rejection of my handgun application (with some personal information redacted).

2 I fear arrest, criminal prosecution, incarceration, and fine if I were to possess a handgun within my home. I presently intend to possess a handgun within the home for self-defense, but am prevented from doing so by the city's active enforcement of the handgun ban as outlined in their letter to me.

3. After my handgun application was denied, I tried to communicate to the police that the handgun had never been in the city, but the police insisted that

I completely dispose of the handgun. I did so, and reported that event to the city on the proper form, but have since re-acquired the handgun. The handgun is not kept in the city. I still intend to register the handgun and would do so but for the fact of the city's handgun ban.

4. I own a lawfully registered shotgun. The shotgun registration application was approved by the city on June 12, 2008. On June 19, 2008, I visited the gun registration office and asked about the delay in receiving the registration certificate. An officer I believe is named Passiki gave me a printout of my registration records, and noted in his writing that the shotgun registration was approved June 12. Exhibit B is a true and correct copy of that printout. I've since been told that the certificate itself should be in the mail to me shortly. I fear arrest, criminal prosecution, incarceration, and fine if I were to possess my shotgun in Chicago without re-registering it annually.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 31 day of July, 2008

/s/ Otis McDonald
Otis McDonald

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTIS McDONALD, et al.,	)	Case No. 08-CV-3645
Plaintiffs,	)	**SEPARATE STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
v.	)	
CITY OF CHICAGO,	)	
Defendants.	)	

SEPARATE STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 31, 2008)

COME NOW the Plaintiffs, Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, by and through undersigned counsel, and submit their separate statement of material facts as to which there is no genuine dispute in support of their motion for summary judgment.

Dated: July 31, 2008

Alan Gura (admitted
pro hac vice)
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By: /s/ Alan Gura/
Alan Gura

Respectfully submitted,

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By: /s/ David G. Sigale/
David G. Sigale

Attorneys for Plaintiffs

SEPARATE STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THE PARTIES

1. Plaintiff Otis McDonald is a natural person residing in Chicago, Illinois.	1. McDonald Decl., Exh. A, B.
2. Plaintiff Adam Orlov is a natural person residing in Chicago, Illinois.	2. Orlov Decl., Exh. C.
3. Plaintiff Colleen Lawson is a natural person residing in Chicago, Illinois.	3. C. Lawson Decl., Exh. D.
4. Plaintiff David Lawson is a natural person residing in Chicago, Illinois.	4. D. Lawson Decl., Exh. E-G.

5. Plaintiff Second Amendment Foundation, Inc. is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.	5. Gottlieb Decl., ¶ 2.
6. The Second Amendment Foundation has individual members who are impacted by the laws challenged in this litigation.	6. Gottlieb Decl., ¶ 3.

7. Plaintiff Illinois State Rifle Association is a nonprofit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation.	7. Pearson Decl., ¶ 2.
8. The Illinois State Rifle Association has individual members who are impacted by the laws challenged in this litigation.	8. Pearson Decl., ¶ 3.
9. Defendant City of Chicago is a municipal entity.	9. Answer, ¶ 7.

JURISDICTION

10. The Court has subject matter jurisdiction over this action as the claims present questions of federal law.	10. *See generally* Complaint; 28 U.S.C. §§ 1331, 1343.

11. The Court has personal jurisdiction over defendant City of Chicago as the city is located within the jurisdictional reach of the Court.	11. 28 U.S.C. § 93(a)(1).

VENUE

12. Venue is proper in this Court as the defendant is located within this judicial district, plaintiffs reside in this judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.	12. 28 U.S.C. § 1391; *see generally* Complaint; Answer, ¶ 10; Declarations and Exhibits to this motion.

MATERIAL FACTS

13. Defendant City of Chicago generally bans the home possession of handguns by requiring that all firearms be registered, but refusing the registration of handguns.	13. Chicago Mun. Code §§ 8-20-040; 8-20-050; Answer, ¶¶ 36, 37.
14. Plaintiff Otis McDonald applied to register a handgun for possession in his Chicago home, but was denied per the city's handgun ban.	14. McDonald Decl., ¶ 1; Exh. A

15. Plaintiff Adam Orlov applied to register a handgun for possession in his Chicago home, but was denied per the city's handgun ban and pre-acquisition registration requirement.	15. Orlov Decl., ¶ 1; Exh. C.
16. Plaintiff Colleen Lawson applied to register a handgun for possession in her Chicago home, but was denied per the city's handgun ban.	16. C. Lawson Decl., ¶ 1; Exh. D
17. Plaintiff David Lawson applied to register a handgun for possession in his Chicago home, but was denied per the city's handgun ban and pre-acquisition registration requirement.	17. D. Lawson Decl., ¶ 1; Exh. D
18. Each individual plaintiff fears arrest, criminal prosecution, incarceration, and fine if he or she were to possess a handgun within the home.	18. McDonald Decl., ¶ 2; Orlov Decl., ¶ 2; C. Lawson Decl., ¶ 2; D. Lawson Decl., ¶ 2.

19. Each plaintiff presently intends to possess a handgun within the home for self-defense, but is prevented from doing so only by the city's active enforcement of the handgun ban.	19. McDonald Decl., ¶ 2, 3; Orlov Decl., ¶ 2; C. Lawson Decl., ¶ 2; D. Lawson Decl., ¶ 2.
20. Defendant city mandates that all registered guns be re-registered each year.	20. Chicago Mun. Code § 8-20-200; Answer, ¶ 39.
21. If a registered gun is not timely re-registered, that particular gun becomes "unregisterable" and thus illegal to possess in Chicago.	21. Chicago Mun. Code § 8-20-200(c); Answer, ¶ 39.
22. Plaintiff McDonald owns a shotgun lawfully registered pursuant to the Chicago Municipal Code.	22. McDonald Decl. ¶ 4; Exh. B.
23. Plaintiff David Lawson owns various guns lawfully registered pursuant to the Chicago Municipal Code.	23. D. Lawson Decl. ¶ 3; Exh. F.

24. Plaintiffs McDonald and David Lawson fear arrest, criminal prosecution, incarceration, and fine if they were to possess their guns in Chicago without re-registering them annually.	24. McDonald Decl., ¶ 4; D. Lawson Decl., ¶ 4.
25. On May 4, 2008, the registration for one of Mr. Lawson's rifles, a K31, lapsed. The rifle thus became permanently unregisterable within the City of Chicago.	25. D. Lawson Decl., ¶ 5.
26. Mr. Lawson removed the rifle from his Chicago home and now keeps it outside the City of Chicago.	26. D. Lawson Decl., ¶ 5.
27. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the lapsed K31 rifle within his Chicago home without benefit of registration.	27. D. Lawson Decl., ¶ 5.

28. The unregisterability penalty and re-registration requirement have caused a decline in the number in the number of registered guns, such that the city's registry does not reflect the true firearm population in the city.	28. Fran Spielman, *Daley backs Mell's gun plan,* Chicago Sun-Times (May 21, 2008); Fran Spielman, *Aldermen extend amnesty to re-register guns in city,* Chicago Sun-Times (June 4, 2008); Hal Dardick, *Committee OKs gun registry changes,* Chicago Tribune (June 4, 2008).
29. When Alderman Richard Mell had various firearms become unregisterable for lack of timely re-registration, he successfully sponsored an amnesty ordinance permitting the re-registration of lapsed firearms upon payment of a fine.	29. Fran Spielman, *Daley backs* Sun-Times (May 21, 2008); Fran Spielman, *Aldermen extend amnesty to re-register guns in city,* Chicago Sun-Times (June 4, 2008); Hal Dardick, *Committee OKs gun registry changes,* Chicago Tribune (June 4, 2008).
30. The amnesty ordinance does not repeal the re-registration annual requirement.	30. Chicago City Clerk Document S02008-2626, Ordinance of June 11, 2008.
31. The city also requires that all firearms be registered prior to their acquisition, lest they become unregisterable.	31. Chicago Mun. Code § 08-20-090; Answer, ¶ 38; Exh. G.

32. In 2007, plaintiff David Lawson applied to purchase a rifle from the federal Civilian Marksmanship Program ("CMP"). On October 18, 2007, Mr. Lawson was informed via email that his application was granted and the rifle would be delivered to his Chicago home.	32. D. Lawson Decl., ¶ 6; Exh. G
33. The CMP requires that delivery be made to Mr. Lawson's Chicago home, because that is the address listed both in Mr. Lawson's driving license and Illinois Firearms Owner Identification Card.	33. D. Lawson Decl., ¶ 6; Exh. G
34. On October 19, 2007, the CMP rifle arrived at the Lawson home via the U.S. Postal Service.	34. D. Lawson Decl., ¶ 7; Exh. G

35. Mr. Lawson thus had approximately a day's notice that he would be receiving the CMP rifle. Only upon receiving the CMP rifle could Mr. Lawson learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm.	35. D. Lawson Decl., ¶ 7; Exh. G
36. Mr. Lawson relocated the rifle outside of Chicago and, on November 30, 2007 applied to register the rifle.	36. D. Lawson Decl., ¶ 8; Exh. G
37. On December 11, 2007, that application was refused because Lawson did not effectuate registration of the rifle prior to taking possession of it.	37. D. Lawson Decl., ¶ 8; Exh. G
38. Mr. Lawson presently intends to possess the CMP rifle within his home, but is prevented from doing so only by the city's active enforcement of the pre-acquisition registration requirement and now unregisterable status of that firearm.	38. D. Lawson Decl., ¶ 10.

39. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the CMP rifle within his home.	39. D. Lawson Decl., ¶ 10.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC., and ILLINOIS STATE RIFLE ASSOCIATION,	
Plaintiffs,	**No. 08 C 3645** **Judge Milton I. Shadur** **Magistrate Judge Schenkier**
v.	
CITY OF CHICAGO and MAYOR RICHARD M. DALEY,	
Defendants.	

DEFENDANT CITY OF CHICAGO'S AMENDED ANSWER TO PLAINTIFFS' COMPLAINT, DEFENSE, AND JURY DEMAND

(Filed Sept. 5, 2008)

Defendant City of Chicago ("City"), by and through its attorney, Mara S. Georges, Corporation Counsel for the City of Chicago, hereby submits its Answer to Plaintiffs' Complaint, its Defense, and its Jury Demand.

ANSWER

THE PARTIES

1. Plaintiff Otis McDonald is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. McDonald resides in a high-crime neighborhood and is active in community affairs. As a consequence of trying to make his neighborhood a better place to live, Mr. McDonald has been threatened by drug dealers.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 1.

2. Plaintiff Adam Orlov is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Orlov is a former Evanston, Illinois, police officer. As a police officer, Mr. Orlov was entrusted with a handgun for the purpose of defending himself and others from violent crime.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 2.

3. Plaintiff Colleen Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Ms. Lawson's home has been targeted by burglars.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 3.

4. Plaintiff David Lawson is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. Lawson's home has been targeted by burglars.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, all but the first sentence of this paragraph is stricken. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4.

5. Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 600,000 members and supporters nationwide, including many in Chicago. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of

gun control. SAF brings this action on behalf of itself and its members.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5.

6. Plaintiff Illinois State Rifle Association ("ISRA") is a non-profit membership organization incorporated under the laws of Illinois with its principal place of business in Chatsworth, Illinois. ISRA has over 17,000 members and supporters in Illinois, including many in Chicago. The purposes of ISRA include securing the Constitutional right to privately own and possess firearms within Illinois, through education, outreach, and litigation. ISRA brings this action on behalf of itself and its members.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6.

7. Defendant City of Chicago is a municipal entity organized under the Constitution and laws of the State of Illinois.

ANSWER: The City admits the allegations contained in Paragraph 7.

8. Defendant Richard M. Daley is the Mayor of the City of Chicago, and as such is responsible for executing and administering the City of Chicago's laws, customs, practices, and policies. In that capacity, Mr. Daley is presently enforcing the laws, customs, practices and policies complained of in this

action, and is sued in both his individual and official capacities.

ANSWER: Pursuant to the Court's Memorandum Orders of June 27, 2008 and July 7, 2008, this paragraph is stricken.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, the references in Paragraph 9 to 28 U.S.C. §§ 2201 and 2202 are stricken. The City admits that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343. The City denies the remaining allegations contained in Paragraph 9.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

ANSWER: The City admits the allegations contained in Paragraph 10.

STATEMENT OF FACTS

11. Mr. McDonald lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. McDonald presently intends to possess the handgun within his home for self-defense, but is prevented

from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11.

12. Mr. McDonald applied for permission to possess a handgun within his Chicago home. On June 13, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. McDonald applied to the City for permission to register a handgun and that the application was refused on June 13, 2008, pursuant to Chicago Municipal Code § 8-20-050. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 12.

13. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13.

14. Mr. McDonald owns a shotgun which he keeps in his Chicago home. This shotgun is lawfully registered pursuant to the Chicago Municipal Code.

ANSWER: The City admits that a shotgun is currently registered with the City under Mr. McDonald's name. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 14.

15. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess the shotgun in his Chicago home without re-registering it annually as required by the Chicago Municipal Code.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15.

16. Mr. Orlov lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Orlov presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16. 4

17. Mr. Orlov applied for permission to possess the handgun within his Chicago home. On May 6, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. Orlov applied to the City for permission to register a handgun and that the application was refused on May 6, 2008, pursuant to Chicago Municipal Code §§ 8-20-050 and 8-20-090. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 17.

18. Mr. Orlov fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18.

19. Ms. Lawson lawfully owns a handgun, which she keeps outside the City of Chicago. Ms. Lawson presently intends to possess the handgun within her home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19.

20. Ms. Lawson applied for permission to possess the handgun within her Chicago home. On January 3, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Ms. Lawson applied to the City for permission to register a handgun and that the application was refused on January 3, 2008, pursuant to Chicago Municipal Code § 8-20-050. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 20.

21. Ms. Lawson fears arrest, criminal prosecution, incarceration, and fine if she were to possess a handgun within her home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21.

22. Mr. Lawson lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. Lawson presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22.

23. Mr. Lawson applied for permission to possess the handgun within his Chicago home. On January 23, 2008, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. Lawson applied to the City for permission to register a handgun and that the application was refused on January 23, 2008, pursuant to Chicago Municipal Code §§ 8-20-050 and 8-20-090. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 23.

24. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24.

25. Mr. Lawson owns various long arms which are kept in his Chicago home and are lawfully registered pursuant to the Chicago Municipal Code.

ANSWER: The City admits that it has approved various registration applications filed by Mr. Lawson for various long arms. The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25.

26. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess these arms in his Chicago home without re-registering them annually as required by the Chicago Municipal Code.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26.

27. On May 4, 2008, the registration for one of Mr. Lawson's rifles, a K31, lapsed. The rifle thus became permanently unregisterable within the City of Chicago. Mr. Lawson removed the rifle from his Chicago home and now keeps it outside the City of Chicago.

ANSWER: The City admits that, on May 3, 2007, the City approved the registration of one of Mr. Lawson's rifles, Serial No. 750304, and that Mr. Lawson has not filed an application to re-register that rifle. The City further admits that section 8-20-200(c) of the Chicago Municipal Code states that "Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregisterable." The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 27.

28. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the lapsed K31 rifle within his Chicago home. Mr. Lawson presently intends to possess the K31 rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28.

29. In 2007, Mr. Lawson applied to purchase a rifle from the federal Civilian Marksmanship Program ("CMP"). On October 18, 2007, Mr. Lawson was informed via email that his application was granted and the rifle would be delivered to his Chicago home. The Civilian Marksmanship Program requires that delivery be made to Mr. Lawson's Chicago home, because that is the address listed both in Mr. Lawson's

driving license and Illinois Firearms Owner Identification Card.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29.

30. On October 19, 2007, the CMP rifle arrived at the Lawson home via the U.S. Postal Service. Mr. Lawson thus had approximately a day's notice that he would be receiving the CMP rifle. Only upon receiving the CMP rifle could Mr. Lawson learn the gun's serial number, necessary to apply for a Chicago registration certificate for the firearm.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30.

31. Mr. Lawson relocated the rifle outside of Chicago and, on November 30, 2007 applied to register the rifle. On December 11, 2007, that application was refused pursuant to the policies complained of in this action.

ANSWER: The City admits that Mr. Lawson applied to the City for permission to register a rifle on November 30, 2007, and that on December 11, 2007, that application was refused pursuant to Chicago Municipal Code § 8-20-090. The City is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 31.

32. Mr. Lawson presently intends to possess the CMP rifle within his home, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action. Mr. Lawson fears arrest, criminal prosecution, incarceration, and fine if he were to possess the CMP rifle within his home.

ANSWER: The City is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32.

33. The Second Amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

ANSWER: The City admits that the Second Amendment to the United States Constitution states that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The City denies the remaining allegations contained in Paragraph 33.

34. At a minimum, the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, including a handgun, within the home.

ANSWER: The City denies the allegations contained in Paragraph 34.

35. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ANSWER: The City admits that the Fourteenth Amendment to the United States Constitution contains the language quoted in Paragraph 35. The City denies the remaining allegations contained in Paragraph 35.

36. Chicago Municipal Code § 8-20-040(a) mandates that

> All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm which is unregisterable under the provisions of this chapter.

ANSWER: The City admits that § 8-20-040(a) of the Chicago Municipal Code contains the language cited in Paragraph 36. The City denies that Paragraph

36 fully and completely cites the entirety of § 8-20-040(a). The City denies the remaining allegations contained in Paragraph 36.

37. Chicago Municipal Code § 8-20-050 provides: "No registration certificate shall be issued for any of the following types of firearms: . . . (c) handguns . . . " While Section 8-20-050(c) provides exceptions for certain handguns owned prior to the law's effective date, and handguns owned by police officers, security personnel, and private detectives, the provision, in conjunction with Section 8-20-040, generally bars the private home possession of handguns by law-abiding adult citizens.

ANSWER: The City admits that § 8-20-050 of the Chicago Municipal Code contains the language cited in Paragraph 37. The City denies that Paragraph 37 fully and completely cites the entirety of § 8-20-050. The City denies the remaining allegations contained in Paragraph 37.

38. Chicago Municipal Code § 8-20-090(a) provides: "A registration certificate shall be obtained prior to any person taking possession of a firearm from any source."

ANSWER: The City admits the allegations in Paragraph 38.

39. Chicago Municipal Code § 8-20-200 provides:

(a) Every registrant must renew his registration certificate annually. Applications for renewal shall be made by such registrants 60 days prior to the expiration of the current registration certificate.

(b) The application for renewal shall include the payment of a renewal fee as follows:

1 firearm. . . . $20.00; 2-10 firearms. . . . 25.00; More than ten firearms. . . . 35.00

(c) Failure to comply with the requirement for renewal of registration of a firearm shall cause that firearm to become unregisterable.

(d) All terms, conditions and requirements of this chapter for registration of firearms shall be applicable to renewal or registration of such firearms.

(e) The renewal fee shall not be applicable to duty-related handguns of peace officers domiciled in the City of Chicago.

ANSWER: The City admits the allegations contained in Paragraph 39, except that the City denies that § 8-20-200(b) of the Chicago Municipal Code contains semicolons.

40. Many Chicago gun owners fail to re-register their firearms every year. Among these recently was Alderman Richard Mell, whose firearms became unregisterable when he failed to timely renew his registration certificates.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

41. Accordingly, Alderman Mell proposed an ordinance amending the law to permit, for one month, lapsed guns to be re-registered if their owners had attempted to re-register their guns between May 1, 2007 and April 1, 2008, a period that would have covered his lapsed firearm registrations.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

42. Defendant Mayor Daley endorsed Mell's proposal, stating: "A lot of people go back and forth to their summer homes . . . A lot of people move their shotguns. A lot of 'em are bird hunters, gun collectors. . . . They move 'em back from Wisconsin, Michigan, [other] parts of Illinois."

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

43. Defendant Mayor Daley added: "It's one time [for] one month . . . You want to have 'em register. There's nothing wrong with that . . . People want to just register. A lot of 'em bring 'em back from hunting trips. So, why not?"

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

44. Speaking of Alderman Mell's desire to re-register his lapsed guns, Defendant Mayor Daley stated: "He has a home in Wisconsin. He brings 'em back and forth. He's not running out with a shotgun and hurting people."

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

45. The proposed re-registration amnesty bill was passed by the Chicago City Council, with the amnesty period extended to 120 days. The fee for re-registering a lapsed firearm under the amnesty bill is $60.00.

ANSWER: Pursuant to the Court's June 27, 2008 Memorandum Order, this paragraph is stricken.

46. A first violation of Chicago's ban on the ownership or possession of unregistered firearms within the home is punishable by a fine of "not less than $300.00, nor more than $500.00; or [incarceration] for not less than ten days nor more than 90 days or both." Chicago Municipal Code § 8-20-250. Subsequent violations are punishable by a fine of $500.00 and incarceration ranging from ninety days to six months. Id.

ANSWER: The City admits that § 8-20-250 of the Chicago Municipal Code states that "Any person who violates any provision of this chapter, where no other penalty is specifically provided, shall upon conviction for the first time, be fined not less than $300.00, nor more than $500.00; or be incarcerated for not less than ten days nor more than 90 days or both. Any subsequent conviction for a violation of this chapter shall be punishable by a fine of $500.00 and by incarceration for a term of not less than 90 days, nor more than six months." The City denies the remaining allegations contained in Paragraph 46.

FIRST CAUSE OF ACTION – HANDGUN BAN RIGHT TO KEEP AND BEAR ARMS U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

47. Paragraphs 1 through 46 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-46, above.

48. The Second Amendment right is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment.

ANSWER: The City denies the allegations contained in Paragraph 48.

49. The Second Amendment right to keep and bear arms is a privilege and immunity of United States citizenship which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate.

ANSWER: The City denies the allegations contained in Paragraph 49.

50. Handguns, as a class of weapons, are "arms" whose possession by law-abiding adult citizens is protected by the Second Amendment right to keep and bear arms.

ANSWER: The City denies the allegations contained in Paragraph 50.

51. By banning handguns, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 51. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

SECOND CAUSE OF ACTION – RE-REGISTRATION REQUIREMENT RIGHT TO KEEP AND BEAR ARMS U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

52. Paragraphs 1 through 51 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-51, above.

53. By requiring Plaintiffs to annually re-register each firearm, Defendants currently maintain and actively enforce a set of laws, customs, practices,

and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 53. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

THIRD CAUSE OF ACTION – PRE-ACQUISITION REGISTRATION REQUIREMENT RIGHT TO KEEP AND BEAR ARMS U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

54. Paragraphs 1 through 53 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-53, above.

55. By requiring Plaintiffs to register all firearms prior to their acquisition, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their

right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 55. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

FOURTH CAUSE OF ACTION – UNREGISTERABLE STATUS PENALTY RIGHT TO KEEP AND BEAR ARMS U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983

56. Paragraphs 1 through 55 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-55, above.

57. By declaring specific firearms "unregisterable" as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to keep and bear arms, in violation of the Second and

Fourteenth Amendments to the United States Constitution. Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 57. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

FIFTH CAUSE OF ACTION – UNREGISTERABLE STATUS PENALTY
EQUAL PROTECTION
U.S. CONST., AMEND. XIV,
42 U.S.C. § 1983

58. Paragraphs 1 through 57 are incorporated as though fully stated herein.

ANSWER: The City hereby incorporates its answers to Paragraphs 1-57, above.

59. By declaring specific firearms "unregisterable" as a penalty for not complying with registration requirements, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law which deprive individuals, including the Plaintiffs, of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

Plaintiffs are thus damaged in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional customs, policies, and practices.

ANSWER: The City denies the allegations contained in Paragraph 59. The City further denies that Plaintiffs are entitled to the relief sought in this Paragraph.

PRAYER FOR RELIEF

Plaintiffs request judgment be entered in their favor and against Defendants as follows:

1. An order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing Chicago Municipal Code § 8-20-050(c), barring registration of handguns; Chicago Municipal Code § 8-20-200, requiring the annual renewal of firearms registrations; Chicago Municipal Code § 8-20-090, mandating that registration certificates for firearms be obtained prior to taking possession of a firearm; Chicago Municipal Code § 8-20-040, as applied to prohibiting possession of an unregistered firearm within a period of time reasonably necessary to obtain registration; and any custom, policy, or practice of deeming

a firearm "unregisterable" for the sole reason that it has previously been not validly registered.

2. Attorney Fees and Costs pursuant to 42 U.S.C. § 1988;

3. Declaratory relief consistent with the injunction;

4. Costs of suit; and

5. Any other further relief as the Court deems just and appropriate. Dated: June 26, 2008.

ANSWER: The City denies that the Plaintiffs are entitled to the relief sought in the Prayer for Relief. The City further requests that judgment be entered in its favor and against Plaintiffs.

DEFENSE – FAILURE TO STATE A CLAIM

1. The Complaint fails to state any claims upon which relief can be granted.

JURY DEMAND

The City demands trial by jury.

Respectfully submitted,

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Dated: Sept. 5, 2008.

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, ILLINOIS STATE RIFLE ASSOCIATION, and SECOND AMENDMENT FOUNDATION, INC.,	)	Case No. 08-CV-3645
Plaintiffs,	)	
v.	)	
CITY OF CHICAGO,	)	
Defendant.	)	

ORDER

On December 4, 2008, the Court ruled it is bound by *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) to reject incorporation of the Second Amendment *via* the Fourteenth Amendment as against Defendant City of Chicago. Accordingly, the Court denied Plaintiffs' Rule 56 motion for summary judgment, holding Plaintiffs cannot prevail absent incorporation of the Second Amendment. On the same grounds as announced earlier by the Court, and over Plaintiffs' objection for the reasons stated in their Rule 56 and Rule 16 Motions and in open court, the Court hereby grants the contested December 9, 2008 oral motion of the Defendant City of Chicago, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings on Counts I-V of the Complaint. Judgment is hereby entered in favor of the City of Chicago and against Plaintiffs on all counts of the Complaint.

Dated: December 18, 2008.

ENTERED:

/s/ Milton I. Shadur
The Honorable
Milton I. Shadur
United States District
Court Judge

United States District Court
Northern District of Illinois
Eastern Division

McDonald **JUDGMENT IN A CIVIL CASE**

v. Case Number: 08 C 3645

City of Chicago

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of the City of Chicago and against Plaintiffs on all counts of the Complaint.

Michael W. Dobbins,
Clerk of Court

Date: 12/18/2008 /s/ S Newland
/s/ Sandy Newland,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse Room 2722 – 219 S. Dearborn Street Chicago, Illinois 60604	Office of the Clerk Phone: (312) 435-5850 www.ca7.uscourts.gov

[LOGO]

FINAL JUDGMENT

June 2, 2009

BEFORE: FRANK H. EASTERBROOK, Chief Judge
WILLIAM J. BAUER, Circuit Judge
RICHARD A. POSNER, Circuit Judge

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al., Plaintiffs-Appellants,	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 08-4241 and 08-4243 v.	Nos. 1:08-cv-03697 1:08-cv-03696
CITY OF CHICAGO and VILLAGE OF OAK PARK, Defendants-Appellees.	Milton I. Shadur, Judge.
OTIS MCDONALD, et. al., Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 08-4244 v.	No. 1:08-CV-03645
CITY OF CHICAGO, Defendant-Appellee.	Milton I. Shadur, Judge.

The judgments of the district court are **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

PETITIONER'S BRIEF

96 Pages - B
Batch 33
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(11)

No. 08-1521

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CORRECTED COPY

CITY OF CHICAGO, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆

PETITIONERS' BRIEF

TC+TA
59BW07

◆

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

PARTIES TO THE PROCEEDINGS

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the related case plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in either Second Amendment Foundation, Inc. or the Illinois State Rifle Association.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, Petition Appendix ("Pet. App.") 1, is published at 567 F.3d 856. The decision of the United States District Court for the Northern District of Illinois, Pet. App. 17, is unpublished.

◆

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2009. This Court granted the Petition for Writ of Certiorari on September 30, 2009. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

◆

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are printed in the Petition, at 2, and at Pet. App. 19-33, respectively.

◆

STATEMENT OF THE CASE

1. Respondent City of Chicago requires inhabitants to register their firearms, but generally prohibits the registration of handguns. Chi. Mun. Code §§8-20-040(a), 8-20-050(c). This handgun ban functions

identically to that struck down as infringing the Second Amendment rights of District of Columbia residents. *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008).

Firearm registrants must immediately notify police of any changes in their registration information, including the loss or other disposition of a gun or registration certificate. Chi. Mun. Code §8-20-140. However, Respondent requires annual re-registration of firearms, initiated at least sixty days prior to the registration's expiration. Chi. Mun. Code §8-20-200. Re-registration requires the payment of additional fees and re-submission of all initial registration materials. *Id.*

If the annual re-registration process is not timely completed, the particular gun whose registration lapses becomes "unregisterable" and thus illegal to possess in Chicago. *Id.* An identical penalty befalls any firearm (and by extension, any owner of that firearm) that is acquired prior to its registration. Chi. Mun. Code §8-20-090.

On June 11, 2008, Respondent enacted a 120-day amnesty period allowing the re-registration of firearms whose registration had lapsed. The amnesty ordinance was sponsored by a city alderman who had neglected to timely re-register his firearms. App. 53.

A first violation of Chicago's ban on the ownership or possession of unregistered firearms within the home is punishable either by a fine ranging from $300 to $500, incarceration ranging from ten to ninety days, or both. Chi. Mun. Code §8-20-250. Subsequent violations are punishable by a fine of $500 and incarceration ranging from ninety days to six months. *Id.*

2. Respondent denied each individual Petitioner's attempt to register a handgun pursuant to the handgun registration ban. Pet. App. 34-45. Petitioners Orlov and David Lawson were also denied handgun registrations pursuant to the city's pre-acquisition registration requirement. Pet. App. 37, 40.

As the registered owners of long arms, Petitioners McDonald and David Lawson are subjected to the city's re-registration requirements. App. 40-41, 44. The registration for one of Petitioner David Lawson's rifles lapsed, rendering it unregisterable. App. 41.

Petitioner David Lawson also acquired a rifle through the federal Civilian Marksmanship Program ("CMP"), which sent the rifle directly to his Chicago home, rendering it automatically unregisterable as it was acquired prior to its possible registration. Respondent denied Lawson's administrative appeal of its refusal to register the CMP rifle. Pet. App. 46-48, App. 41-42.

3. On June 26, 2008, Petitioners filed suit in the United States District Court for the Northern District of Illinois challenging Chicago's handgun ban, re-registration and pre-acquisition registration requirements, and non-registrability penalty, as violating their Second and Fourteenth Amendment rights.

Petitioners moved for summary judgment on July 31, 2008. The District Court advised that the case should be resolved on a motion to narrow the legal issues under Fed. R. Civ. P. 16. Petitioners thereafter filed such a motion, seeking to establish the Second Amendment binds Respondent under the Fourteenth Amendment's Privileges or Immunities and Due Process Clauses.

On December 4, 2008, the District Court denied Petitioners' Rule 16 and summary judgment motions, citing *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982). Pet. App. 18. *Quilici* followed *Presser* v. *Illinois*, 116 U.S. 252 (1886), declining to apply the Second Amendment to the states through the Privileges or Immunities Clause. *Quilici* had refused consideration of "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments," *Quilici*, 695 F.2d at 270 n.8, key aspects of the selective incorporation analysis.

Because it held the Second Amendment inapplicable to Respondent, the District Court subsequently granted Respondent's oral motion for judgment on the pleadings. App. 83-84.

On appeal, the Seventh Circuit affirmed, holding the case controlled by this Court's opinions in *United States* v. *Cruikshank*, 92 U.S. 542 (1876), *Presser*, *supra*, and *Miller* v. *Texas*, 153 U.S. 535 (1894). Pet. App. 3. The lower court reached this conclusion despite acknowledging that these three cases "did not consider [the] possibility, which had yet to be devised when those decisions were rendered," that the Second Amendment is selectively incorporated. Pet. App. 2. Respondents acknowledge that the court below did not address the selective incorporation question. Br. in Opp'n 5.

◆

SUMMARY OF ARGUMENT

1. Although this Court has never squarely addressed either the original public meaning or legislative history of the Fourteenth Amendment, it nonetheless follows a tradition of upholding individual liberty. Should this Court do what the lower courts did not, and apply settled precedent to determine whether the Second Amendment is incorporated as against the States via the Fourteenth Amendment's Due Process Clause, reversal is mandatory.

And yet this Court's various approaches to the Fourteenth Amendment fall short of upholding this provision's essential promise. State violations of rights understood and intended by the ratifying public to receive significant Fourteenth Amendment protection are not meaningfully secured by federal courts. Moreover, the failure to honor the Fourteenth Amendment's original public meaning foments confusion and controversy as courts pursue other approaches to protecting core individual rights.

This case presents a rare opportunity to correct a serious error, honor the Fourteenth Amendment's true meaning, and bring a needed measure of clarity to this Court's civil-rights jurisprudence.

2. The Fourteenth Amendment's Privileges or Immunities Clause forbids the States from abridging civil rights, including those codified in the Bill of Rights. This was the frequently expressed, never controverted purpose of the Amendment's framers, an understanding shared by the ratifying public. With the Fourteenth Amendment, Americans long dissatisfied with state treatment of free blacks and abolitionists broadly established federal birthright citizenship for all people. And they imbued that citizenship with significant protection for the individual rights that states rampantly violated, including, unambiguously, the right to keep and bear arms.

The language chosen to contain the rights of federal citizenship—"privileges or immunities"—enjoyed an established definition. Long synonymous with "rights" generally, the term acquired additional heft with a landmark decision interpreting Article IV, Section 2's guaranty that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" to encompass a broad range of rights believed naturally inherent in human beings and secured by any free government. *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). On the Civil War's eve, this Court invoked "privileges and immunities" to define citizenship, albeit in the negative sense describing what would be denied to African Americans. In reaction, the Fourteenth Amendment reflected the broad common usage of "privileges or immunities," including the pre-existent natural rights of the sort identified in *Corfield* and the personal rights guaranteed by the Bill of Rights.

3. The Privileges or Immunities Clause was all but erased from the Constitution in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Slaughter-House* refused to consider the clause's original public meaning or its framers' well-known intent. Instead, the *SlaughterHouse* majority identified substitute language in place of Article IV's actual text, and utilized this new constitutional language to justify the imposition of its own policies upon the Fourteenth Amendment's contrary command.

SlaughterHouse transformed the Framers' broad protection of individual liberty, commonly understood, into a clause securing only the most obscure rights, rarely exercised by any American and with which the States could not ordinarily interfere even had they the will to do so. It "defeat[ed], by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted . . . turn[ing], as it were, what was meant for bread into a stone." *SlaughterHouse*, 83 U.S. at 129 (Swayne, J., dissenting).

As mandated by *SlaughterHouse*'s rationale, this Court soon held that the Privileges or Immunities Clause did not secure Americans' First and Second

Amendment rights against state action. *Cruikshank*, 92 U.S. 542; *Presser* v. *Illinois*, 116 U.S. 252 (Second Amendment); *cf. Miller*, 153 U.S. 535 (stating in dicta that the Second and Fourth Amendments are inapplicable to states).

SlaughterHouse's illegitimacy has long been all-but-universally understood. It deserves to be acknowledged by this Court. Because *SlaughterHouse* rests on language not actually in the Constitution, contradicts the Fourteenth Amendment's original textual meaning, defies the Framers' intent, and supplies a nonsensical definition for Section One's key protection of civil rights, overruling this error and its progeny remains imperative. No valid reliance interests flow from the wrongful deprivation of constitutional liberties. The reliance interest to be fulfilled remains Americans' expectation that the constitutional amendment their ancestors ratified to protect their rights from state infringement be given its full effect.

4. The Fourteenth Amendment's requirement that no person be deprived of life, liberty or property without due process of law has long been properly understood to offer substantive as well as procedural protection. Accordingly, most of the rights secured in the first eight amendments have been deemed incorporated as against the States.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149

(1968), or "necessary to an Anglo-American regime of ordered liberty," *id.* at 150 n.14. *Duncan* looks to the right's historical acceptance in our nation, its recognition by the States (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

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ARGUMENT

I. THE RIGHT TO KEEP AND BEAR ARMS IS AMONG THE PRIVILEGES OR IMMUNITIES OF AMERICAN CITIZENSHIP THAT STATES MAY NOT ABRIDGE.

"[W]e are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2788 (2008) (citations and internal quotation marks omitted). Constitutional interpretation may also rely upon the framers' apparent intent. *Id.* at 2822 (Stevens, J., dissenting). "Before invoking the [Privileges or Immunities] Clause, . . . we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant."

Saenz v. *Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).[1]

In this case, either interpretive method leads to the same result. In 1868, the "privileges" and "immunities" of American citizenship were popularly understood to include a broad array of pre-existent natural rights believed secured by all free governments, as well as the personal rights memorialized in the Bill of Rights. The Fourteenth Amendment's framers used language that successfully accomplished their intent.

A. A Constitutional Amendment Broadly Securing Americans' Rights Proved Necessary Following the Civil War.

The Fourteenth Amendment was understood and intended to provide the Union a legal framework commensurate with its military victory. The Thirteenth Amendment ended slavery, but did not improve the legal status of free blacks and their supporters. Repression of civil rights by state officials had long agitated Americans prior to the war. Continuing outrages in the unreconstructed South could no longer be tolerated.

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[1] Although the primary inquiry explores the text's original public meaning, unambiguously expressed legislative intent can supply evidence of public meaning, and exclude interpretations that are nonsensical in historical context.

Chief among the North's complaints, "[b]lacks were routinely disarmed by Southern States . . . Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Heller*, 128 S. Ct. at 2810 (collecting examples). Initially, the Army sought to secure the right to arms, among other rights, by fiat. For example, in South Carolina, the occupying Union commander ordered that "[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed." Order of Gen. Sickles, Disregarding the Code, Jan. 17, 1866, in POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 37 (Edward McPheron, ed., 2d ed. 1875).

The freedmen appreciated the protection of their rights to armed self-defense:

> We are glad to learn that Gen. Scott, Commissioner for this State, has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present.

CHRISTIAN RECORDER (AFRICAN METHODIST EPISCOPAL CHURCH), Feb. 24, 1866, at 1, col. 7-2, col. 1.

But the South could not remain forever under military rule, and Congress noted the situation. "[M]en who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other sections of the country." Cong. Globe, 39th Cong., 1st Sess. 40 (1865) (Statement of Sen. Wilson); House Ex. Doc. No. 70, *id.* at 236-39 (1866) (Kentucky "marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs," while outlaws "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders").

Congress responded by enacting the Civil Rights Act of 1866, and the renewed Freedmen's Bureau Act. The Civil Rights Act established birthright American citizenship, and secured to all "citizens of the United States," against state action, their rights

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

14 Stat. 27 (April 9, 1866).

Likewise, the Freedmen's Bureau Act secured "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms . . . ." 14 Stat. 173, 176 (July 16, 1866).

Presidential vetoes and Southern resistance fueled doubts about such mere legislative approaches to Reconstruction, as did two antebellum precedents: *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), holding blacks could not be citizens; and *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), holding that states were not bound to respect constitutionally-guaranteed rights absent specific textual instruction.

Sympathetic Northerners saw the need to constitutionalize civil-rights protection. Ohio Representative John Bingham reacted to the Civil Rights Act by expressing his "earnest desire to have the bill of rights in [the] Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866).

Bingham would author the Fourteenth Amendment's Section One, which achieved this purpose.

Dismantling *Dred Scott* required securing both federal and state citizenship. Securing state citizenship directly responded to *Dred Scott*'s holding that states could not be compelled to accept blacks as citizens. *Cf. Cooper* v. *Mayor of Savannah*, 4 Ga. 68, 72 (1848) ("[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . . "); *Aldridge* v. *Commonwealth*, 4 Va. 447, 449 (1824) (same). In the absence of constitutional correction, states could deprive black residents of state citizenship benefits—even as Article IV required they extend those benefits to visiting citizens of other states.[2]

Indeed, southern courts also denied Congress's authority to establish federal citizenship. Mississippi's Chief Justice held the Civil Rights Act unconstitutional in upholding the conviction of black Union veteran James Lewis for carrying a gun, reasoning that only states could establish citizenship—to which Lewis was not entitled. *Decision of Chief Justice Handy, Declaring the Civil Rights Bill Unconstitutional,* N.Y. TIMES, Oct. 26, 1866, at 2, col. 2.

The Fourteenth Amendment left unaddressed the content of state citizenship. But there can be no serious question that the Fourteenth Amendment's framers intended to include basic civil rights, such as those identified in the Civil Rights Act, together with those memorialized in the Bill of Rights, within the protection of federal citizenship.

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[2] Abolitionists had long attacked this incongruity. *See A Fact*, THE LIBERATOR, Mar. 26, 1831, at 51, col. 1 (suggesting a Massachusetts free black citizen challenge a Savannah racial tax assessment under Article IV, §2).

B. "Privileges" and "Immunities" Were Popularly Understood to Encompass Pre-Existent Fundamental Rights, Including Those Enumerated in the Bill of Rights.

Whatever its language might signify to modern ears, "an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption, . . . For it was for public adoption that it was proposed.'" *Adamson* v. *California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (citation omitted), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964).

An examination of what "privileges" and "immunities" of citizenship meant to the Fourteenth Amendment's framers shows that this language was selected neither casually nor at random.

> The words "privileges and immunities" often were used to describe fundamental rights and liberties such as those in the Federal Bill of Rights . . . . This usage stretches from the English and Colonial period, in which such rights were considered privileges of freeborn Englishmen, through the struggle for American independence, to the American Civil War and the framing of the Fourteenth Amendment and beyond.

Michael Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1090 (2000) (containing exhaustive survey of American historical usage of "privileges" and "immunities").

1. Privileges and Immunities in the Early Republic.

The national debate over the Bill of Rights frequently invoked "privileges" and "immunities" to refer to the rights eventually codified therein. *Id.* at 1098-1104.

James Madison proposed that no state should violate "equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases" under Article I, Section 10, 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1027 (1971), "because it must be admitted . . . that the State governments are as liable to attack the invaluable privileges as the General Government is . . . . " *Id.* at 1033.

Referring to the Privileges and Immunities Clause of Article IV, Section 2, Madison interchangeably employed "privileges" and "rights" in discussing the Constitution's improvement over the Articles of Confederation with respect to treatment shown visiting citizens by the States. THE FEDERALIST No. 42 (James Madison). Justice Washington supplied a most-influential early definition of these "privileges and immunities":

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens

> of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . .

Corfield, 6 F. Cas. at 551.

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52. "[S]ome" examples of privileges and immunities "deemed fundamental" included:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . [and] the elective franchise . . . .

Id. at 552.

2. Privileges And Immunities In Antebellum Usage.

The Fourteenth Amendment's framers were heavily influenced by abolitionist thought. *See generally* Jacobus tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Richard Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 Cath. U. L. Rev. 881 (1988). Abolitionists echoed *Corfield*'s definition of "privileges and immunities," condemning slave state mistreatment of free blacks and their supporters as Article IV violations.

Quoting Article IV, Section 2, Representative Horace Mann chided the President for assisting slave apprehension, while slave states searched the mails for abolitionist sermons to burn, offered bounties for the abduction of individual Northerners, and imposed "unconstitutional imprisonment" upon free black sailors calling on southern ports. Cong. Globe, 31st Cong., 2nd Sess. 249 (1851).

> [E]very man found within the limits of a free state is prima facie FREE . . . [and] has a right to stand on this legal presumption, and to claim all the privileges and immunities that grow out of it until his presumed freedom is wrested from him by legal proof.

Id. at 241.

Referring to Article IV, Section 2 in protest of an Ohio law restricting the immigration of free blacks, an Ohio Senate committee asked:

> Was it not intended to secure to all the citizens, in each state, the right of ingress and egress to and from them, and the privileges of trade, commerce, and employment in them, of acquiring and holding property, and sustaining and defending life and liberty in any state in the Union? Does it not form one of the conditions of our national compact?

Unconstitutional Laws of Ohio, THE LIBERATOR, Apr. 6, 1838, at 53, col. 5.

Months later, an abolitionist newspaper grouped "the privileges and immunities of citizens in every State" with a host of rights enumerated in the first eight amendments, including "the uninfringeable right to keep and bear arms." *The Claim of Property in Man*, THE LIBERATOR, Sept. 21, 1838, at 149, col. 6.

Influential abolitionist attorney Joel Tiffany explained:

> What are the privileges, and immunities of citizenship, of the United States? . . . [T]o be a citizen of the United States, is to be entitled to the benefit of all the guarantys of the Federal Constitution for personal security, personal liberty, and private property.

Joel Tiffany, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 97 (1849). Among these is "the right to keep and bear arms." *Id.* at 99.

Not only abolitionists held an expansive view of "privileges and immunities." One definition of citizenship's "privileges and immunities" foremost on the public mind would have been that supplied by *Dred Scott*:

> [I]f [blacks] were so received, and entitled to *the privileges and immunities of citizens*, it would exempt them from the operation of the special laws and from the police regulations [related to blacks]. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*.

Dred Scott, 60 U.S. at 416-17 (emphasis added).

Abolitionists found that *Dred Scott*'s description of "privileges and immunities" ironically underscored the decision's essential injustice:

> Thank heaven! there are higher *privileges* embraced in this term, "Citizen of the United states," than all that comes to; and it is of these *privileges and rights* that the colored man is deprived, and it is of that deprivation he complains. I could find, sir, in that very

> *Dred Scott* decision, an enumeration, by the Supreme Court itself, of the rights guaranteed by the Constitution of the United States . . . *Those rights are to bear arms* . . . and various other rights therein enumerated, entirely distinct from that class of political rights . . . Of all these, in the express terms of the decision, the colored man is deprived . . .

Who Are American Citizens?, THE LIBERATOR, Jan. 21, 1859, at 10, col. 2 (emphasis added) (quoting Massachusetts State Rep. Wells).

Illinois Rep. Owen Lovejoy, brother of abolitionist martyr Rev. Elijah Lovejoy, insisted he had

> the privilege, as an American citizen, of writing my name and recommending the circulation of any and every book . . . the right of discussing this question of slavery anywhere, on any square foot of American soil . . . to which the privileges and immunities of the Constitution extend. Under that Constitution, which guaranties to me free speech.

Cong. Globe, 36th Cong., 1st Sess. app. 205 (1860).

3. Privileges and Immunities Among the Fourteenth Amendment's Framers.

The Privileges or Immunities Clause was intended to constitutionalize the preexistent natural rights protected by the Civil Rights Act, including the rights of personal security. Additionally, it was meant to protect the personal guarantees enumerated in the Bill of Rights. The framers of the Fourteenth Amendment accomplished their purpose by adopting the language of "privileges or immunities," the public meaning of which had come to include both sets of rights.

"[D]ictionaries in the 1860s treated these terms as synonyms. Accordingly, the term 'privilege or immunities' can easily be read to denote, at the least, the rights and freedoms enumerated in the Bill of Rights." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1302 (2000) (hereafter "Tribe") (citing WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1039 (1866) (listing "immunity" and "right" as synonyms of "[p]rivilege"); *id.* at 542 (defining "[f]reedom" as "particular privileges; . . . immunity"); *id.* at 661 (defining "[i]mmunity" as "[f]reedom from an obligation" or a "[p]articular privilege"); *id.* at 1140 (defining "[r]ight" as "[p]rivilege or immunity granted by authority")).

At least one judge in 1866 understood that the right to arms is a "privilege" of citizenship:

> The citizen has the right to bear arms in defence of himself, secured by the constitution. . . . *Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen? It is a natural and personal right—the right of self-preservation* . . . [t]he citizens of the state and other white persons are allowed to carry arms, *the freedmen can have no adequate protection*

> *against acts of violence unless they are allowed the same privilege.*

N.Y. TIMES, Oct. 26, 1866, at 2, col. 2 ("cases of Wash Lowe and other discharged United States colored soldiers").

By 1859, Bingham firmly believed that "the Constitution of the United States does not exclude [blacks] from the body politic, and the privileges and immunities of citizens of the United States." Cong. Globe, 35th Cong., 2nd Sess. 984-85 (1859). Protesting Oregon's admission to the Union owing to the state's exclusion of blacks, Bingham declared,

> I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the "privileges and immunities" of a citizen of the United States . . . . I maintain that the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all *the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property*, and their due protection in the enjoyment thereof by law.

Id. (emphasis added).

Recalling *Corfield*'s definition of "privileges and immunities," Bingham continued, "I cannot, and will not, consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights," which are "those rights common to all men, and to protect which, not to confer, all good governments are instituted." *Id.* at 985.

Bingham would add enumerated rights to his vision of "privileges and immunities." For example, he referred to the Eighth Amendment's Cruel and Unusual Punishment Clause as among the "guarantied privileges" the Fourteenth Amendment would protect. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Two years earlier, Rep. James Wilson referenced "the privilege of free discussion." Cong. Globe, 38th Cong., 1st Sess. 1202 (1864).

Introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob Howard explicitly defined "privileges" and "immunities" as including *Corfield* rights, as well as the personal rights secured by the Bill of Rights. Bingham and others had referred to rights both enumerated and unenumerated as "privileges" and "immunities." Howard's critical introductory speech unified both sources.

After reciting *Corfield*'s definition of "privileges and immunities," Howard continued:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent

> and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . and the right to keep and to bear arms . . . .
>
> [H]ere is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . .

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

The Fourteenth Amendment's opponents shared this broad view of the Privileges or Immunities Clause. Representative Rogers stated,

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.

Cong. Globe, 39th Cong., 1st Sess. 2538 (1866).

In sum, a straight line of popular understanding of "privileges" and "immunities" runs from Madison through *Corfield*, leading abolitionists, *Dred Scott*, and the Fourteenth Amendment's framers. The "privileges" and "immunities" of American citizens include two sets of overlapping rights: the natural, fundamental rights, believed to fall under Article IV, Section 2, and the rights codified in the first eight amendments.

C. The Fourteenth Amendment's Framers Intended to Apply Fundamental Rights, Including Those Secured in the Bill of Rights, Against the States.

Identifying the rights of American citizenship was insufficient. The Privileges or Immunities Clause would have to be designed as an enforcement mechanism.

> With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

Adamson, 332 U.S. at 72 (Black, J., dissenting).

This question is now squarely before the Court.

Introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob

Howard described the personal guarantees of the Bill of Rights, in addition to *Corfield's* delineated natural rights, as being among the privileges and immunities of federal citizenship. He then declared:

> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . there is no power given in the Constitution to enforce and to carry out any of these guarantees . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).

The broad array of rights Howard declared would be enforced were earlier encompassed by the Civil Rights Act that the Amendment sought to constitutionalize. "[C]ivil rights are the natural rights of man." *Id.* at 1117 (Statement of Rep. Wilson). "[T]he term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country." *Id.* at 1291 (Statement of Rep. Bingham).

Representative Broomall connected the "civil rights" protected by the Act to *Corfield* privileges and immunities:

> For thirty years prior to 1860 everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right of domicil, the right to sue, the writ of *habeas corpus*, and the right of petition.

Id. at 1263. Representative Raymond explained that the Act's broad language also encompassed "the right of free passage . . . a right to defend [one]self . . . to bear arms . . . [and] to testify in the Federal courts . . . " *Id.* at 1266.[3]

> If the states would all observe the rights of our citizens, there would be no need of this bill. If the states would all practice the constitutional declaration, that [reciting Article IV, §2 Privileges and Immunities Clause], and enforce it, as meaning that the citizen has [reciting *Corfield*'s natural rights definition] we might very well refrain from the enactment of this bill into a law.

Id. at 1117-18 (Statement of Rep. Wilson).

And were it not for *Dred Scott* and *Barron*, Congress might have been satisfied with the Civil Rights Act, and refrained from submitting the Fourteenth

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[3] Similarly, when the House added an express protection of the right to arms to the general language protecting the "security of person and estate" in the Freedmen's Bureau Act, Senator Trumbull explained that it "[did] not alter the meaning." *Id.* at 743.

Amendment for ratification. Opponents understood as much, declaring Section One "no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill." *Id.* at 2538 (Statement of Rep. Rogers).

"Congress in 1866 understood perfectly well that section one was intended to repudiate *Barron*. 'Over and over [Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights'—a phrase he used more than a dozen times in a key speech . . . .'" Michael Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 19 (2007) (quoting Akhil Amar, THE BILL OF RIGHTS 182 (1998)).

> [T]hese great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States . . . [T]he legislative, executive, and judicial officers of eleven States within this Union within the last five years . . . have violated in every sense of the word these provisions . . . the enforcement of which are absolutely essential to American nationality.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866) (Statement of Rep. Bingham).

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for

> violation of the oaths enjoined upon them by their Constitution? . . . Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

Id. at 1090.

> I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights . . .

Id. at 1291-92. Although Bingham at one point stated that the amendment would have "that extent—no more," *id.* at 1088, it would be a mistake to simplistically seize on this remark out of context, for Bingham then explained the amendment "seeks the enforcement of" Article IV, Section 2. *Id.* at 1089.

That states were not already bound to respect federal civil rights surprised one representative, who demanded Bingham produce precedent proving the necessity of amending the Constitution. Bingham obliged:

> I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment . . . on this subject I refer the House and the country to a decision of the Supreme Court . . . in the case of *Barron* . . . I read one further decision on this subject—

> the case of the *Lessee of Livingston* vs. *Moore* . . . . Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights . . .

Id. at 1089-90 (citing *Barron*, 32 U.S. (7 Pet.) 243 and *Livingston* v. *Moore*, 32 U.S. (7 Pet.) 469 (1833) ("[I]t is now settled that those amendments do not extend to the States")).

Bingham would later explain that his desire to defeat *Barron* directed the choice of language employed in the Privileges or Immunities Clause:

> [T]he Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention." . . . Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;" imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution . . .

Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871). "*Barron* asked for 'Simon Says' language, and that's exactly what the Fourteenth Amendment gave [the Court]." Amar, *supra*, at 164.

This understanding of the Amendment was widely shared. Thaddeus Stevens stated in offering the Fourteenth Amendment: "[T]he Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect . . . " Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Congressman Donnelly demanded "all the guarantees of the Constitution" be enforced, lest "the old reign of terror revive in the South." *Id.* at 586. Proponents viewed constitutional security for privileges and immunities just as broadly, interpreting it to secure "the natural rights which necessarily pertain to citizenship." *Id.* at 1088 (Statement of Rep. Woodbridge).

"Not a single Senator or Congressman contradicted" Bingham and Howard's assertions that the Privileges or Immunities Clause would apply the Bill of Rights to the States. Michael Curtis, NO STATE SHALL ABRIDGE 91 (1986). Indeed, approximately thirty speeches in both houses supported this view. Akhil Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 Harv. J.L. Pub. Pol'y 443, 447 (1996).

If the Fourteenth Amendment is to be interpreted by reference to the declared intentions of its framers, the right to keep and bear arms clearly applies to Respondent.

D. The Ratifying Nation Understood that the Privileges or Immunities Clause Encompasses the Second Amendment.

That the Fourteenth Amendment compels state obedience to fundamental rights, including those codified in the Bill of Rights, did not remain a secret from the ratifying public. The nation knew full-well what the Framers intended to achieve, and shared their understanding of the Privileges or Immunities Clause.

1. Dissemination of Congressional Intent.

Congressional debates explaining the Amendment's impact received wide coverage in the press. The *New York Herald*, the largest circulation paper of the day, carried Bingham's February 26, 1866 speech on its front page. David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 Whittier L. Rev. 695, 711-12 (2009) ("Hardy") (citation omitted). The *Herald*, along with the *Chicago Tribune*, carried on their front pages Bingham's February 28, 1866 speech, stridently demanding enforcement of the Bill of Rights among other privileges and immunities. *Id.* at 712 (citations omitted).

Bingham's speeches were also covered by the *New York Times*, and smaller newspapers, including the *Daily National Intelligencer* (Washington, D.C.), *Ft. Wayne's Daily Gazette*, and the *Bangor Daily Whig & Courier*. *Id.* at 712-13 (citations omitted).

> Bingham's hometown newspaper, the *Cadiz Republican*, reprinted many of his speeches; others were bound in pamphlet form for mass distribution. Since these speeches were intended for circulation among constituents as well, they "provide clues to the sentiments of [those] constituents."

Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 69 n.66 (1993) (hereafter "Aynes") (quoting Kenneth Stamp, AMERICA IN 1857, at viii (1990)).[4]

Senator Howard's speech, defining "Privileges or Immunities" to contain *Corfield*'s natural rights and the Bill of Rights, received even greater play. Its core aspects were reprinted in the *New York Times, New York Herald, Philadelphia Inquirer, National Daily Intelligencer,* among others, and was encapsulated in other newspapers. Hardy, at 715-17 (citations omitted). One reported:

> The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government.

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[4] Order sheet records for the printing of Bingham's speeches ran into the thousands. *Id.*

Reconstruction: The Debate in the Senate, BOSTON DAILY ADVERTISER, May 24, 1866, at 1, col. 2.

The Reconstruction Committee report detailed the need for a constitutional requirement binding the states to respect civil rights. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. 39-30 (1866); Sen. Rep. 39-112 (1866).

> [A] student of the period reports that 150,000 copies of the Report and the testimony which it contained were printed in order that senators and representatives might distribute them among their constituents. Apparently the Report was widely reprinted in the press and used as a campaign document in the election of 1866 [and] was "eagerly . . . perused" for information concerning "conditions in the South."

Adamson, 332 U.S. at 108-9 (Black, J., dissenting) (alteration in original) (citing Benjamin Kendrick, JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 265 (1914)).

2. Ratification Debate.

The proposed amendment generated letters to editors, op-ed pieces, and magazine expositions discussing its impact. Paraphrasing *Corfield*, and Senator Howard's widely-publicized speech, "Madison" wrote the *New York Times*:

> The one great issue really settled is, that the people will not lose the fruits of the victory

> won in the suppression of the rebellion. They demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction--*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; *to keep and bear arms in his own defence*, to be tried and sustained in every way as an equal . . . Let us see how far the Constitutional Amendment is calculated to effect this object . . .
>
> What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.

"Madison," *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2, cols. 2-3 (second emphasis added).

Twelve days before its ratification, *The Nation* explained that the Amendment "would, indeed, be almost a revolution; it would give to the liberty of the individual inhabitant the will of the nation as its basis, instead of the will of a State." *Pomeroy's Constitutional Law*, THE NATION, July 16, 1868, at 54.

Negative Southern reaction confirmed the proposed Amendment's impact. The Texas House Committee tasked with reviewing the amendment urged its rejection:

> [I]n these privileges would be embraced the exercise of suffrage at the polls, participation in jury duty in all cases, bearing arms in the militia, and other matters which need not be here enumerated . . . these [are] "privileges and immunities," now sought to be forced on the Southern States.

TEX. HOUSE JRNL., 11TH LEGISLATURE, 578 (1866).[5]

Southern resistance to the Privileges or Immunities Clause manifested itself in President Johnson's proposed compromise. The alternative amendment duplicated Section One's language with one exception: Article IV's Privileges and Immunities Clause was repeated in place of the Privileges or Immunities Clause. 1 Walter Fleming, DOCUMENTARY HISTORY OF RECONSTRUCTION 238 (1906).

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[5] Individuals bearing arms in an organized militia "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *United States* v. *Miller*, 307 U.S. 174, 179 (1939).

Interior Secretary Orville Browning publicly conveyed President Johnson's opposition to the Fourteenth Amendment, predicting the Due Process Clause would "subordinate the State judiciaries in all things to Federal supervision and control; [and] totally annihilate the independence and sovereignty of State judiciaries," in civil and criminal matters. Browning charged the Amendment would be unnecessary as states could be entrusted with the protection of civil rights. *The Political Situation: Letter from Secretary Browning*, N.Y. TIMES, Oct. 24, 1866, at 1, col. 1.

The *New York Times* retorted:

> The Constitution of the United States . . . provides that "the right of the people to keep and bear arms shall not be infringed." But this restriction is . . . a restriction upon the power of the United States alone, and gave to James Lewis no protection against the law of Mississippi, which deprived him, because of his color, of a right which every white man possessed.

Mr. Browning's Letter and Judge Handy's Decision, N.Y. TIMES, Oct. 28, 1866, at 4, col. 1; *see discussion, supra*, at 14.

Mississippi's constitution contained a Second Amendment analog, "[b]ut Judge Handy got round that safeguard very easily . . . which he could hardly have done if the proposed amendment had formed part of the Constitution." *Id.* at col. 2. Repeating *Wash*

Lowe's description of the right to carry arms as a "privilege," *supra*, 22-23, the *Times* concluded: "It is against just such legislation and such judicial decisions that the first section of the Amendment is designed to furnish a protection." *Id.*

Northern debate confirmed this point. Speaking before constituents, Ohio Congressman Columbus Delano declared that citizens

> have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.

CINCINNATI COMMERCIAL, Aug. 31, 1866, at 2, col. 3.

Speaking in Philadelphia, Connecticut Governor Joseph Hawley reportedly stated that

> [t]here were men who had been honorably discharged from our armies who had been ruthlessly stripped of the very weapons given them by the Government for their fidelity to it. He claimed that the war was not over until every man should have free and uninterrupted possession of every right guaranteed him by the Constitution.

PHILADELPHIA INQUIRER, Sept. 5, 1866, at 8, col. 3.

Summing up a wide array of speeches debating the amendment's ratification, one commentator concluded:

> The declarations and statements of newspapers, writers and speakers, . . . show very clearly . . . the general opinion held in the North . . . that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States.

Horace Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908). Flack's survey overlooked statements specifically contemplating the Bill of Rights' application to the states, some of which are noted here, but he nonetheless "inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it." *Id.* at 153-54.

3. Legal Scholarship.

The earliest treatises covering the Fourteenth Amendment period asserted that it applied fundamental rights. Pomeroy referred to "the immunities and privileges guarded by the Bill of Rights." John Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 147 (1868). Describing *Barron* as "unfortunate," *id.* at 149, Pomeroy added that "a remedy is easy, and the question of its adoption is now pending before the people," referring to the Fourteenth Amendment. *Id.* at 151.

Judge Farrar agreed. Referring to precedent holding the Bill of Rights inapplicable to the states, Farrar wrote: "All these decisions . . . are entirely swept away by the 14th amendment." Timothy Farrar, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (2d ed. 1869). Writing during the Fourteenth Amendment's ratification period, Judge Paschal offered that "[t]he new feature declared is that the general principles, which had been construed to apply only to the national government, are thus imposed upon the States." George Paschal, THE CONSTITUTION OF THE UNITED STATES 290 (1868). Added Israel Andrews:

> And as it has been maintained that the first eight Amendments had no reference to the State governments, but were restraints upon the general government only, this Fourteenth Amendment declares explicitly that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Israel Andrews, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 274 (1874).

It is simply impossible to maintain that the public, including political leaders, common citizens, and the Bar, did not comprehend that the Privileges or Immunities Clause applies fundamental civil rights against the States. This understanding was widely communicated, and never denied.

II. *THE SLAUGHTERHOUSE CASES, UNITED STATES V. CRUIKSHANK*, AND *PRESSER V. ILLINOIS* MUST BE OVERRULED.

As late as 1937, this Court referred to the Bill of Rights as securing "privileges" and "immunities," in describing the "exclusion of . . . immunities and privileges from the privileges and immunities protected against the action of the states . . . ." *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937), *overruled by Benton* v. *Maryland*, 395 U.S. 784 (1969).

The error should have been self-evident. But *Palko* described accurately the state of affairs produced by *The SlaughterHouse Cases* and its unavoidable progeny, *Cruikshank* and *Presser*. These cases established that the States could continue to violate virtually all privileges and immunities of American citizens, including those codified in the Bill of Rights, notwithstanding Section One's clear textual command to the contrary.

One notable scholar described *SlaughterHouse* as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court." Charles Black, Jr., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 55 (1997). The decision, and its progeny, lack legitimacy. Faced with a clear conflict between precedent and the Constitution, this Court should uphold the Constitution.

A. This Court's Privileges or Immunities Doctrine Is Profoundly Erroneous.

The earliest federal court decisions interpreting the Fourteenth Amendment correctly interpreted the Privileges or Immunities Clause. Before being reversed by the Supreme Court, Justice Bradley held New Orleans's slaughtering monopoly unconstitutional as states were forbidden from "interfer[ing] with the fundamental privileges and immunities of American citizens." *Live-Stock Dealers' & Butchers' Ass'n* v. *Crescent City Live-Stock Landing & Slaughter-House Co.,* 15 F. Cas. 649 (C.C.D. La. 1870). Justice Bradley thereafter urged this view upon future Justice William Woods, who had written him seeking advice in deciding the then-pending case of *United States* v. *Hall*, 26 F. Cas. 79 (S.D. Ala. 1871). Aynes, *supra*, at 97. *Hall* held that the Fourteenth Amendment's Privileges or Immunities "are undoubtedly those" as described in *Corfield*, and "[a]mong these we are safe in including those which in the constitution are expressly secured to the people . . . " *Hall*, 26 F. Cas. at 81.

Yet when this Court first passed on the Fourteenth Amendment, it announced a theory of the Privileges or Immunities Clause never apparently considered by anyone during the framing and ratification process, standing diametrically opposed to every statement of intent and understanding related to the Privileges or Immunities Clause.

SlaughterHouse first observed that while individuals held both federal and state citizenship, the Clause at issue protects only privileges and immunities of national citizenship. *SlaughterHouse*, 83 U.S. at 74. It then purported to quote Article IV as securing "the privileges and immunities of citizens of the several States." *Id.* at 75. Reading these asserted rights of state citizenship broadly, in line with *Corfield*, *SlaughterHouse* declared Article IV "did not create those rights, which it called privileges and immunities of citizens of the States." *Id.*

Was the Fourteenth Amendment intended "to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" *Id.* at 77. Incorrectly, *SlaughterHouse* answered in the negative. Without consulting the Fourteenth Amendment's history, the *SlaughterHouse* majority simply refused to contemplate so great a change had occurred, *id.* at 78, although the nearly-contemporaneous Thirteenth and Fifteenth Amendments undeniably effected significant change.

With this decision, civil rights inhering naturally in individuals, and which predate the Constitution, would be left to the States' protection. The Fourteenth Amendment would protect only rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. In dicta, *SlaughterHouse* suggested that these included the right to visit the federal subtreasuries, petition the federal government, access federal seaports, seek diplomatic protection abroad, enjoy treaty benefits, and travel among the States. *Id.* at 79-80. Except for the last one, none of these rights were consistent with *SlaughterHouse*'s view that the Fourteenth Amendment was primarily meant to resolve the Freedmen's problems.

Three years later, *Cruikshank* explored whether the Justice Department could prosecute anyone for violating the First and Second Amendment rights of freedmen, massacred in a coup against the government of Grant Parish, Louisiana. Under *Slaughter-House*, this proved impossible: citizens "can demand protection from each [government] within its own jurisdiction." *Cruikshank*, 92 U.S. at 550.

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government . . . The government of the United States when established found it in existence.

Id. at 551. Likewise, the Second Amendment right to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* at 553. *Presser* reaffirmed as much. *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886).

It is hard to quarrel with *Cruikshank*'s assessment of the First and Second Amendments' provenance. Yet precisely because these amendments secure ancient, natural rights, under *SlaughterHouse*, protection of their enjoyment by freedmen fell to Louisiana's government. Months following the *Cruikshank* decision, a former Confederate General was declared the winner of the state's gubernatorial election.

The Framers' condemnation of this doctrine was predictable, Aynes, *supra*, at 99, but their opponents did not substantively disagree. Reconstruction's foes acknowledged the error—and celebrated it. *Id.* at 99-101. One commentator applauded this Court for having "dared to withstand the popular will as expressed in the letter of [the Fourteenth] amendment." Christopher Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 103 (1890). At this Court's Memorial Service for Chief Justice Waite, a congressman

> noted that [*Cruikshank*] contravened the intent of the framers of the Fourteenth Amendment: "[M]any of the framers of these Amendments received information regarding their intentions which was new, and was not calculated to allay the apprehensions with which they saw Chief Justice Waite go upon the bench" . . . historians would later praise Waite primarily because "the lapse of years has matured men's views and cooled their feelings regarding the results of the late war."

Aynes, *supra*, at 100 (quoting *Appendix, In Memoriam, Morrison Remick Waite, L.L.D.*, 126 U.S. 585, 600 (1888)).

The *SlaughterHouse* doctrine vindicated the Court's role as a check on the Constitution itself, specifically, against the Fourteenth Amendment's alleged "immaturity":

> [A]fter the lapse of years, when the temper and spirit in which the text of the Amendments was penned have cooled, and the views of men have matured, it is seen on a survey of all the decisions considered as a body, that the value of the Court as the great conservative department of the government was never greater than then.

2 Hampton Carson, HISTORY OF THE SUPREME COURT 485-86 (1891).

Today the Civil War and the Reconstruction Amendments are widely viewed as having been necessary steps toward increased protection of individual liberty. But consensus regarding *SlaughterHouse*'s analytical merit stands unchanged. "Virtually no serious modern scholar—left, right, and center—thinks that [*SlaughterHouse*] is a plausible reading of the Amendment." Akhil Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001).

SlaughterHouse's errors are obvious:

1. The Privileges or Immunities Clause Implemented Significant Changes.

Justice Miller refused to accurately interpret the Privileges or Immunities Clause because the consequences of doing so would be

> so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions . . . . [that we] are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

SlaughterHouse, 83 U.S. at 78.

Of course the Fourteenth Amendment enacted a "serious," "far-reaching and pervading," "great departure from the structure and spirit of our institutions." Countless Civil War dead and the chaos of Reconstruction demanded that the States be forced to respect the basic civil rights of American citizens. For the Fourteenth Amendment's framers, *Barron* and the ugly history of antebellum repression refuted the notion that the States were traditional guarantors of federally protected rights.

Less enthusiastically, opponents predicted the Fourteenth Amendment would "result in a revolution worse than that through which we have just passed." Cong. Globe, 39th Cong., 1st Sess. 2538 (1866) (Statement of Rep. Rogers). Another opponent decried that the amendment would defeat

> the reserved rights of the States . . . declared by the framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people. The first section of this proposed amendment . . . is to strike down those State rights and invest all power in the General Government.

Id. at 2500.

A Texas House committee declared the amendment "would profoundly modify if not destroy our political and even our social institutions," TEX. HOUSE JRNL., *supra*, at 579, and "virtual[ly] repeal" the Tenth Amendment. *Id.* at 580. It would "centralize all power in the Federal Congress, making the States mere appendages to a vast oligarchy, at the National Capitol." TEX. SENATE JRNL., 11TH LEGISLATURE, 422-23 (1866).

President Johnson's surrogate not only declared the amendment would "totally annihilate the independence and sovereignty of State judiciaries in the administration of state laws," he predicted it would "change the entire structure and texture of our Government, and sweep away all the guarantees of safety devised and provided by our patriotic sires of the revolution." N.Y. TIMES, Oct. 24, 1866, at 1, col. 1.

Opponents of the Amendment may have overstated its impact on federalism, but any examination of the Amendment's history reveals an intent to effect significant change. Substituting its preferences for those historically expressed, *SlaughterHouse* reduced the Fourteenth Amendment to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *SlaughterHouse*, 83 U.S. at 96 (Field, J., dissenting).

As Bingham foreshadowed in 1859,

> the failure to maintain [natural rights] inviolate furnishes, at all times, a sufficient cause for the abrogation of such government . . . impos[ing] a necessity for such abrogation, and the reconstruction of the political fabric on a juster basis, and with surer safeguards.

Cong. Globe, 35th Cong., 2nd Sess. 985 (1859). The Privileges or Immunities Clause effected change "novel and large [but] the novelty was known and the measure deliberately adopted." *SlaughterHouse*, 83 U.S. at 129 (Swayne, J., dissenting).

2. *SlaughterHouse* Contradicts History.

> It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (*the SlaughterHouse Cases*), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment to ascertain what it was that they were seeking to accomplish.

William Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. Rev. 558, 563 (1879).

Ignoring the amendment's historical context and ratification proceedings allowed the *SlaughterHouse* majority to substitute its own conjecture for the Framers' and their public's contrary understanding. *SlaughterHouse* found it

> a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.

SlaughterHouse, 83 U.S. at 74.

What is remarkable is *SlaughterHouse*'s premise that the Amendment could only be given broad interpretation were it concerned with protecting "the citizen of a State." The Framers shared the long-held view of many that all American citizens, as such, enjoyed a broad array of "privileges and immunities" regardless of their state citizenship. Their amendment "caus[ed] citizenship of the United States to be paramount and dominant instead of being subordinate and derivative." *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918).

SlaughterHouse's refusal to acknowledge the primacy of federal citizenship was not unprecedented:

> In what manner are we citizens of the United States? . . . [E]very citizen is a citizen of some State or Territory, and, as such, under an express provision of the constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this, and no other sense, that we are citizens of the United States.

2 THE WORKS OF JOHN C. CALHOUN 242-43 (Richard Cralle, ed., 1888). This is exactly what the Fourteenth Amendment rejected.

In any event, the Citizenship and Privileges or Immunities Clauses had different origins, the former a late Senate amendment, the latter a heavily debated product of the Joint Committee, and there is no evidence that Congress considered the impact of one upon the other. "[O]nce the textual discrepancy between the citizenship and privileges or immunities clause is removed as a viable rationale, *Slaughter-House* simply fails." Michael Lawrence, *Rescuing the Fourteenth Amendment Privileges or Immunities Clause: How "Attrition of Parliamentary Processes" Begat Accidental Ambiguity; How Ambiguity Begat SlaughterHouse*, 18 Wm. & Mary Bill of Rights Jrnl. ___ (forthcoming 2009), available at: http://ssrn.com/abstract=1462184. *SlaughterHouse*'s

> studied distinction between the privileges deriving from state and national citizenship . . . should have been seriously doubted by

> anyone who read the Congressional debates of the 1860s.

Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 530 (2002).

3. *SlaughterHouse* Rests on a Misquotation, Reflecting a Premise Rejected by the Amendment's Framers.

The other errors notwithstanding, *Slaughter-House*'s attempt to distinguish the privileges and immunities of the Fourteenth Amendment from those of Article IV fails for "an even more astounding and obvious difficulty." Tribe, AMERICAN CONSTITUTIONAL LAW at 1306. The distinction rests upon a misquotation of Article IV, which secures the rights of "citizens *in* the several States," U.S. Const. art. IV, §2 (emphasis added), not the rights of "citizens *of* the several States." *SlaughterHouse*, 83 U.S. at 75 (quoting U.S. Const. art. IV, §2) (emphasis added). Justice Bradley identified the error, to no avail. *Id.* at 117 (Bradley, J., dissenting).

Bingham specifically rejected the construction *SlaughterHouse* placed on Article IV's alleged language. "There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens *of the United States* in the several States' that it guaranties." Cong. Globe, 35th Cong., 2nd Sess. 984 (1859) (emphasis added).

In any event, the language *SlaughterHouse* claims to exist in Article IV—"citizens of the several States"—was understood differently in the Thirty-Ninth Congress. Contrary to *SlaughterHouse*'s supposition, the Framers used that same language to describe the Fourteenth Amendment's Privileges or Immunities Clause. Introducing the Fourteenth Amendment, Senator Howard remarked: "[t]he first section of the amendment they have submitted for the consideration of the two Houses relates to the privileges of *citizens of the several states* . . . " Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). Section One's correct text, "privileges or immunities of citizens of the United States," then follows in the record. *Id.*

Even had it existed, *SlaughterHouse*'s distinction—"citizens of the several states" as opposed to "citizens of the United States"—would have been one without a difference to the Fourteenth Amendment's Framers.

4. *SlaughterHouse* Is Illogical.

Construing the rights of federal citizenship as necessarily relating to the creation of the federal government misreads the Fourteenth Amendment's plain text. The privileges and immunities states are forbidden to infringe are those "of citizens of the United States," meaning, of "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof," U.S. Const. amend. XIV, §1, as opposed to the rights of some other category of people.

It does not logically follow that American citizenship fails to secure pre-existing natural rights. With the Privileges or Immunities Clause, the Framers sought to protect "rights that attach to citizenship in all free Governments." Cong. Globe, 39th Cong., 1st Sess. 3031 (1866) (Statement of Sen. Henderson). "To be a citizen of the United States carries with it some rights, and what are they? They are those inherent, fundamental rights, which belong to free citizens or free men in all countries . . . . " *Id.* at 1757 (Statement of Sen. Trumbull). In *Corfield's* oft-cited words, they are "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." *Corfield*, 6 F. Cas. at 551.

"It must be remembered that the National Government, too, is republican in essence and in theory . . . . 'To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring) (quoting THE FEDERALIST No. 2, at 38-39 (Clinton Rossiter ed. 1961)). Under the original understanding of American citizenship, *SlaughterHouse's* narrow reading of "Privileges or Immunities" defines the federal government as unfree.

The rights secured by the Privileges or Immunities Clause are not merely important. Presumably, the Clause protects rights that states were abridging—hence, its ratification. Justice Miller believed the Amendment protected an individual's "life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." *SlaughterHouse*, 83 U.S. at 79. Yet in proposing protection for Privileges and Immunities, Bingham lamented, "We have the power to vindicate the personal liberty and all the personal rights of the citizen in the remotest sea . . . while we have not the power in time of peace to enforce the citizens' right to life, liberty, and property within the limits of South Carolina . . . . " Cong. Globe, 39th Cong. 1st Sess. 1090 (1866).

> The right to travel to the seat of government had been protected by the Court since 1867, before ratification of the Fourteenth Amendment, so the amendment would not affect it, and exactly how a state would abridge an American citizen's rights in France or on the high seas is unclear. The Arkansas navy perhaps? Finally, rights under treaties were already protected by the Supremacy Clause. In other words, Miller's effort to show that fundamental rights were left completely under state control was shameful.

Lucas Powe, Jr., THE SUPREME COURT AND THE AMERICAN ELITE 1789-2008, at 136 (2009).

B. *Stare Decisis* Does Not Secure the *SlaughterHouse* Line.

"[T]he *stare decisis* hurdle posed by *Slaughter-House* appears fairly insignificant. It would take but a little wind, and far from a hurricane, to blow that House down." Tribe, at 1324.

At times, "a prior judicial ruling should come to be seen so clearly as error that its enforcement [is] for that very reason doomed." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 854 (1992). Petitioners submit this to be the case with *SlaughterHouse* and its progeny.

> [T]he construction put upon the language of [Section One] by [*SlaughterHouse*] is not its primary and most obvious signification. Ninety nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear.

Royall, 4 S. L. Rev. at 563.

A doctrine originally celebrated for defying the Constitution, and which cannot seriously be defended against the overwhelming weight of text and history, must not be allowed to continue depriving Americans of their civil rights. "[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes."

Payne v. *Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

Stare decisis protects erroneous decisions out of "prudential and pragmatic considerations." *Casey*, 505 U.S. at 854. The doctrine has particular value in the common law, which is inherently judge-made, and in the interpretation of statutes and regulations where error can be easily corrected by the coordinate branches. *Stare decisis*,

> to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts.

Payne, 501 U.S. at 834-35 (Scalia, J., concurring).

Yet "*stare decisis* is not 'an imprisonment of reason.'" *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting). Nor is it "an inexorable command." *Payne*, 501 U.S. at 828 (citation omitted).

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional

> decisions. This has long been accepted practice . . . .

Smith v. *Allwright*, 321 U.S. 649, 665 (1944).[6]

"The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its framers when they added the Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5. When "[m]embers of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding" of constitutional text, this Court has been receptive. *Crawford* v. *Washington*, 541 U.S. 36, 60 (2004).

Beyond cases such as the *SlaughterHouse* line, plainly compelling correction, this Court may look to four prudential factors in considering to overrule precedent:

> We may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far

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[6] For the frequency of this Court's practice in overruling past decisions, *see* cases collected in *Payne*, 501 U.S. at 828 n.1; *Smith*, 321 U.S. at 665 n.10; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 n.2 (1932) (Brandeis, J., dissenting).

> developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Casey, 505 U.S. at 854-55 (citations omitted).

The *SlaughterHouse* doctrine fails each of these factors.

1. ***SlaughterHouse*** **Is Not Truly Practical.**

The *SlaughterHouse* doctrine offers a workable definition of the Privileges or Immunities Clause—by virtually eliminating it—but workability measured by the impact on the Fourteenth Amendment as a whole is less satisfying.

"[T]he demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence," *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting), by closing off the natural textual mechanism for securing basic rights against state action. "There is a very real threat that the doctrinal shakiness of substantive due process may in turn undermine public confidence in the institution of judicial review and in the ability of judges honestly to interpret the dictates of the Constitution." Tribe, at 1317.

2. Correcting This Court's Privileges or Immunities Doctrine Would Not Upset Legitimate Reliance Interests.

The *SlaughterHouse* doctrine has engendered only the sort of reliance interests never meriting this Court's protection. The statute at issue in *Slaughter-House* might have been upheld as a legitimate "restraint[ ] as the government may justly prescribe for the general good of the whole," *Corfield*, 6 F. Cas. at 552. Sustaining the measure by trivializing the fundamental rights of American citizenship was excessive.

SlaughterHouse was originally the redoubt of monopolists, while *Cruikshank* helped place Klan violence beyond the Justice Department's reach. For the latter reason, one early commentator called the decisions "most fortunate":

> They largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.

3 Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY 330 (1922). Of course, *Slaughter-House* and *Cruikshank* restored only *some* Southern people's confidence in this Court.

But there can be no valid reliance interests in depriving individuals of their constitutional rights. If anything, reliance interests cut against preserving the *SlaughterHouse* doctrine. Americans are inclined to believe that their "citizenship is not an empty name, but . . . has connected with it certain incidental rights, privileges, and immunities of the greatest importance." *SlaughterHouse*, 83 U.S. at 116 (Bradley, J., dissenting). "[W]e are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Id.* at 118 (Bradley, J., dissenting).

Nor would invocation of the Privileges or Immunities Clause, referencing the rights of "citizens," rather than under the Due Process Clause, which protects "person[s]," necessarily deprive non-citizens of any rights. One way to read the Privileges or Immunities Clause comprehends that "the reference to citizens may define the class of rights rather than limit the class of beneficiaries." John Ely, DEMOCRACY AND DISTRUST 25 (1980). That is, rights of the sort belonging to citizens cannot be the subject of abridgment, regardless of who would benefit.

Moreover, honoring the Privileges or Immunities Clause does not require abandonment of the Due Process or Equal Protection Clauses. Regardless of a right's textual anchor in the Privileges or Immunities Clause, non-citizens are procedurally entitled to challenge any unlawful alienage restriction. Courts would continue to subject alienage classifications to strict scrutiny. *See Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Approving of a state law banning immigrants from possessing hunting guns, this Court suggested barring aliens from having "pistols that may be supposed to be needed occasionally for self-defence" could be viewed differently. *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914). Perhaps more critically, in *SlaughterHouse*'s absence, state-level alienage restrictions would remain broadly pre-empted by the federal immigration power. *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982).

Had the Framers intended for Fourteenth Amendment rights, rooted in citizenship, to be denied wholesale to non-citizens, surely the concept would have engendered some debate considering the amendment was designed in part to prevent arbitrary denial of citizenship as a tool of denying substantive rights. Yet the opposite is true. Without contradiction, Senator Howard offered that the Amendment, "if adopted by the States, [would] forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction*." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added).

Bingham agreed: "That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment." *Id.* at 2543. The purpose of Section One is "to protect by national law the privileges and immunities of all the citizens of the Republic *and the inborn rights of every person within its jurisdiction* whenever the same shall be abridged by the unconstitutional acts of any State." *Id.* at 2542 (emphasis added). "It seems to be generally agreed that no conscious intention to limit the protection of the clause to citizens appears in the historical records." Ely, *supra*, at 25.

3. *SlaughterHouse* Is Largely Anachronistic.

The third *Casey* factor clearly militates against sustaining *SlaughterHouse*. The *SlaughterHouse* majority's limitation of the Fourteenth Amendment's purpose to redress solely the problems of the freedmen, 83 U.S. at 81, is not considered authoritative today. *Compare, e.g., United States* v. *Virginia*, 518 U.S. 515 (1996) *with SlaughterHouse*, 83 U.S. at 81 ("[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]").

Most of the rights codified in the Bill of Rights, and many others likely included within the privileges and immunities of citizenship as historically understood, are protected against state infringement under the Due Process Clause. "[T]he law's growth in the intervening years has left" [*SlaughterHouse*'s] "central rule a doctrinal anachronism discounted by society." *Casey*, 505 U.S. at 855. Even the "privileges and immunities" rejected in *SlaughterHouse*, today remain protected under the non-discrimination provisions of Article IV. *See, e.g., Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (privilege of practicing law). It is unclear why a state violating civil rights without regard to residence is preferable to a state that honors those rights only when exercised by its residents. The Constitution condemns both, via the Fourteenth Amendment and Article IV, §2, respectively, and the American people are entitled to its full protection.

4. Modern Factual Understandings Render *SlaughterHouse* Untenable.

This Court is not merely presented with a situation in which the facts have "come to be seen so differently." *Casey*, 505 U.S. at 855. The facts had never been examined by this Court at all. *SlaughterHouse* announced a set of assumptions, which later courts would not re-examine. Notwithstanding the precedent, with respect to the Privileges or Immunities Clause, this is arguably a case of first impression.

III. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS INCORPORATED AS AGAINST THE STATES BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

Although the case for applying the Second Amendment to the States, textually and historically, rests primarily upon the Privileges or Immunities Clause, Petitioners are also entitled to relief pursuant to the Fourteenth Amendment's Due Process Clause.

It is now well-established that the Due Process Clause has a substantive dimension, and that deprivation of enumerated constitutional rights is thus largely incompatible with due process. A "law" depriving one of life, liberty or property "must not have exceeded the limits of legislative power marked by natural and customary rights." Frederick Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 644-45 (2009). Almost every provision of the Bill of Rights considered for incorporation in the modern era has been incorporated.

Given that the Due Process Clause has incorporated virtually all other enumerated rights, "[t]he obvious question . . . is what exactly justifies treating the Second Amendment as the great exception." Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1990). Second Amendment rights must be among those incorporated.

In the early days of incorporation, this Court explained that

> immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Palko, 302 U.S. at 324-25. The Second Amendment, given its forceful command and basis in the inherent human right of self-preservation, would surely pass this test.

More recently, this Court settled on an analysis proven yet more amenable to incorporation. The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.*, 150 n.14. *Duncan*'s analysis suggests looking to the right's historical acceptance in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

A. The Right to Arms Is Secured in the Nation's Legal Traditions.

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S. Ct. at 2798 (citations omitted). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). The violation of that right by George III "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799. "[T]he right contains both a political component—it is a means to protect the public from tyranny—and a personal component—it is a means to protect the individual from threats to life or limb." *Nordyke* v. *King*, 563 F.3d 439, 451 (9th Cir.), *reh'g en banc granted*, 575 F.3d 890 (2009) (citation omitted).

There should be no need to recite the exhaustive historical evidence considered in *Heller*. The matter is settled: the Second Amendment "codified a right inherited from our English ancestors." *Heller*, 128 S. Ct. at 2802 (citation omitted).

B. States Historically Acknowledged the Right to Arms.

All five state constitutional ratifying conventions that proposed amendments to the Constitution sought a right to arms. Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF

THE FEDERAL CONSTITUTION (1836), 1:326 (New Hampshire), 1:328 (New York), 1:335 (Rhode Island) 3:659 (Virginia), 4:244 (North Carolina). Free speech merited only three requests, *id.*, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina), while protection from double-jeopardy was sought only by New York. *Id.* at 1:328.

Today, forty-four of the fifty states secure a right to arms in their constitutions. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). Of these, fifteen are either new or strengthened since 1970. *Id.*

These Second Amendment analogs are effective and consequential. Modern state courts enforce these provisions against laws impermissibly restricting the possession and carrying of arms. *See, e.g., Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State ex rel. City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W. Va. 1988); *State* v. *Delgado*, 692 P.2d 610 (Ore. 1984).

C. The Interest Secured by the Right to Arms Is an Aspect of Liberty.

The Second Amendment's purpose confirms its incorporation. "The inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2818. Blackstone described that right as preserving "'the natural right of resistance and self-preservation,' and 'the right of having and using arms for self-preservation and defence.'" *Id.* at 2792 (citations omitted). This concept was well-accepted in

1868 America. *See* Clayton Cramer, Nicholas Johnson, and George Mocsary, *"This Right is Not Allowed by Governments that are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 Geo. Mason L. Rev. ___ (forthcoming 2010), available at http://ssrn.com/abstract=1491365.

"[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted). States must respect various rights which, like the Second Amendment, are rooted in deference to preserving personal autonomy. Observing that

> no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,

Cruzan v. *Dir., Mo. Dep. of Health*, 497 U.S. 261, 269 (1990) (citation omitted), this Court recognized a right to refuse life-sustaining medical care. *Id.* at 278; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Lawrence* v. *Texas*, 539 U.S. 558, 562 (2003) ("liberty of the person both in its spatial and more transcendent dimensions" supports right to consensual intimate relationships);

Rochin v. *California*, 342 U.S. 165 (1952) (right of bodily integrity against police searches).

"[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. It is unfathomable that the states are constitutionally limited in their regulation of medical decisions or intimate relations, because these matters touch upon personal autonomy, but are unrestrained in their ability to trample upon the enumerated right to arms designed to enable self-preservation.

Casey invoked the second Justice Harlan's celebrated passage describing the liberty protected by the Due Process Clause as broader than

> a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.

Id. at 848 (quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added). Liberty cannot now be defined so narrowly as to exclude one of its more obvious attributes.

Indeed, the right to purchase contraception was discovered as related to the "indefeasible right of personal security." *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (citation omitted). This Court's landmark abortion right decision in *Roe* v. *Wade*, 410 U.S. 113 (1973) "may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity." *Casey*, 505 U.S. at 857. "[T]he right to define one's own concept of existence" lying "[a]t the heart of liberty," *id.* at 851, includes the right of armed self-defense against violent criminal attack.

The Second Amendment also has another purpose, spelled out in the prefatory clause: preservation of the people's ability to act as militia. *Heller*, 128 S. Ct. at 2800-01. The Amendment's framers believed this purpose was "necessary to the security of a free state." U.S. Const. amend. II. By its own terms, the Second Amendment secures a fundamental right.

Heller has defined the contours of the Second Amendment right: it identified the right's origins, traced its history, and described its core purposes. Applying these variables to this Court's established selective incorporation doctrine yields a judgment of reversal.

◆

CONCLUSION

The judgment below must be reversed.

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RESPONDENT'S BRIEF

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OTIS MCDONALD, *et al.*,
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v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Due Process or Privileges or Immunities Clause.

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IN THE

Supreme Court of the United States

No. 08-1521

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

STATEMENT

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because "the convenient availability of firearms and ammunition has increased firearm related deaths and injuries" and handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery." Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago's ordinance, "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm," and no person may possess "any firearm which is unregisterable." Municipal Code of Chicago, Ill. § 8-20-040(a) (2009). Unregisterable firearms include most handguns, but rifles and shotguns that are not sawed-off, short-barreled, or assault weapons are registerable. *Id.* § 8-20-050. Registerable firearms must be registered before being possessed in Chicago (*id.* § 8-20-090(a)), and registration must be renewed annually (*id.* § 8-20-200(a)). Failure to renew "shall cause the firearm to become unregisterable." *Id.* § 8-20-200(c).

Otis McDonald, several other individual plaintiffs, the Illinois State Rifle Association, and the Second Amendment Foundation (collectively "petitioners") filed a lawsuit against Chicago, challenging the handgun ban and certain registration requirements. J.A. 16-31. The individual petitioners allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. J.A. 19-21. Petitioners allege in count I that Chicago's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause. J.A. 26. Counts II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregisterable for failure to comply with either requirement. J.A. 27-29. Count V is an equal protection challenge to the unregisterability penalty. J.A. 30.

Meanwhile, the National Rifle Association of America, Inc., and several individual plaintiffs (collectively "NRA") filed two similar lawsuits: one challenging Chicago's handgun ban, and another challenging Oak Park's.[1] *McDonald* and the two *NRA* cases proceeded before the same district court judge. Petitioners moved for summary judgment, which the district court deferred. Subsequently, petitioners and NRA filed motions to narrow the issues, asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment. The district court ultimately granted Chicago and Oak Park judgment on the pleadings in all three cases, on the basis that the Second Amendment does not apply to the States. *E.g.*, Pet. App. 11-18; J.A. 85.

The court of appeals consolidated the cases and affirmed. The court held it was bound by decisions of this Court (Pet. App. 4-5) rebuffing requests to apply the Second Amendment to the States (*id.* at 2). The court further reasoned that the outcome of this case under the Court's more recent jurisprudence "is not as straightforward" as in other situations when the Court has applied the "selective incorporation" doctrine and overruled precedent. *Id.* at 5-6. The court of appeals observed that "local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule," and "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." *Id.* at 9. And the court noted that "[t]he prevailing approach is one of

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[1] Oak Park's firearms ordinance makes it "unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm . . . ." Municipal Code of Oak Park, Ill. § 27-2-1 (1995). "Firearms" include "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1.

'selective incorporation'" and "the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this." *Id.* at 5.

SUMMARY OF ARGUMENT

To address the problem of handgun violence in their communities, Chicago and Oak Park have enacted stringent firearms regulations prohibiting the possession of handguns by most individuals. The Court should reaffirm that the Second Amendment does not bind state and local governments. Neither the Court's selective incorporation doctrine under the Due Process Clause nor the Privileges or Immunities Clause provides a basis for imposing the Second Amendment on the States and establishing a national rule limiting arms regulation.

I. Bill of Rights provisions are incorporated into the Due Process Clause only if they are implicit in the concept of ordered liberty. That is an exacting standard that appropriately protects federalism values at the root of our constitutional system and is particularly appropriate when addressing firearms regulation. Firearms are designed to injure or kill; conditions of their use and abuse vary widely around the country; and different communities may come to widely varying conclusions about the proper approach to regulation. Thus, Chicago and Oak Park may reasonably conclude that in their communities, handgun bans or other stringent regulations are the most effective means to reduce fear, violence, injury, and death, thereby enhancing, not detracting from, a system of ordered liberty. Although other approaches are possible and may be effective elsewhere, it cannot be concluded that easy and widespread availability of firearms everywhere is necessary to ordered liberty.

The practice in the States throughout our history does not support incorporating the Second Amendment. While many States have adopted firearms rights in one form or another, the nature of these rights differs substantially from the Second Amendment right. The Second Amendment precludes an "interest balancing" approach and a ban on weapons in common use. But the States have generally adopted a "reasonable regulation" approach under which even stringent restrictions or outright bans of particular firearms are ordinarily upheld.

The Court has sometimes consulted the Framing-era history of a provision in considering incorporation. For the Second Amendment, that history does not support incorporation. Although a right to firearms for personal use was recognized in a variety of sources of law that pre-existed the Constitution, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), makes clear that it was not included in the Bill of Rights for its own sake or to protect it against the political process; rather, it was codified to protect the militia by eliminating the threat that the federal government would take away the arms necessary for militia service. Nothing in the congressional debate over the Amendment suggests any view that a private arms right unconnected to preservation of the militia was thought implicit in the concept of ordered liberty. The scope of the Second Amendment right—weapons in common use—also reflects its purpose of protecting the militia, rather than an individual right related to self-defense, since the Second Amendment protects weapons regardless of whether they are useful for self-defense.

Petitioners' argument that an unenumerated constitutional right to self-defense supports incorporation should be rejected. Even if this Court were to recognize such a right, it would at most protect against an (unlikely) law eliminating all reasonable tools (or perhaps, all firearms) necessary for its effectuation; it would not support incorporation of the Second Amendment, which grants a right to any weapon in common use, regardless of the reasons for limiting it or the availability of other weapons or firearms.

II. The Privileges or Immunities Clause does not apply the provisions of the Bill of Rights, or the Second Amendment individually, to the States. In a long series of cases beginning with *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Court has consistently held that the Privileges or Immunities Clause does not incorporate any of the provisions of the Bill of Rights. All of the *stare decisis* factors the Court typically examines counsel adherence to those precedents. The current rule is workable and venerable; significant reliance interests are in place; and there is nothing petitioners cite that was not known to and considered by the Court whose Members actually lived through the Civil War and Reconstruction. Adopting petitioners' view would throw into doubt the rights of aliens and corporations; make the Grand Jury Clause and Seventh Amendment applicable to the States; and unsettle the legal status of unenumerated rights, both those that have been recognized and those that have not. *Stare decisis* concerns are of overwhelming force in this case.

Even reviewed *de novo*, the historical record does not support petitioners' argument that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights (plus some class of unenumerated rights). That history shows no general public understanding or congressional intent that the Privileges or Immunities Clause was meant to impose the Bill of Rights on the States. The ambiguous text of the Clause, which does not mention "rights" at all, would not have alerted the public to this purpose. *Slaughter-House* itself was decided just five years after Fourteenth Amendment ratification, by a Court uniquely situated to know the history that led to the Amendment, the congressional intent, and the public understanding at the time of ratification. The congressional and ratification debates show that while a few believed that the Privileges or Immunities Clause would make the Bill of Rights applicable to the States, most held a variety of other views on the meaning and effect of the Clause. Treatise writers of the era were similarly divided.

Petitioners and NRA argue that the Reconstruction Congress wanted to embody in the Constitution a firearms right against the States because of concern over the disarmament of freedmen after the Civil War. But Congress was concerned with discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle in the Fourteenth Amendment. Indeed, the manner in which firearms were regulated during the period shows public acceptance of state regulation, including outright bans, so long as it was not done in a discriminatory manner.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT INCORPORATE THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

A. A Provision Of The Bill Of Rights Applies To The States Under The Due Process Clause If It Is "Implicit In The Concept Of Ordered Liberty."

This Court held long ago that the provisions of the Bill of Rights, of their own force, apply only to the federal government and do not limit state or local governments. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). That continues to be the law. See *Virginia v. Moore*, 128 S. Ct. 1598, 1603 (2008); *United States v. Balsys*, 524 U.S. 666, 675 (1998). In a series of cases beginning in the late 19th century, the Court has recognized that the Due Process Clause of the Fourteenth Amendment incorporates—and therefore applies to the States—fundamental rights included in the Bill of Rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969). As the Court explained in *Thornhill v. Alabama*, 310 U.S. 88 (1940), First Amendment rights were incorporated because they are "essential to free government." *Id.* at 95; see also *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) ("at the foundation of free government by free men"). Likewise, incorporation of the Fourth Amendment's protection against unreasonable search and seizure rested on the Court's conclusion that "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty.'" *Mapp v. Ohio*, 367

U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

1. To be "implicit in the concept of ordered liberty," a right must be "implicit"—that is, essential—to the very "concept" of ordered liberty. As the Court has explained, that means that "neither liberty nor justice would exist if [the right] were sacrificed." *Palko*, 302 U.S. at 326; see also NRA Br. 8 ("a fundamental principle of liberty that is basic to a free society"). In what is regarded as the first selective incorporation case, the Court described such a right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 238 (1897) (incorporating Takings Clause); see *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) ("[I]f a civilized system could be imagined that would not accord the particular protection," incorporation is not appropriate); see also *Malloy v. Hogan*, 378 U.S. 1, 4 (1964) (selective incorporation originated with *Chicago* case); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) ("a fundamental principle of liberty and justice which inheres in the very idea of free government"), overruled on other grounds by *Malloy*. Cf. *Danforth v. Minnesota*, 128 S. Ct. 1029, 1034-35 (2008) (Due Process Clause "requires state criminal trials to provide defendants with protections 'implicit in the concept of ordered liberty'") (quoting *Palko*).[2]

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[2] Since *Duncan*, the Court has also applied this standard to determine whether unenumerated substantive rights are components of due process. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (whether right to assisted suicide is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed'") (quoting *Palko*).

In determining whether a provision of the Bill of Rights is incorporated under that standard, the Court has looked at the protection provided by the right and whether that protection is necessary in a system of ordered liberty. See, *e.g.*, *Duncan*, 391 U.S. at 155-56; *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). It has also examined the extent to which it has been embodied in federal and state law (*e.g.*, *Duncan*, 391 U.S. at 154) and the history of the right in question (*e.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 223-26 (1967)).[3]

2. While it protects rights essential to a free society, incorporation necessarily limits the ability of state and local governments to make their own decisions. Accordingly, the standard for incorporation under the Fourteenth Amendment is and should be an exacting one. Federalism is based on two essential premises. First, because conditions vary from one place to another, residents in different locales, facing widely different conditions and social problems, should be able to address them with widely varying solutions. Second, and more fundamental, even if

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[3] As *Duncan* suggests, the incorporation of Fifth and Sixth Amendment procedural rights has involved somewhat different considerations. Such cases considered rights in the context of actual "state criminal processes" with particular characteristics, such as an accusatorial, not inquisitorial, setting. 391 U.S. at 149 n.14. In such cases, "[t]he question thus is whether *given this kind of system* a particular procedure is fundamental." *Ibid.* (emphasis added). For a substantive right, by contrast, the inquiry does not turn on its place in the context of a particular procedural system, but whether it is more generally implicit in the concept of ordered liberty. That was the standard that governed the incorporation of the great substantive rights of the First, Fourth, and Fifth Amendments, for example. See *ibid.*

conditions in two States may be similar, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As the court of appeals noted, "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." Pet. App. 9.

These concerns have particular force with respect to the Second Amendment. It is the only Bill of Rights provision that confers a substantive right to possess a specific, highly dangerous physical item—an item designed to kill or inflict serious injury on people. And there may well be a wider range of opinion on the basic issue whether and how to regulate firearms than on any other enumerated right. Some believe that, subject only to limited regulation, permitting easy and widespread gun ownership may reduce the overall level of gun violence; others believe that, under at least some conditions, stringent regulation of the possession of handguns (and other firearms) is necessary to reduce the level of gun violence, injury, and death. The genius of our federal system ordinarily leaves this type of social problem to be worked out by state and local governments, without a nationally imposed solution excluding one choice or the other. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). Under "the theory and utility of our federalism . . . States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

3. The present-day operation and effect of a right is crucial to whether it should be recognized as protected by the Due Process Clause. That Clause was designed to be adaptive rather than fixed:

> Had those who drew and ratified the Due Process Claus[e] of . . . the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.

Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). Indeed, a "conception of due process" incorporation that "ignores the movements of a free society . . . belittles" the Clause; due process is to be defined by "the gradual and empiric process of 'inclusion and exclusion.'" *Wolf,* 338 U.S. at 27 (overruled on other grounds by *Mapp*).

B. Regulation Or Prohibition Of Firearms, Particularly Handguns, May Reasonably Be Thought To Preserve, Not Intrude On, Ordered Liberty.

While Chicago and Oak Park ban handgun possession nearly entirely, we do not contend that such regulation is necessary, advisable, or appropriate in many, most, or all States. Local conditions regarding firearms risks and uses vary widely around the country. Local views on the necessarily contentious issues that underlie firearms regulation—how to reduce crime and violence, as well as accidental injuries caused by highly dangerous instruments like firearms—also vary widely. Our submission is simply that data exist to support a conclusion that under some conditions stringent firearms regulations can limit violence; reduce injury and death; and lead to the preservation of, not the intrusion upon, a system of ordered liberty. Because Second Amendment incorporation would severely limit such regulation in those communities that believe this approach best suited to their own local conditions, it should be rejected.

1. There is no dispute that some communities, including Chicago, face an exceptionally serious problem of firearm—and, in particular, handgun—violence and crime. Handguns were used in 402 of the 412 firearm homicides in Chicago in 2008. See Chicago Police Department, *2008 Murder Analysis in Chicago* 22 (2009) (https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical Reports/Homicide Reports/2008 Homicide Reports). Handguns are used to kill in the United States more than all other weapons—firearms and otherwise—combined. See Josh Sugarmann, *Every Handgun is Aimed at You: The Case for Banning Handguns* 75 (2001). A study of data collected between 1976 and 2005 demonstrated that "[h]omicides are most often committed with guns, especially handguns," and nearly 60% of those homicides take place in large cities. James Alan Fox, *et al.*, Bureau of Justice Statistics, Department of Justice, *Homicide Trends in the United States* (available at "Weapons trends" and "Trends by city size" links at http://bjs.ojp.usdoj.gov/content/pub/pdf/htius/pdf). And handguns cause death at a rate

significantly higher than other generally available firearms. See Sugarmann, *supra*, at 177 (more than two out of three fatalities from firearms caused by handguns, even though two-thirds of guns owned by Americans are rifles or shotguns). Handguns are also far more frequently used in suicides than other firearms, especially in urban environments. See *id.* at 36-38. And handguns are, by definition, concealable and therefore facilitate unlawful use. Between 1993 and 2001, handguns were used in 87% of violent nonlethal crimes (*e.g.*, assault, rapes/sexual assault, robbery, and theft) committed with firearms. See Craig Perkins, Bureau of Justice Statistics, Department of Justice, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* 3 (2003). As for accidental injuries, 5,974 unintentional firearms deaths were reported in the United States between 1999 and 2006. In 4,231 of them, the firearm was not identified, and in 856 it was specifically identified as a handgun. See Centers for Disease Control and Prevention, WONDER On-Line Database Compressed Mortality File 1999-2006 (http://wonder.cdc.gov/mortSQL.html) (query based on ICD-10 code W32 for "handguns" and W34 for "other and unspecified" firearms). See also Brief of the Association of Prosecuting Attorneys as *Amicus Curiae* in Support of Respondents; Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Respondents; Brief of Chicago Board of Education, *et al.*, as *Amici Curiae* in Support of Respondents.

2. The people of Chicago, a major urban center plagued by gangs and firearms violence, and Oak Park, an abutting suburb confronting negative spillover effects, have determined that, of the various alternative regulatory approaches to firearms, a handgun ban and stringent firearms regulation will

best address the very serious problem of handgun crime and violence in their communities.[4] That approach is at the very least a reasonable approach to a difficult social problem on which definitive answers remain elusive. Because that approach aims to protect personal security, it is consistent with, and supportive of, a free society and a system of ordered liberty.

Features that cause handguns to be regarded by many as the "quintessential self-defense weapon" (*Heller*, 128 S. Ct. at 2818) also make them attractive for criminal purposes, including homicide, suicide, and other violent crimes. Handguns can be stored where readily accessible; they are small and lightweight; they are easier to control if someone tries to take them away; and they can be pointed at someone with one hand while leaving the other hand free. See *ibid.*

Because handguns are so well adapted for the commission of crimes and the infliction of injury and death, stringent handgun regulations, including prohibitions, can be reasonably thought to create the conditions necessary to foster ordered liberty, rather than detracting from it. Enforcing handgun control laws can make a difference in curbing firearms violence. See, *e.g.*, Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Lawyer 1, 30-44

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[4] The Chicago ordinance at issue in this case was adopted by the City Council. See p. 1, *supra*. The Oak Park ordinance was first adopted by the town council. The following year, the citizens of Oak Park voted in an advisory referendum. See Brief of Oak Park Citizens' Committee for Handgun Control as *Amicus Curiae* in Support of Respondents.

(2009) (discussing studies showing New York City crime reduction correlating to police tactics directed at handguns); Phillip J. Cook, *et al.*, *Underground Gun Markets*, 117 Economic J. F558, F581-82 (2007) (important contributing factor to high transaction costs of underground gun market is that handguns are illegal in Chicago, and "law enforcement efforts targeted at reducing gun availability at the street level seem promising"); Colin Loftin, *et al.*, *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) (District's handgun ban coincided with abrupt decline in firearms-caused homicides and suicides with no comparable decline elsewhere in the region); Brief of the Association of Prosecuting Attorneys as *Amicus Curiae* in Support of Respondents; Brief of United States Conference of Mayors as *Amicus Curiae* in Support of Respondents; Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Respondents.

Handgun restrictions can be an effective tool for curbing criminal street gangs, a major source of crime and violence in Chicago. When the police see gang members suspected of carrying guns, they can make an arrest and remove the gun from the street. This makes it riskier for gang members to ply their trade outdoors, thus making the streets safer. Criminal street gangs with the right to carry guns could use those guns to increase fear in their communities and violence used to control the drug trade that is their lifeblood. See Rosenthal, *Second Amendment Plumbing*, *supra*, at 39-48. Chicago and Oak Park may legitimately conclude that, in "an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor." *Id.* at 87. For that reason, it should not be incorporated.

3. Not all state and local firearms regulations would be in jeopardy if the Second Amendment were applied to the States.[5] But incorporating the Second Amendment would place at risk, in addition to handgun bans, many other firearms regulations that may equally be viewed as necessary to reduce fear, violence, and injury, and therefore to foster, not threaten, a system of ordered liberty. Insofar as those types of regulations would be invalid, *all* levels of government would be disabled from adopting (or even experimenting with) sensible firearms regulations that could fight crime and save lives under at least some local conditions.

For example, although *Heller* recognized that prohibitions on concealed carrying of firearms had been frequently upheld, the Court did not directly address the status under the Second Amendment of laws prohibiting or severely regulating *any* carrying of firearms. Nor did the Court comment on requirements that those who carry firearms be licensed. At least eight States condition the possession or carrying of handguns in many or all instances on a permit[6] that generally issues only upon a showing of at least good cause or necessity.[7] And these States generally have wide discretion in issuing them.[8]

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[5] As the Court noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 128 S. Ct. at 2816. The Court expressly declined to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17. The Court also recognized that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 2816.

The extent to which these requirements would be upheld under the Second Amendment is at present unclear. The Court noted that the term "bear" in the Second Amendment "refers to carrying for a particular purpose—confrontation." *Heller*, 128 S. Ct. at 2793; see *id.* at 2818 (citing state decision holding that statute forbidding openly carrying a pistol violated state Second Amendment analogue). Conditioning the open or concealed carrying of firearms on particular showings of good cause or need could therefore conflict with the Second Amendment. Of course, there may be many places in which a State would conclude that the unlicensed open or concealed carrying of weapons poses no concern. But surely there are others, such as gang-infested areas of major cities, in which such carrying could increase gang-related domination and intimidation and cause the local community to prohibit it. See *In the Matter of Atkinson*, 291 N.W.2d 396, 400 (Minn. 1980) ("'such widespread handgun possession in the streets, somewhat reminiscent of frontier days, would not be at all in the public interest'") (citation omitted). Insofar as the Second Amendment would limit the ability of those jurisdictions to do so, incorporation could substantially affect the security of residents and correspondingly decrease—not increase—the zone of "ordered liberty" in which they may exercise their other freedoms.[9]

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[6] See Cal. Penal Code § 12031(a)(1), (b)(6); Haw. Rev. Stat. § 134-9(c); Iowa Code § 724.4(1), (4)(i); Md. Code, Crim. Law § 4-203; Mass. Gen. Laws ch. 269, § 10(a); N.J. Stat. § 2C:39-5(b); N.Y. Penal Law §§ 265.03(3) & 265.20(a)(3); R.I. Gen. Laws § 11-47-8(a).

[7] Five States require at least a general showing of good cause or justification (see Cal. Penal Code § 12050(a)(1); Iowa Code § 724.7; Md. Code, Pub. Safety § 5-306(a)(5)(ii); N.J. Stat. § 2C:58-4(c); N.Y. Penal Law § 400.00(2)(f)); two require a showing of good reason to fear an injury to person or property, or another proper reason (see Mass. Gen. Laws ch. 140, § 131(d); R.I. Gen. Laws § 11-47-11(a)); and Hawaii requires "an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property" (see Haw. Rev. Stat. § 134-9(a)).

[8] See, *e.g.*, *Gifford v. City of Los Angeles*, 106 Cal. Rptr. 2d 164, 167 (Ct. App. 2001) (sheriff has "extremely broad discretion"); *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998) (applicant must show "a special need for self-protection" arising from an "extraordinary personal danger, documented by proof of recurrent threats to life or safety"); *In re Preis*, 573 A.2d 148, 152 (N.J. 1990) (applicant must show "specific threats or previous attacks demonstrating special danger to the applicant's life that cannot be avoided by other means"); *Ruggiero v. Police Commissioner of Boston*, 464 N.E.2d 104, 108 (Mass. App. Ct. 1984) (fear of becoming a "potential victim of crim[e]" no basis for permit).

There are numerous other types of regulations that are or have been used to limit the possession and use of firearms, and many of them as well would be subject to attack—and more than a few of them may well succumb—if the Second Amendment were applied to the States. See pp. 25-28, *infra*.[10] Irrespective of the merits of such challenges, the States would have to spend scarce resources defending them. Indeed, federal arms bans have already come under careful scrutiny in the wake of *Heller*. See, *e.g.*, *United States v. Skoien*, 2009 WL 3837316, at *1 (7th Cir. 2009) (vacating conviction on ground that "*Heller*'s language about certain 'presumptively lawful' gun regulations—notably, felon dispossession laws . . . cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights").[11] Costly Second Amendment challenges to arms regulations would no doubt force state and local governments to consider repealing them (and refrain from enacting new ones), even when, in their judgment, they could substantially contribute, under local conditions, to reducing violence, injury, and death.

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[9] For example, application of the Second Amendment's protection for weapons in common use (see pp. 23, 26, 36, *infra*) would raise questions whether a weapon generally in common use for lawful purposes in one locale (such as a high-powered hunting rifle with precision sighting equipment popular in rural Illinois) must be allowed elsewhere, precluding a ban on use by Chicago gangs seeking to assassinate rivals.

[10] For example, one survey shows 27 States impose criminal or civil liability for improperly storing firearms or allowing

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children to access or use them. See Legal Community Against Violence, *Child Access Prevention* (available at http://www.lcav.org/content/child_access_prevention.pdf). Some require firearms to be secured with a trigger lock, placed in a locked container, or stored in a secure, inaccessible location. See, *e.g.*, Fla. Stat. ch. 790.174(1); Iowa Code § 724.22(7). These laws could be attacked under an incorporated Second Amendment right to keep firearms "in the home operable for the purpose of immediate self-defense." *Heller*, 128 S. Ct. at 2822. Laws limiting purchase to one gun a month (see Cal. Penal Code § 12072(a)(9)(A); Md. Code, Pub. Safety § 5-128(b); Va. Code § 18.2-308.2:2(P); N.J. Stat. § 2C:58-3(i)); requiring handguns to be capable of microstamping the make, model, and serial number of the firearm on each cartridge case when the handgun is fired (see Cal. Penal Code § 12126(b)(7)); and requiring firearm owners to complete safety training and carry insurance could be challenged on other grounds.

[11] As this brief is filed, Second Amendment challenges to arms regulations have been raised in at least 156 cases since *Heller*.

4. Finally, the treatment of firearms rights in other countries—especially countries that share our Anglo-American heritage—supports the conclusion that the Second Amendment right is not implicit in the concept of ordered liberty. The legal systems of England, Canada, and Australia each have their roots in the same English law as does this country, and each should be seen as a country in which "ordered liberty" is valued. Yet each of them imposes stringent regulations on firearms that would be impermissible or at least suspect under Second Amendment standards.

For example, England itself—from whose arms right ours is derived—bans handguns. See Firearms (Amendment) Act, 1997, c. 5, § 1 (Eng.); Firearms (Amendment) (No. 2) Act, 1997, c. 64, § 1 (Eng.). In addition, applications to possess other firearms for protection "should be refused on the grounds that firearms are not an acceptable means of protection in Great Britain." Home Office, *Firearms Law Guidance to the Police* (2002) (located at http://police.homeoffice.gov.uk/publications/operational-policing/HO-Firearms-Guidance2835.pdf?view=Binary), ch. 13.72. Arms possession is generally limited to "good reasons" such as hunting, target shooting, pest control, slaughtering, and collecting, and requires extensive governmental investigation and verification. See generally *id*. ch. 13.

Canada, too, imposes stringent regulations on the possession and storage of handguns. While handguns are available for target practice, competitions, and collecting activities, they may be possessed for self-defense only upon a showing that the gun is needed for self-protection. See Firearms Act, S.C. 1995, c. 39, §§ 4, 28, 54. Approval to carry a handgun requires a showing that someone's life "is in imminent danger" and that "police protection is not sufficient." Authorizations to Carry Restricted Firearms and Certain Handgun Regulations, SOR/98-207, § 2. See also Firearms Act, § 20. Moreover, a handgun must be stored unloaded and either (i) rendered inoperable by a locking device and stored in a locked case or room or (ii) locked in a specially constructed vault or room. See Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, SOR/98-209, §§ 6, 7. Australia too has similar, very stringent regulations. Although it permits possession of handguns, it does so only for a limited number of reasons, not including self-defense. See Australian Police Ministers' Council, Special Firearms Meeting, Genuine Reason for Owning, Possessing or Using a Firearm Resolution (1996) (available at http://www.austlii.edu.au/au/other/apmc/#RTFToC3).

Other countries, whose legal systems derive from a variety of sources, but which nonetheless would reasonably be seen as countries in which "ordered liberty" is respected, have similarly stringent controls over firearms. Japan, for example, has stringently restricted not only handguns but indeed all firearms since 1958. See generally Jūhō tōkenrui shoji tō torishimarihō [Law Controlling Possession, Etc. of Fire-arms And Sword], Law No. 6 of 1958, as amended, last translated in 3 EHS Law Bull. Ser. No. 3920 (1978). Other than extremely limited exceptions, such as hunting, athletic events, and research, "no person shall possess" a firearm or sword. *Id.*, Art. 3. See also *id.*, Art. 4. A 1998 United Nations study found that other countries such as Denmark, Finland, Luxembourg, and New Zealand do not permit handgun ownership for "protection of persons or property" or for "private security," although some of them do permit gun ownership for hunting, target shooting, and collection. United Nations International Study on Firearm Regulation 38-39 (Table 2.1) (1998).

C. The Treatment Of Firearms Rights By The States Does Not Support Incorporation Of The Second Amendment.

The Court in *Heller* held that the Second Amendment protects weapons "in common use." 128 S. Ct. at 2815, 2817; see also *United States v. Miller*, 307 U.S. 174, 179 (1939) (recognizing that persons called to militia used arms "of the kind in common use at the time"). As a result, the federal government may not ban these weapons, including handguns, no matter how dangerous they are in a particular community and no matter the benefits of doing so. Categorical protection of weapons in common use is required because that is the scope the Second Amendment "[was] understood to have when the people adopted" it. *Heller*, 128 S. Ct. at 2821. Since "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," the Court concluded that "the problem of handgun violence in this country" could not justify a ban on handguns in the home under the Second Amendment (*id.* at 2822) and rejected Justice Breyer's "interest-balancing" approach (*id.* at 2821).

The scope of firearms rights protected by the States, however, varies widely and does not hew to the Second Amendment right to weapons in common use. Nor does it preclude an outright ban, if other weapons are allowed. State law accordingly does not support incorporation.

1. *Interest balancing by the States.* The right protected by the Second Amendment is quite different from the right that has been adopted by the States.[12] The consensus in States that recognize a firearms right is that arms possession, even in the home, is indeed subject to interest-balancing.[13] Those States evaluate firearms regulations under a "reasonable regulation" standard. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686, 716-17 (2007); Brief of the Brady Center, *et al.*, as *Amici Curiae* in Support of Neither Party 18-24. See also, *e.g.*, *Benjamin v. Bailey*, 662 A.2d 1226, 1233 (Conn. 1995) ("State courts that have addressed the question under their respective constitutions overwhelmingly have recognized that the [arms] right is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety and morals of the citizenry.") (citing cases); *Robertson v. City and County of Denver*, 874 P.2d 325, 329-30 (Colo. 1994) (citing cases). That standard inherently "focuses on the balance of the interests at stake." Winkler, *supra*, at 717 (citation omitted). Courts "identif[y] the underlying

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[12] Today, 44 States have firearms rights in their constitutions. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Politics 191, 194-200 (2006) (California, Iowa, Maryland, Minnesota, New Jersey, New York do not). Two of these protect only a militia-linked right (see *Commonwealth v. Davis*, 343 N.E.2d 847, 848-50 (Mass. 1976); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905)).

[13] At least twelve States expressly recognize in constitutional text that the right is subject to regulation. See Volokh, *supra*, at 194-203 (Florida, Georgia, Illinois, Idaho, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Utah). Only Hawaii uses the phrasing of the Second Amendment. See *id.* at 195.

governmental objectives and weig[h] those goals against the burden on the individual." *Ibid*. See also, *e.g., State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986) (statute "imposes some limitation on a person's right to bear arms in defense of himself; but, when balanced against the object of the statute, we do not find the limitation unreasonable, particularly when we recognize that it is not always necessary, nor is it always lawful, to use deadly force in one's own defense"). The standard recognizes that gun regulation "requires highly complex socioeconomic calculations" regarding how to balance within a particular community "the individual's ability to defend herself against the collective need to protect all others"—a balance "that courts are not institutionally equipped to make." Winkler, *supra*, at 715.

Applying that standard, state courts generally approve a wide variety of firearms regulations. Highly specific regulations, differing markedly across jurisdictions, control who may possess weapons; what kinds of weapons may be possessed; where they may be possessed; how they may be used and stored; whether and how they may be transported; how they may be bought and sold; what kinds of ammunition may be used; and more. See generally, *e.g.*, Legal Community Against Violence, *State and Local Laws* (available at http://www.lcav.org/content/state_local.asp) (arms regulations in each State). No other substantive Bill of Rights protection has been regulated nearly as intrusively. And restrictions are almost always upheld. In the half century before 2007, there were only six published state-court decisions striking down firearms regulations on the basis of a right to bear arms, and none in 36 of the 42 States protecting individual arms rights. See Winkler, *supra*, at 718, 723-25.

2. *Weapons bans by the States.* Under the Second Amendment's common-use rule, weapons enjoy protection merely because they are in common use: "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 128 S. Ct. at 2818. But, under the widespread practice in the States that recognize firearms rights, the availability of other arms very much permits bans of particular weapons. "So long as a gun control measure is not a *total ban* on the right to bear arms"—that is, if it does not wholly "eviscerate[]" or "destr[oy]" the right—the courts will consider it a mere reasonable regulation of the right. Winkler, *supra*, at 717 (citations omitted).[14]

a. Applying this approach, state courts uphold handgun bans where other arms are permitted. For instance, *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984), upheld an Illinois suburb's handgun ban because the arms right is merely a right "to possess some form of weapon suitable for self-defense or recreation." *Id.* at 273. Therefore, "a ban on all firearms that an individual citizen might use would not be permissible, but a ban on discrete categories of firearms, such as handguns, would be." *Ibid.* Likewise, *City of Cleveland v. Turner*, No. 36126, 1977 WL 201393 (Ohio Ct. App. Aug. 4, 1977), upheld a handgun ban because it "does not absolutely interfere with the right of the people to bear arms, but rather proscribes possession of a specifically defined category of handguns." *Id.* at *5. See also *State v. Bolin*, 662 S.E.2d 38, 39 (S.C. 2008) (ban on handgun possession by persons under 21 did not infringe arms right because they can "posses[s] other types of guns"); Winkler, *supra*, at 719.

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[14] The Brief of the States of Texas, *et al.*, as *Amici Curiae* in Support of Petitioners asserts that "the legislatures of all 50 States are united in their rejection of bans on the possession of handguns." *Id.* at 9. That is incorrect. In Illinois, at least, local governments retain the prerogative to ban handguns. See Brief for the States of Illinois, *et al.*, as *Amici Curiae* in Support of Respondents; *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273-77 (Ill. 1984). Indeed, under present law, the States retain the ability—if their people so desire—to permit as much or as little firearms possession and use (consistent with federal law) as they choose. In urging incorporation of the Second Amendment, whose effect could only be to restrict state legislative authority, Texas, *et al.*, apparently seek to override the considered judgments regarding arms rights reached either by other States or the citizens of their own States.

A wide array of bans on other firearms has been upheld under this approach. See *Benjamin*, 662 A.2d at 1232 (assault weapons ban; state constitution "does *not* guarantee the right to possess any weapon of the individual's choosing for use in self-defense" but protects only "each citizen's right to possess a weapon of reasonably sufficient firepower to be effective for self-defense"); *Robertson*, 874 P.2d at 333 (assault weapons ban; "ample weapons [remained] available for citizens to fully exercise their right to bear arms in self-defense"); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (assault weapons ban; "practical availability of certain firearms for purposes of hunting, recreational use and protection" remained); *Carson v. State*, 247 S.E.2d 68, 73 (Ga. 1978) (short-barreled shotgun ban "does not prohibit the bearing of *all* arms" and state constitution does not confer right to keep and carry arms "*of every description*"); *City of Cincinnati v.*

Langan, 640 N.E.2d 200, 205-06 (Ohio Ct. App. 1994) (semi-automatic weapon ban; following *Arnold*).[15]

b. Banning weapons routinely used for self-defense when necessary for the public welfare also has ample historical pedigree. The 19th century saw a sudden and dramatic increase in the availability of personal weapons "designed primarily for personal self-defense." Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 137 (2006). These weapons included pistols, sword canes, dirks (a kind of small dagger), and bowie knives (also known as Arkansas toothpicks). See *id.* at 137-38. They were particularly deadly. See *ibid.* Yet they were also popular. Knives in particular were widely used for lawful purposes. See Eric H. Monkkonen, *Murder in New York City* 36 (2001) ("In contrast to handguns, knives and other sharp instruments were certainly more prevalent in the nineteenth century than they are today, because they served as essential multipurpose tools in a world of wood-using technology.").

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[15] And although not turning on the availability of alternative arms, courts in numerous other modern cases have upheld firearm bans on other grounds. See, *e.g., State v. LaChapelle*, 451 N.W.2d 689 (Neb. 1990) (short shotguns); *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) (short-barreled shotguns); *Morrison v. State*, 339 S.W.2d 529 (Tex. Crim. App. 1960) (machine gun). Against the great weight of this authority, petitioners muster only one modern case, *State v. Delgado*, 692 P.2d 610 (Or. 1984), striking down a ban on switch-blades. Pet. Br. 69. Petitioners' other cases struck down a license requirement (see *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988)), and required local officials to submit handgun applications to citizens wishing to exercise their state-law firearms right (see *Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990)).

Like the handguns of today, the popularity of these 19th-century weapons led to frequent violent confrontations; legislation restricting or banning these weapons as public nuisances followed. See Cornell, *supra*, at 138-41. See also Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 512-16 (2004). Such legislation was frequently upheld. See *Aymette v. State*, 21 Tenn. 154 (1840) (upholding power to ban keeping and bearing of bowie knife); *State v. Buzzard*, 4 Ark. 18 (1842) (upholding ban on carrying concealed pistol); *Day v. State*, 37 Tenn. 496, 500 (1858) ("Legislature intended to abolish these most dangerous weapons [bowie-knives] entirely from use"); *English v. State*, 35 Tex. 473, 1872 WL 7422, at *2 (1871) (upholding ban on carrying of "pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives"). As one court explained:

> Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention of [sic] crime—a great public end—no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully prescribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's

> particular safety, if such case could exist, ought to be allowed to defeat this end.

Andrews v. State, 50 Tenn. 165, 188-89 (1871); see *id.* at 186-87 (upholding ban on carrying of dirk, swordcane, Spanish stiletto, belt or pocket pistol, or revolver if not a militia weapon). See also Brief of Professional Historians and Legal Historians as *Amici Curiae* in Support of Respondents.[16]

And, of course, bans on common weapons addressed unique local conditions. For example, responding to violence during the western cattle drives, Dodge City, Kansas, in 1876, banned the carrying of pistols and other dangerous weapons. See Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876) (on file with Kansas Historical Society). Indeed, by the 1870s, most Western cattle towns effectively banned firearms, requiring cowboys to "'check' their guns when they entered town, typically by exchanging them for a metal token at one of the major entry points or leaving them at the livery stable." David T. Courtwright, *The Cowboy Subculture*, in *Guns in America: A Reader* 96 (Jan E. Dizard, *et al.*, ed. 1999); see also Robert R. Dykstra, *The Cattle Towns* 121-22 (1968).

c. The longstanding consensus approach in the States reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155. See also Winkler, *supra*, at 720 ("State courts in the modern era have uniformly upheld state prohibitions on particular types of guns, without requiring any legislative fact-finding to support the bans."). And it is worlds away from the Second Amendment's common-use rule. Unlike the "deep commitment of the Nation to the right of jury trial in serious criminal cases" discernable from state practice in *Duncan* (391 U.S. at 156), there is no deep commitment in the States to a rule of arms possession without regard to harm to the public welfare, and regardless of whether other weapons are permitted. To the contrary, state and local governments routinely ban weapons whose availability, in their considered judgment, harms the public welfare, while, at the same time, permitting other weapons for purposes of self-defense. Incorporation of the Second Amendment in the teeth of this considered and established state practice would be unwarranted.

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[16] South Carolina banned the sale of handguns within the State for more than 60 years. See Act No. 435, 1901 S.C. Acts 748, repealed by Act No. 330, 1965 S.C. Acts 578.

D. The Framing-Era History Of The Second Amendment Does Not Support Incorporation.

This Court has sometimes considered the Framing-era history of a Bill of Rights provision in considering whether the provision is incorporated in the Due Process Clause.[17] That history is not determinative, because the due process standard is an adaptive one. See pp. 10-12, *supra*. And even the fact that a right was sufficiently valued to include in the Bill of Rights is not sufficient to establish that it was implicit in the concept of ordered liberty and therefore should be applied to the States. See, *e.g.*, *Malloy*, 378 U.S. at 4; *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916) (Seventh Amendment); *Hurtado v. California*, 110 U.S. 516 (1884) (Grand Jury Clause).

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[17] The only incorporation cases extensively discussing the Framing-era history of the right at issue were *Duncan*, 391 U.S. at 151-53, and *Klopfer*, 386 U.S. at 225-26.

Nonetheless, the Framing-era history can cast light on the extent to which the right was viewed—and should still be viewed—as implicit in the concept of ordered liberty. In this case, that history does not support incorporation.

1. This Court in *Heller* extensively canvassed the Framing-era history of the Second Amendment because contemporary public understanding was decisive in determining the question before the Court: whether the Second Amendment right was "only the right to possess and carry a firearm in connection with militia service" or a "right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." 128 S. Ct. at 2789. The Court held that the right was an "individual right to possess and carry weapons in case of confrontation." *Id.* at 2797.

The Court explained that the Second Amendment right was an "individual right protecting against both public and private violence" that originated at the time of the Glorious Revolution. *Heller*, 128 S. Ct. at 2798-99. That pre-existing right to keep and bear arms, however, was not codified in the Constitution to protect "self-defense and hunting," though doubtless many "thought it even more important for self-defense and hunting" than for "preserving the militia." *Id.* at 2801. Instead, "the purpose for which the right was codified" was "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms," as the English had attempted to do to the colonists. *Ibid.* Thus, "self-defense had little to do with the right's *codification*," although "it was the *central component* of the right itself." *Ibid.* The Framers realized that, "unlike some other English rights" that remained outside the Constitution, the pre-existing right to keep and bear arms should be codified in order to protect the militia, which in turn was thought to be necessary to address "the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia." *Ibid.*[18]

2. The Second Amendment's history thus varies widely from the history examined by the Court in prior incorporation cases. When the Court has examined the Framing-era history as support for incorporating a right in the Due Process Clause, the right was included in the Bill of Rights because its protection of individual liberty was valued for its own sake. See, *e.g.*, *Duncan*, 391 U.S. at 151-53; *Klopfer*, 386 U.S. at 225-26. Even where the Court has not found it necessary expressly to canvass the Framing-era history, the same holds true. For example, it is obvious that the great rights of the First Amendment—freedom of speech and the press, the prohibition of establishment of religion and the right of free exercise, the rights to petition and peaceably assemble—were codified precisely because

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[18] It does not matter that some Framers might have "sought to address their fear of federal abolition of state militias not through the Second Amendment, but 'in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so.'" Brief of Texas, *et al.*, 22 (quoting *Heller*, 128 S. Ct. at 2804). While those structural provisions may have guarded against "aboli[tion]" of the "institution" of the militia, *Heller* is clear that the Second Amendment was motivated not by fear of formal abolition but fear that the federal government would *de facto* eliminate the militia "by taking away the people's arms." 128 S. Ct. at 2801.

their protection of the individual from governmental intrusion was thought essential to a free society. See, *e.g.*, *Schneider*, 308 U.S. at 161 (characterizing freedoms of speech and press "as fundamental personal rights and liberties . . . reflect[ing] the belief of the framers . . . that exercise of the rights lies at the foundation of free government by free men"). In answering the incorporation question, there was no need separately to examine the Framing-era history or whether the Framers viewed the right as essential to personal liberty.

The Second Amendment is in this respect entirely different. As *Heller* explained, the Second Amendment right was *not* codified because the Framers believed that its protection of a non-militia-related individual liberty was essential to a free society. Although they valued the right as it had been reflected in a variety of legal sources, they codified it for a different reason: "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms." 128 S. Ct. at 2801. Indeed, the preamble to the Second Amendment, which is "unique in our Constitution" (*id.* at 2789), serves precisely the function of explaining to the public why codifying the right in the Constitution was thought necessary; the other rights in the Bill of Rights required no similar explanation, because the need to protect them from governmental intrusion and from the political process was obvious. Nor does anything in *Heller* suggest (and there is otherwise no reason to believe) that the right to keep and bear arms would have been included in the Bill of Rights were it not for this militia-related purpose. See *id.* at 2801 ("the reason" the right was codified was to preserve the militia). Rather, although the right was valued and embodied in a variety of other sources of law, there is every reason to believe that the Framers thought that the non-militia-related aspect of the right—primarily, the desire to have arms available for self-defense—would be adequately protected in the political process (as the right was in England, see 128 S. Ct. at 2798) by the ordinary process of democratic decisionmaking.[19]

The congressional debate surrounding Madison's proposal for the Second Amendment tends to confirm that conclusion. If the Second Amendment right were thought essential to protect a non-militia-related personal liberty from governmental intrusion and from the political process, some trace of that belief would likely have surfaced. But nothing in the congressional debate over Madison's proposal for the Second Amendment suggests any view that a private arms right unconnected to preservation of the militia was essential. See *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 169-76, 185-91 (Cogan ed. 1997); Jack Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 127-28 (2000).[20]

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[19] *Heller* noted that, at the time of the Framing, only Pennsylvania and Vermont had clearly adopted state constitutional provisions protecting an individual firearms right "unconnected to militia service." 128 S. Ct. at 2802. The constitutions of North Carolina and Massachusetts had provisions that were ambiguous in that respect. See *id.* at 2802-03. In any event, by the 19th century, the public recognized that, rather than protecting a firearms right from the political process, government can and should exercise its police power to balance the interests in weapon possession and the harms that such weapons could cause. See pp. 28-30, *supra* (mid-19th century), 77-79, *infra* (post-Civil War); Brief of Professional Historians and Legal Historians in Support of Respondents.

[20] The Framers may have thought that service in the militia and participation in defense of the country was itself an impor-

3. The scope of the Second Amendment right also reflects the purpose to protect the militia rather than to further a fundamental aspect of personal liberty. The Second Amendment protects weapons in common use because that is what was required to "secur[e] the militia" in the founding era. *Heller*, 128 S. Ct. at 2811. At that time, weapons possessed commonly for purely private uses such as self-defense and the weapons used by private citizens in the militia "'were one and the same.'" *Id.* at 2815 (citation omitted). Militia members had to "appear bearing arms supplied by themselves and of the kind in common use at the time" (*id.* at 2815 (quoting *Miller*, 307 U.S. at 179)), and knowing how "to handle and use [arms] in a way that makes those who keep them ready for their efficient use" (*id.* at 2811-12 (quoting Thomas Cooley, *Treatise on Constitutional Limitations* 271 (1868))). Consequently, the Second Amendment generally protects weapons in common use, regardless of how useful they are for self-defense, and it does not protect weapons not in common use that would undoubtedly be useful for self-defense (*e.g.*, machine guns). See *id.* at 2817.

4. In short, the Framing-era history of the Second Amendment is unique, because the reason for codi-

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tant personal right that they valued highly, apart from the "individual right to possess and carry weapons in case of confrontation." *Heller*, 128 S. Ct. at 2797. As *Heller* notes, however, "modern developments have limited the degree of fit between the prefatory clause [recognizing the need to maintain the militia] and the protected right." *Id.* at 2817. Few would maintain that a right to participate in the national defense in the way that the Second Amendment protects—as a member of the unorganized militia possessing small arms in common use—is implicit in ordered liberty or essential to a present-day free society.

fying the Second Amendment (to protect the militia) differs from the purpose (primarily, to use firearms to engage in self-defense) that is claimed to make the right implicit in the concept of ordered liberty. Unlike the other provisions of the Bill of Rights, there is no reason to believe that the Framers thought that highly valued individual interests, such as self-defense, could not be protected without the blanket right. Nor does the history indicate that the Framers believed it was implicit in a system of ordered liberty that the right to keep and bear arms be protected from the democratic political process.

E. The Other Arguments Advanced By Petitioners And Their Supporters Should Be Rejected.

1. The constitutional status and incidents of a right to self-defense are not at issue.

NRA argues that the Second Amendment should be incorporated because "Americans' personal right to possess . . . firearms for . . . self-defense has long been an essential and fundamental component of Americans' view of themselves as a free people." NRA Br. 35; see also Pet. Br. 69-70. *Heller* noted that "the inherent right of self-defense has been central to the Second Amendment right" (128 S. Ct. at 2817), and contentions about the need for firearms for self-defense have long dominated the controversies about the extent to which governments at various levels should regulate or limit firearms. This case, however, does not present any question about the constitutional status or incidents of an unenumerated right to self-defense, and the presumed existence of such a right would not support incorporating the Second Amendment in any event.

This Court has had many cases working out the law of self-defense (*e.g.*, *Brown v. United States*, 256 U.S. 335 (1921)) and addressing the constitutional consequences of recognizing a defense of self-defense to a criminal charge (*e.g.*, *Martin v. Ohio*, 480 U.S. 228 (1987)). But, because no State or the federal government to our knowledge has ever tried to eliminate self-defense as a defense in the criminal law, the Court has never had occasion to address whether or how the Due Process Clause protects it. While there may be significant support for recognizing an unenumerated right to a defense of self-defense in the criminal law if the occasion arose (*cf. Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion)), substantial care would be warranted to avoid freezing the continuing evolution of the self-defense doctrine and the wide variation in its incidents in various jurisdictions. See, *e.g.*, Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (2d ed. 2003).

Assuming that there is an unenumerated right to self-defense that extends beyond its recognition as a defense to criminal charges, such a right would not support incorporation of the Second Amendment. To be sure, the question could arise whether there is an ancillary right to the tools necessary to engage in self-defense, and a state law that purported to deprive people of all such tools would raise the question whether such an ancillary right should be recognized. But even if the Court were to recognize not merely the existence of a constitutional right to self-defense but also an ancillary right to tools necessary for its effectuation, and even if that ancillary right included a right to some kind of firearm, it would not provide support for incorporating the Second Amendment. So long as the States permitted the use of reasonable tools (including perhaps some kind of firearm) for self-defense, any constitutional right to self-defense would surely be adequately protected.[21] Yet such a regime would stop short of including the Second Amendment right to choose a weapon from among those in common use.

Indeed, neither petitioners nor NRA has attempted to make a showing that Chicago's ordinance eliminates a right to self-defense, or even the ability to have tools necessary to effectuate any such right. Nor could such a showing be made. Both Chicago and Oak Park permit the possession of long guns for self-defense or other purposes.[22] Petitioners and NRA make no argument that they are unable to adequately exercise a protected liberty interest in self-defense without access to handguns. Although there is a variety of views on the subject, there is a wealth of authority among experts that handguns are not the best weapon for self-defense purposes. See Sugarmann, *supra*, at 58-59. See also Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry, and Shoot a Gun in Self Defense* 140 (2008) (handgun is "a compromise," "the least-effective firearm for self defense," and "the hardest firearm to shoot accurately," while "shotguns and rifles are much more effective in stopping a drug-hyped robber or rapist"); Violence Policy Center, *Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense* (2001) (available at www.vpc.org/studies/unincont.htm).

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[21] At most, an unenumerated right to self-defense could invalidate laws that place an "undue burden" on it. See, *e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Such a right would not support incorporation of the Second Amendment, which invalidates any prohibition of weapons in common use, regardless of the justifications for the restriction.

[22] Chicago's ordinance differs from the one at issue in *Heller*. Although the District permitted long guns in the home, they had to be "unloaded and disassembled or bound by a trigger lock or similar device." *Heller*, 128 S. Ct. at 2818 (citation omitted). Those restrictions limited the utility of long guns as an alternative to handguns.

2. Incorporation of other Bill of Rights provisions does not support incorporation of the Second Amendment.

According to petitioners, "[g]iven that the Due Process Clause has incorporated virtually all other enumerated rights, the obvious question is what exactly justifies treating the Second Amendment as the great exception." Pet. Br. 66 (internal quotation marks and ellipsis omitted). But there is no "me, too" principle applicable to incorporation. To establish that a particular provision of the Bill of Rights applies to the States, that particular provision—not some other one—must be so fundamental that it warrants displacing the ability of state and local governments to make their own sovereign choices and legislate for their own conditions.

In fact, the Second Amendment right is much closer to the Fifth Amendment grand jury and Seventh Amendment civil jury rights that are not incorporated than to the First, Fourth, Fifth, Sixth, and Eighth Amendment rights that are. The latter rights are incorporated not because they are means to greater ends, but because they themselves have been recognized as core aspects of liberty. To be sure, both the grand jury and civil jury rights could also be described as serving more significant background values that are much closer to the core of "ordered liberty": the need for regularized institution of criminal proceedings and for an impartial decisionmaker to decide civil cases. Nonetheless, this Court has held that the grand jury right, while important enough to be included in the Fifth Amendment, was not essential to due process because the underlying value could be served through other mechanisms, such as initiation of a criminal proceeding by information. See *Hurtado*, 110 U.S. at 537-38. And the Court has accepted that a judge may be an adequate factfinder in a civil case. See *Minneapolis*, 241 U.S. at 217-18. Similarly, the right to keep and bear arms may have a relationship to an unenumerated right to self-defense, which this Court could recognize as fundamental in an appropriate setting. But, as we explain above, that right, insofar as it is protected by the Due Process Clause, may be protected in many ways aside from the particular means embodied in the Second Amendment.

Finally, the Second Amendment is different from the other rights that have been incorporated in another important respect. As this Court has worked out the meanings of each of the provisions of the Bill of Rights, it has had to address hotly contested issues concerning the incidents of each of those rights. But the necessity to a free society of the substantive rights that have been incorporated—the freedom of the press, freedom of speech, Establishment Clause and free exercise rights, the right against government expropriation of private property in the Just Compensation Clause, etc.—is not seriously open to question. The subject matter of the Second Amendment, however, is a highly dangerous item, firearms. The desirability of regulating or prohibiting certain firearms is very much a subject of dispute and contention among those committed to a free society—

precisely the sort of dispute that should be worked out in the political systems of the States.

II. THE COURT SHOULD ADHERE TO PRECEDENT REJECTING INCORPORATION UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE.

A. This Court Has Repeatedly Held That The Privileges Or Immunities Clause Does Not Incorporate Any Provisions Of The Bill Of Rights.

Petitioners devote the bulk of their brief to urging this Court to overrule a long line of precedent holding that the Privileges or Immunities Clause does not incorporate any or all of the provisions of the Bill of Rights. Pet. Br. 9-65. The *stare decisis* considerations that this Court examines overwhelmingly support continued adherence to those precedents. At the same time, the historical record on which petitioners rely does not nearly establish that such incorporation was understood by members of Congress, the ratifiers, or the public as a consequence of adopting the Clause; certainly an intent to incorporate under the Clause is not clear enough to upset settled precedent.

1. The Privileges or Immunities Clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. The Court first construed this clause in the seminal *Slaughter-House Cases*, ruling that it includes only those rights that "are dependent upon citizenship of the United States, and not citizenship of a State." 83 U.S. at 80. The Court noted that the immediately prior Citizenship Clause makes "persons born or naturalized in the United States and subject to the jurisdiction

thereof . . . citizens of the United States and of the State in which they reside"; if the Privileges or Immunities Clause "was intended as a protection to the citizen of a State against the legislative power of his own State," it was "remarkable . . . that the word citizen of the State should be left out" when the distinction from "citizens of the United States" had appeared elsewhere. *Id.* at 73-74. Accordingly, the Court construed the "privileges or immunities of citizens of the United States" to be those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 78-79. They did not include those derived from other sources.

The Court gave some examples of the privileges or immunities of national citizenship, such as the right to "come to the seat of government to assert any claim he may have . . ., to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions." *Slaughter-House*, 83 U.S. at 79 (quoting *Crandall v. Nevada*, 75 U.S. (6 Wall.) 36 (1867)). They also included, *inter alia*, the "privilege of the writ of habeas corpus" (U.S. Const. art. I, § 9) and the privilege "that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein." *Slaughter-House*, 83 U.S. at 80. But before the Clause was enacted, the privileges of *national* citizenship under *Barron* had not included a right against *state* abridgment of freedom of speech, freedom of the press, or the other provisions of the Bill of Rights; those sorts of protections and others were instead provided by state laws or state constitutions. See *id.* at 76. Nothing in the Privileges or Immunities Clause purported to or did alter that situation.

2. As petitioners acknowledge, in the wake of *Slaughter-House*, the Court expressly rejected incorporation of Bill of Rights provisions, including the Second Amendment, under the Privileges or Immunities Clause. Pet. Br. 7-8. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court held that the Second Amendment does not apply to the States, finding the right to bear arms is not "in any manner dependent upon [the Constitution] for its existence." *Id.* at 553. In *Presser v. Illinois*, 116 U.S. 252 (1886), the Court reaffirmed that the Second Amendment right "to keep and bear arms" is not a privilege or immunity of United States citizenship. *Id.* at 266-67.

3. Relying on *Slaughter-House*, the Court has consistently rejected incorporation of other Bill of Rights provisions under the Privileges or Immunities Clause. In *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court rejected the argument that the Privileges or Immunities Clause requires the States to adhere to the Fifth Amendment right to grand jury indictment or the Sixth Amendment right to jury trial in criminal cases. See *id.* at 596-02. The Court explained that under *Slaughter-House*, the protection of the privileges and immunities of state citizenship "still remains with the state," and the privileges or immunities of national citizenship do not "include all the rights protected by the first eight amendments." *Id.* at 597. Similarly, in *Twining*, the Court reaffirmed that civil rights "which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by" the Privileges or Immunities Clause (211 U.S. at 96); the Clause "did not forbid the states to abridge the personal rights enumerated in the first eight Amendments" (*id.* at 99). See also *In re Kemmler*, 136 U.S. 436, 446-49 (1890) (Eighth Amendment prohibi-

tion against cruel and unusual punishment); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (Seventh Amendment). Finally, in *Adamson v. California*, 332 U.S. 46 (1947), the Court held that the privilege against self-incrimination was a privilege or immunity of state, rather than national, citizenship. See *id.* at 52-53.

In those cases and afterwards, the Court has relied on the Due Process Clause to address incorporation claims. For example, it overruled the due process holding of *Maxwell* in *Williams v. Florida*, 399 U.S. 78 (1970), and the due process holdings of *Adamson* and *Twining* in *Malloy*. But the Court has never departed from or cast doubt on the holdings of any of those cases that the Privileges or Immunities Clause does not incorporate any of the provisions of the Bill of Rights.

B. Considerations Governing *Stare Decisis* Militate Strongly For Adherence To Settled Precedent In This Case.

Petitioners admit that *Slaughter-House* forecloses incorporation under the Privileges or Immunities Clause; they urge this Court to overrule it and the many cases that have relied on it (Pet. Br. 42), and to embrace an interpretation of the Privileges or Immunities Clause that includes not only the first eight amendments, but also an undefined "broad array of pre-existing natural rights believed secured by all free governments" (*id.* at 10). Overruling *Slaughter-House* and its progeny at this late date would upset strong reliance interests, throw the structure of constitutional law applicable to the States into disarray, and serve no useful purpose. It also would be inconsistent with the bulk of the historical evidence concerning the meaning of the Privileges or Immunities Clause and would merely substitute the views of the current Members of this Court for the considered views of a Court whose Members had recently lived through the proposal and ratification of the Clause and were therefore in a uniquely favorable position to discern its meaning. Petitioners' argument should be rejected.

"[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). Adhering to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). While "*stare decisis* is not an 'inexorable command,'" especially in a constitutional case (*Casey*, 505 U.S. at 854), its application to a particular case is governed by four primary factors: the workability of the prior rule and the new proposal; the antiquity of the precedent; individual or societal reliance that would be upset by overruling; and evolution of the law or a change in premises of fact that has undermined the original rationale. See, *e.g.*, *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009); *Casey*, 505 U.S. at 854-55; see also *Lawrence*, 539 U.S. at 576-77 (erosion of prior decisions and non-reliance supported overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). These factors cut overwhelmingly in favor of *stare decisis* here. Against them, only the most compelling rationale could support overruling *Slaughter-House* and its progeny.

1. *Workability*. The Court's privileges or immunities jurisprudence is clear and easy to apply. Under it, only laws that trammel protections that the Constitution itself grants as incidents of national

citizenship, like the right to become a citizen of any State (see *Saenz v. Roe*, 526 U.S. 489, 503 (1999)), are invalid. The Court has had relatively few cases arising under the Clause over the course of its history and has not had great difficulty deciding them.

Overruling *Slaughter-House* and its progeny would create a chaotic situation in constitutional law. It would immediately call into doubt the scope of constitutional rights enforceable against the States by two important classes: aliens and corporations. If the Privileges or Immunities Clause were to displace the Due Process Clause as the vehicle of incorporation, then, according to petitioners, all of the first eight Amendments (and additional rights besides) would apply to the States. Pet. Br. 6, 7, 14, 15, 22, 26, 27, 33. Indeed, it would be difficult to understand an argument that the Privileges or Immunities Clause was understood to incorporate the Second Amendment but *not* the other provisions of the Bill of Rights; the Clause does not expressly refer to the Second Amendment, and there is no basis on which the Court could determine that the Second Amendment, but not these other rights, is incorporated.

The Privileges or Immunities Clause, however, is worded distinctly from the Due Process Clause, which until now has governed the incorporation issue. While the Due Process Clause provides "nor shall any State deprive any *person* of life, liberty, or property, without due process of law," the Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States." U.S. Const. amend. XIV, § 1 (emphases added). Aliens and legal entities such as corporations are "persons" under the Due Process Clause. See, *e.g.*, *First National Bank v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (corporations); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (aliens). But aliens are not "citizens," and it has long been settled that corporations too are not "citizens" under the Privileges or Immunities Clause. See, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907); see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (same under Art. IV, § 2); *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 884 (1985) (O'Connor, J., dissenting). Accordingly, if the Privileges or Immunities Clause were the source of constitutional protections against the States, the extent to which aliens and corporations could claim such rights would immediately be thrown into doubt.

To be sure, it is possible that the Due Process Clause would remain applicable to provide redundant incorporation of at least some provisions of the Bill of Rights, and that the rights of aliens and corporations under those provisions would remain secure. But the argument for shifting incorporation of Bill of Rights protections to the Privileges or Immunities Clause rests largely on dissatisfaction with the current protection of at least substantive rights under the Due Process Clause. See *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting). Indeed, if both Clauses continued to protect the same rights, overruling *Slaughter-House* and its progeny would be an empty gesture and could not be justified.

Petitioners themselves recognize the problem with respect to aliens (Pet. Br. 62-64), although they ignore the impact on corporations. They argue, however, that the reference of the word "citizens" in the Privileges or Immunities Clause is to the class of rights protected, rather than the individuals who may assert them; that aliens would continue to have rights against States under the Equal Protection Clause; that state laws regarding alienage may be preempted by federal law; and that Sen. Howard and Rep. Bingham argued that the Fourteenth Amendment would protect everyone within a State's jurisdiction. *Ibid.*[23] Of course, it could equally be argued that by far the most natural reading of the Clause is to protect only citizens; that equal protection rights for aliens would not replicate Bill of Rights provisions that apply to the States; that some state laws may not be preempted and, even if they were, the protections of the Bill of Rights extend beyond possibly preempted state laws (for example, to actions of individual police officers in violation of the Fourth Amendment); and that it was the text of the Clause, not the speeches given in Congress, that was proposed and ratified as part of the Fourteenth Amendment. Accepting petitioners' argument would throw the entire question of the rights of aliens and corporations into doubt that could take many years to resolve.

Other uncertainties flow from accepting petitioners' argument, too. Petitioners base their argument on sources that, if credited, would establish not only that the Privileges or Immunities Clause incorporates all of the Bill of Rights provisions, but that it also makes applicable to the States unenumerated fundamental rights of uncertain scope. See, *e.g.*, Pet. Br. 26 ("the natural, fundamental rights, believed to fall under Article IV, section 2, and the rights codified in the first eight amendments"), 33 ("fundamental rights, including those codified in the Bill of Rights"), 55 ("pre-existing natural rights"). Thus, petitioners' argument would require this Court to sort out which unenumerated and previously unrecognized rights are protected by the Privileges or Immunities Clause. Moreover, even unenumerated rights this Court *has* recognized under the Due Process Clause would need to be reassessed, given petitioners' theory that the Due Process Clause does not provide an adequate means of protecting enumerated or unenumerated rights. Finally, because the Privileges or Immunities Clause does not grant any rights against the federal government, petitioners' "pre-existing natural rights"—whatever they turn out to be—would presumably apply *only* against the States, not the federal government.

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[23] Two of petitioners' *amici* embrace the Privileges or Immunities Clause precisely *because* it excludes aliens. See Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Petitioners 5, 25-28; Brief of American Civil Rights Union, *et al.*, in Support of Petitioners 5, 7-8, 30-34.

2. *The antiquity of the precedent. Slaughter-House* was decided 137 years ago. While Members of the Court have debated whether a 20-year-old precedent has sufficient age to warrant extra care before overruling it (compare *Montejo*, 129 S. Ct. at 2089, with *id.* at 2098 (Stevens, J., dissenting)), there can be no doubt that exceptional justification is required before overruling a venerable precedent that has been consistently reaffirmed.

3. *Reliance.* Policies supporting *stare decisis* are "at their acme . . . where reliance interests are involved." *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009). There has been very substantial reliance on this Court's repeated reaffirmations that the Privileges or Immunities Clause does not make the Bill of Rights applicable to the States. In particular, this Court has regularly (and recently) made clear that two provisions of the Bill of Rights (at least)—the

Grand Jury Clause of the Fifth Amendment and the civil jury right in the Seventh Amendment—do not apply to the States. See, *e.g.*, *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (Grand Jury Clause). Many States have constructed their systems of criminal and civil justice in reliance on those holdings.[24] Petitioners' argument leads inexorably to making *all* of the provisions of the Bill of Rights, including the grand jury and civil jury rights, applicable to the States. Accordingly, overruling *Slaughter-House* would require the States to overhaul their systems that are not in compliance with the newly applicable provisions; call into doubt settled judgments in civil (and possibly even criminal) cases; and require the States to tailor their criminal and civil justice systems to federal standards that have previously been found *not* to be necessary or fundamental. Those reliance interests counsel strongly against overruling *Slaughter-House* and its progeny.

4. *Erosion of legal and factual premises.* There has been no erosion of the foundation of *Slaughter-House*. No related areas of law have changed in a way that renders *Slaughter-House* "anachronistic." *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992). Nor have

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[24] See, *e.g.*, *Beck v. Washington*, 369 U.S. 541, 545 (1962) (noting that State of Washington had eliminated mandatory grand jury practice in 1909 and convened grand juries only on special occasions). Today, most States use procedures other than grand jury indictment to initiate prosecutions; only fifteen require grand juries to return felony charges, and two require it only for capital or life imprisonment cases. See Bureau of Justice Statistics, U.S. Department of Justice, *State Court Organization 2004* at 215-17 tbl. 38. See also Brief for Illinois, *et al.*, as *Amici Curiae* in Support of Respondents.

more recent cases "undermined the assumptions" (*Agostini v. Felton*, 521 U.S. 203, 222 (1997)) or "substantially weakened" its "analytical underpinnings" (*State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997)). The Court's path in this area has been consistent.

Petitioners argue that *Slaughter-House* is an anachronism because most Bill of Rights protections have been incorporated under the Due Process Clause and the prediction in *Slaughter-House* that the Equal Protection Clause would ultimately serve only to protect the rights of African-Americans (see 83 U.S. at 81) has not proven true (Pet. Br. 64). But *Slaughter-House*'s "central rule" (*id.* at 64-65) with respect to Privileges or Immunities has been reaffirmed every time this Court has addressed it. Both incorporation of many Bill of Rights provisions under the Due Process Clause and the Court's recognition that the Equal Protection Clause affords protection to others besides African-Americans demonstrate that the Court's jurisprudence provides amply workable means to protect individual rights without overturning settled precedent. In no sense does either development render the Court's steady approach to the Privileges or Immunities Clause an anachronism.

Petitioners also fail to show that the factual premises underlying *Slaughter-House* and its progeny have been undermined. The historical record was scoured in *Adamson*, when Justice Black's dissent urged incorporation of the Bill of Rights through the Privileges or Immunities Clause (see 332 U.S. at 68-92), relying heavily upon many of the same Congressional Globe excerpts as petitioners. Like petitioners, Justice Black reviewed debates surrounding the Civil Rights Act of 1866 and the Freedmen's Bureau Act. See *id.* at 99-113. The Court in *Adamson*, however, rejected the argument for incorporation (see *id.* at 52-53), as did Justice Frankfurter's concurrence (see *id.* at 62-67). The history has not changed since then, and there is no need for the Court to again re-examine the same factual claims that it has already, and correctly, rejected many times.

C. Even If Viewed *De Novo*, The Historical Record Provides No Basis For Imposing The Second Amendment On The States.

In construing the Second Amendment, *Heller* undertook a historical analysis to discern the meaning according to "public understanding" at the time of ratification. 128 S. Ct. at 2805. As the Court explained:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

Id. at 2788 (citations omitted). The original meaning must be gleaned from the understanding of voters and ordinary citizens.

Petitioners claim that the "privileges or immunities of citizens of the United States" include the Bill of Rights and a host of other fundamental rights. Pet. Br. 26. NRA stops short of arguing that the entire Bill of Rights should be incorporated and is non-committal about which clause was meant to incorporate the Second Amendment, asserting instead that it could be "nestled" in either clause. NRA Br. 10. Neither position is supported by the historical record.

1. The historical record does not support a public understanding of total incorporation.

In 1833, this Court in *Barron* settled a question "of great importance, but not of much difficulty," holding that the Bill of Rights did not restrict the States. 32 U.S. at 247; see also *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551-52 (1833). Thus, long before the 1866 debates on the Fourteenth Amendment, it was clear that the privileges or immunities of national citizenship did not include protection from state infringement of any of the rights in the Bill of Rights. The historical record does not show that the public understood, or even had reason to suspect, that the situation changed in 1868, and that the privileges and immunities of national citizenship now included protection from state infringement of the Bill of Rights generally, or the Second Amendment specifically. To the contrary, while the historical record reveals that a few Members of Congress had incorporationist designs, many others expressed confusion or opined that the Privileges or Immunities Clause was meant only as a non-discrimination rule, or to constitutionalize either the Privileges and Immunities Clause in Article IV, § 2 or the Civil Rights Act of 1866.

a. *Text.* The Privileges or Immunities Clause forbids state abridgement of "the privileges or immunities of citizens of the United States." By 1866, the phrase "Bill of Rights" had long been applied to the first ten amendments of the Constitution. Moreover, while the Bill of Rights refers to its protections as "rights" many times (Amendments I, II, IV, VI, VII, IX), the Bill of Rights does not employ the words "privilege" or "immunity." Surely the most natural way to refer to the first eight amendments would have been to refer directly to the "first eight Amendments," to the "Bill of Rights," or, at the very least, to have used the word "right" in some way to designate the object of the Clause. The Privileges or Immunities Clause does none of those things. If the Fourteenth Amendment's drafters intended to apply the Bill of Rights to the States, and for the public to understand that the Privileges or Immunities Clause would have this effect, they chose an indirect and uncertain way to do so.

In this respect, the Privileges or Immunities Clause may be usefully contrasted with other constitutional amendments that have been similarly designed to overturn decisions of this Court. Petitioners claim the Clause was intended to overrule *Barron*. But where a legislature intends to alter long-settled, clear law, it ordinarily can be expected to act with some clarity. And, in other instances in which the Constitution was amended to undo prior judicial rulings or to modify earlier provisions, the amendments were clearly worded to have that effect, such that the ratifying public would have had little doubt about what it was being asked to approve. While controversy over the full meaning of the Eleventh Amendment has endured, all accept that its terms unambiguously overruled the result in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 723 (1999) ("[T]he Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court."); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 289 (1985) (Brennan, J., dissenting). Similarly, the terms of the Sixteenth Amendment clearly overturned this Court's decision in *Pollock v. Farmers' Loan & Trust*, 157 U.S. 429 (1895). See *Brushaber v. Union Pac. R.*, 240 U.S. 1, 18 (1916) ("[I]n the light of . . . the decision in the *Pollock* Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* Case was decided."). Finally, the Fourteenth Amendment's Citizenship Clause itself shows that, when Congress wants to overturn a well-known decision of this Court, the most natural way to do it is to make its intent clear. As the Court in *Slaughter-House* explained, while *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), held that African-Americans could not be citizens, the terms of the Citizenship Clause clearly "overturn[] the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States." 83 U.S. at 73.

In each of these instances, there was no reason to hide the purpose of the amendment from the public. To the contrary, given the high stakes and importance of reversing a foundational constitutional decision by this Court, Congress had every reason to make its intent clear. The opacity of the language of the Privileges or Immunities Clause, and the failure to use any of the numerous more direct ways to refer expressly to the Bill of Rights, strongly suggests that the Clause was not intended to affect the settled law governing the application of the Bill of Rights to the States.

Petitioners argue that the words "privileges" and "immunities" were "[p]opularly [u]nderstood to [e]ncompass [p]re-existent [f]undamental [r]ights, [i]ncluding [t]hose [e]numerated in the Bill of Rights."

Pet. Br. 15. At most, petitioners show that those words were sometimes used to describe natural or fundamental rights, particular Bill of Rights guarantees, or, more generally, the guarantees of the federal Constitution. *Id.* at 16-19. The words "privileges" and "immunities" appeared in many different contexts (see George C. Thomas III, *Newspapers and the Fourteenth Amendment: What did the American Public Know About Section 1?*, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1392961, at 7 (search of "privileges and/or immunities" in newspapers for 1865-69 showed numerous and varied uses of those terms)), and carried other meanings that, insofar as they referred to rights at all, connoted a narrower or different set of rights.

For example, Webster defined "privilege" as "[a] peculiar benefit or advantage; a right or immunity not enjoyed by others or by all" (Noah Webster, *An American Dictionary of the English Language* 1039 (G & C Merriam 1866)), and "immunity" as "[f]reedom from an obligation; exemption from any charge, duty, office, tax, or imposition" (*id.* at 661). As would be expected from its use in the phrase "Bill of Rights," the word "right" was more generally defined as "[t]hat to which one has a claim" (*id.* at 1140)—a much broader meaning that fits more comfortably with the broadly applicable guarantees of the first eight amendments. Similarly, Rep. Kerr discussed Worcester's definition of the terms during debate over Fourteenth Amendment enforcement legislation:

> It is most erroneous to suppose that the words "rights," "privileges," and "immunities" are synonymous. They are not. The word "rights" is generic, embracing all that may be lawfully

> claimed, and it is affirmative; but the others are, in the most exact and legal definition, both restrictive and negative.

Cong. Globe, 42d Cong., 1st Sess. app. 47 (1871).

Because "privileges" and "immunities" had more than one meaning, it cannot be concluded that the public would have understood those words to invoke petitioners' collection of all broadly defined natural and fundamental rights, and the Bill of Rights too. One of petitioners' own examples makes the point. Justice Washington's lengthy list in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), of "privileges" and "immunities" subject to Article IV, § 2 conspicuously did *not* include the first eight amendments. Pet. Br. 17. Nor does combining "privileges or immunities" with "of citizens of the United States" clarify that Bill of Rights provisions were included. As we have explained, *Barron* made plain that provisions against state intrusion on Bill of Rights protections is not a privilege or immunity of national citizenship.

b. *Judicial decisions.* Judicial opinions around the time that a constitutional provision is adopted are potent evidence of public understanding. See *Heller*, 128 S. Ct. at 2808-10. The Reconstruction-era Court surely would have been aware of a new understanding of the privileges or immunities of national citizenship designed to undo *Barron*, especially if such a public understanding were reflected in the Senate debates over the Fourteenth Amendment that took place next door. See George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L. J. 1627, 1652 (2007). But the Court's decisions in the wake of Fourteenth Amendment ratification reflect no such incorporationist understanding. Just months after ratification, *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868), rejected Fifth and Sixth Amendment challenges to a state indictment, based on *Barron*. If the public understood the Privileges or Immunities Clause to undo *Barron*, surely this Court and Twitchell's lawyer—who was himself a "constitutional theorist who had promoted the concept of incorporation" (Thomas, *Riddle*, *supra*, at 1653)—would have noted that. Besides *Twitchell*, two lower court decisions around the same time also rejected incorporation of Bill of Rights provisions. See *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148-50 (1872).

Then came *Slaughter-House*, just five years after the ratification of the Fourteenth Amendment, in which the majority rejected the incorporationist understanding of the Privileges or Immunities Clause. In dissent, Justice Field, joined by three others, described the Clause as encompassing a nondiscrimination obligation. See 83 U.S. at 96-101. Only Justice Bradley's dissent, joined by Justice Swayne, endorsed a view that the Clause encompassed the first eight amendments. See *id.* at 118-19.[25] *Slaughter-House* received mixed reviews. As Charles Warren observed, *Slaughter-House* was a "tremendous shock and disappointment" to radical Republicans, but "the country at large may not have understood, at the time of the passage of the Fourteenth Amendment, the full purpose" those Republicans had in mind. 2 *The Supreme Court in United States History* 539 (rev. ed. 1926). Others endorsed the soundness of the decision, and not simply because they thought the Court had "dared to withstand the popular will" of the people, as petitioners suggest. Pet Br. 46. Christopher Tiedeman characterized the Court as defying "the letter of this amendment" (*The Unwritten Constitution of the United States* 103 (1890)), but doubted "that the majority of those, whose votes brought about the adoption of this amendment, intended it to have th[e] effect" of an extreme shift in power to the federal government (*id.* at 102). In the press, a New York Times editorial reported that *Slaughter-House* was "calculated to maintain, and to add to, the respect felt for the Court, as being at once scrupulous in its regard for the Constitution, and unambitious of extending its own jurisdiction." Editorial, *The Scope of the Thirteenth and Fourteenth Amendments*, N.Y. Times, Apr. 16, 1873. The Boston Daily Advertiser reported that the decision "attracted little attention outside of legal circles," and that "[t]he opinion of Mr. Justice Miller is held by the Bar to be exceedingly able." Warren, *supra*, at 539 (citing Boston Daily Advertiser, Apr. 16, 1873).

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[25] Justice Swayne filed a separate dissent but did not address incorporation. See 83 U.S. at 124-30.

To be sure, the precise question whether Bill of Rights guarantees were privileges or immunities of national citizenship was not presented in *Slaughter-House*. But in *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874), the Court unanimously rejected a claim that the Seventh Amendment right to trial by jury was a privilege or immunity of citizenship. Then *Cruikshank* held that the Second Amendment restrains only Congress. See 92 U.S. at 553.

The Reconstruction-era Court that decided *Slaughter-House*, *Cruikshank*, and *Edwards* was in a uniquely advantageous position to discern the meaning of the Privileges or Immunities Clause.

Eight of the nine Members of the Court were Republican appointees (see Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1358473, at 32)) and all of them lived through the national trauma of the Civil War, the postwar legislative efforts up to and including Congress's adoption of the Fourteenth Amendment, and the subsequent ratification process in the States. Indeed, the Court itself explained that the issues before it could not be resolved without reference to recent history:

> [F]or in [that history] is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

Slaughter-House, 83 U.S. at 67-68; see *id.* at 71 ("events . . . almost too recent to be called history, but which are familiar to us all"). See also *Morrison*, 529 U.S. at 621-22 (noting special "insight" of Justices who "obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment").

If there had been a public understanding that the Privileges or Immunities Clause made the Bill of Rights applicable against the States, those Justices would have been unable in good faith to ignore it, and commentators on the Court's decision in *Slaughter-*

House would have been equally clear that a dreadful error had been made. Petitioners simply ask this Court to address the same question that the Justices in *Slaughter-House* addressed, but with the disadvantages of 140 years' distance and a cold historical record. Even without the added force provided by *stare decisis*, petitioners' arguments should be rejected.

c. *Congressional record.* As petitioners observe (Pet. Br. 11-12), the Fourteenth Amendment—as well as the Civil Rights Act of 1866 and the Freedmen's Bureau Act—was intended to address discriminatory treatment of freedmen under Black Codes and atrocities committed against freedmen after the Civil War (see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 243-52 (1988); *Slaughter-House*, 83 U.S. at 70 (recounting, *inter alia*, that southern States had imposed "onerous disabilities and burdens" on the freedmen "and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value")). And as NRA emphasizes (NRA Br. 11-14), the Freedmen's Bureau Act was one of Congress's first efforts to restore order, targeting discriminatory laws, including the discriminatory disarmament of freed slaves. That statute provided for the "*full and equal benefit* of all laws . . . including the constitutional right to bear arms . . . without *respect to race or color, or previous condition of slavery*." Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (emphasis added). While this was a start for securing equal rights in rebel territories, it did not grant any substantive rights or purport to define the privileges or immunities of national citizenship; it required only nondiscriminatory treatment. The Civil Rights Act similarly required equal treatment, providing that United States citizens

> of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the *same* right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit* of all laws and proceedings for the security of person and property, *as is enjoyed by white persons.*

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). The Act did not embrace the first eight amendments or mention the right to arms. And petitioners cite no historical evidence that the public understood any of the rights listed, including the right to "full and equal benefit of all laws and proceedings for the security of person and property," to mean the Bill of Rights. Even with respect to the rights that were named, the Act required only nondiscrimination. During debate, several members expressed doubt that Congress had the authority to enact the legislation without a constitutional amendment. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 504 (1866) (Sen. Johnson); *id.* at 1290-93 (Rep. Bingham). Nevertheless, the Act was passed, and the President's veto was overridden. See *id.* at 1861.

Meanwhile, the debates on Rep. Bingham's initial proposed Fourteenth Amendment (see Cong. Globe, 39th Cong., 1st Sess. 1033 (1866)), and on the version introduced by Sen. Howard (see *id.* at 2764) began. Like the equality provisions of the Freedmen's Bureau Act and the Civil Rights Act, "the Amendment's central principle" was to establish "a national guarantee of equality before the law." Foner, *supra*, at 257.

Overwhelmingly, Representatives viewed Section 1 as an antidiscrimination rule. See generally John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). For example, Rep. Raymond described Section 1 as "secur[ing] an equality of rights among all the citizens of the United States." Cong. Globe, 39th Cong., 1st Sess. 2502 (1866). And Rep. Bingham himself defined "immunity" to mean "[e]xemption from unequal burdens." *Id.* at 1089. While Rep. Stevens stated that "the Constitution limits only the action of Congress, and is not a limitation on the States" and "[t]his amendment supplies that defect," he quickly clarified that it "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.* at 2459. He conveyed the same message with respect to the first version of the Fourteenth Amendment proposed by Bingham. To the claim that the Amendment meant that "all State legislation . . . may be overridden . . . and the law of Congress established instead" (*id.* at 1063 (Rep. Hale)), Rep. Stevens responded:

> Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality? Does this proposition mean anything more than that?

Ibid.

Many other Members of Congress expressed, more specifically, the notion that Section 1 would cure any lack of constitutional authority to enact the Civil

Rights Act, and even constitutionalize that rule of law. This was "[p]erhaps the single most frequently expressed understanding of the proposed Amendment." Rosenthal, *Second Amendment Plumbing, supra*, at 58. "[O]ver and over in this debate, the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other." Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 44 (1949). For instance, Rep. Latham stated that "the 'civil rights bill' . . . covers exactly the same ground as this amendment." Cong. Globe, 39th Cong., 1st Sess. 2883 (1866). Rep. Garfield explained that Section 1 was necessary, even after enacting the Civil Rights Act, in order to "lift that great and good law above the reach of political strife . . . and fix it . . . in the eternal firmament of the Constitution." *Id.* at 2462. Other examples of that understanding abound. See, *e.g.*, *id.* at 2459 (Rep. Stevens); *id.* at 2465 (Rep. Thayer); *id.* at 2467 (Rep. Boyer); *id.* at 2498 (Rep. Broomall); *id.* at 2502 (Rep. Raymond); *id.* at 2511 (Rep. Eliot); *id.* at 2538 (Rep. Rogers); *id.* at 2961 (Sen. Poland); *id.* at 3035 (Sen. Henderson); *id.* at 3069 (Rep. Van Aernam). Yet the Civil Rights Act, as we explain above, applied a non-discrimination principle, not a rule granting substantive rights. See 14 Stat. at 27. Those who construed the Amendment to simply duplicate and support the Civil Rights Act would not have understood it to achieve the entirely distinct purpose of applying the Bill of Rights to the States.

Others believed that the Privileges or Immunities Clause rendered Article IV, § 2 enforceable. Sen. Poland, for example, said that the Clause "secures nothing beyond what was intended" by Article IV, § 2. Cong. Globe, 39th Cong., 1st Sess. 2961 (1866). Rep. Bingham himself described "the privileges or immunities of a citizen of the United States" as being the same as the rights against state discrimination found in Article IV, § 2. *Id.* at 1089. Article IV, § 2 was itself a nondiscrimination obligation, requiring States to afford the same "fundamental" privileges and immunities provided its own citizens to citizens "in every other State." *Corfield*, 6 F. Cas. at 551-52. See also *Paul*, 75 U.S. at 179-83 (Article IV, § 2 prohibits "discriminating legislation against" citizens of other States). And *Corfield* did not indicate that the Privileges or Immunities Clause included the Bill of Rights.

Certainly, Sen. Howard was straightforward about his view that the Bill of Rights should be included among the privileges or immunities of national citizenship. See Pet. Br. 27. While he understood that *Corfield* itself did not refer to the Bill of Rights or its provisions, he argued that to the list of "fundamental" rights in *Corfield* "should be added the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). But no one else expressly agreed with, or clearly articulated, that idea. To the contrary, despite his speech, several Senators bemoaned the lack of any clear meaning to the clause. Sen. Hendricks stated that he had not "heard any Senator accurately define, what are the rights and immunities of citizenship" or that "any statesman has very accurately defined them." *Id.* at 3039. He described the terms as "not very certain" and "vague." *Ibid.* Similarly, Sen. Johnson proposed, just before the Amendment's passage, to delete the Privileges or Immunities Clause, "simply because [he did] not understand what [would] be the effect of that." *Id.* at 3041. Rep. Boyer found Section 1 "objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." *Id.* at 2467. No one responded to these claims of ambiguity, although it would have been simple to defeat them if the general understanding was that "privileges or immunities of citizens of the United States" includes the protections of the Bill of Rights. Indeed, while there was vigorous debate on other aspects of the Amendment—including Section 2's solution to apportionment of Congress and Section 3's restrictions on political office for rebels—there was comparatively little said about the Privileges or Immunities Clause. See Thomas, *Riddle*, *supra*, at 1638-39.

As for Rep. Bingham (see Pet. Br. 29-31), he may have desired incorporation, but he did not clearly articulate that desire during Fourteenth Amendment debates. He and "[o]ther leading Republicans . . . spoke on occasion as if section one guaranteed nothing more than equality, but at other times they interpreted it as a guarantor of absolute rights." William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 119 (1988). Many of his comments reflected an erroneous, *Barron*-contrarian view that States were already bound by the first eight amendments, and that a constitutional amendment was necessary only for federal enforcement of those rights. See Cong. Globe, 39th Cong., 1st Sess. 1034, 1088-90 (1866). And, on several occasions, he denied that the Amendment would "take away from any State any right that belongs to it." *Id.* at 1088; accord *id.* at 1090.

Rep. Bingham's clearest statement that Section 1 would incorporate the Bill of Rights did not come until 1871, long after the ratification of the Amendment. In the debates over the Civil Rights Act of 1871, he said the first eight amendments "never were limitations upon the power of the states, until made so by the fourteenth amendment" and that privileges or immunities "are chiefly defined in the first eight amendments." Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871). Even then, Rep. Bingham was sending mixed signals. Only two months earlier, he issued a contradictory statement in a report from the Committee on the Judiciary, stating that the Privileges or Immunities Clause does not "refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2" and "did not add to the privileges or immunities before mentioned." H.R. Rep. No. 22 (Jan. 30, 1871). Based on Rep. Bingham's mixed messages, he has been referred to by scholars as "befuddled" (Fairman, *supra*, at 26), or, to give him more credit, as a "consummate politician" (Thomas, *Newspapers*, *supra*, at 12). See also Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 140-46 (1977) (noting Bingham's conflicting explanations and questioning "upon which . . . did the framers rely"); Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 Am. J. Legal Hist. 41, 70 (1996) (Bingham "often expressed this intent in very confusing terms"). Rep. Bingham's incorporationist view, if indeed he held such a view, simply was not clear and fails as evidence of public understanding.

Other Representatives expressed the notion that the Fourteenth Amendment would facilitate enforcement of constitutional provisions against States. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 586 (1866) (gives Congress "power to enforce by appropriate legislation all the guarantees of the Constitution") (Rep. Donnelly); *id.* at 1054 (would "give vitality and life to portions of the Constitution") (Rep. Higby); *id.* at 1057 (protects rights "already to be found in the Constitution") (Rep. Kelley); *id.* at 1088 (protects "privileges and immunities which are guarantied . . . under the Constitution") (Rep. Woodbridge). But none of them refers to the Second Amendment or the Bill of Rights; and, given the overwhelming emphasis on addressing the Black Codes and combating discrimination, those comments are just as easily read as giving strength to Article IV, § 2—construed a few months after ratification as a non-discrimination provision. See *Paul*, 75 U.S. at 179-83.

As one scholar observes, there is "support in the legislative history for no fewer than four interpretations of the . . . Privileges [or] Immunities Clause." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008). Given the variety of meanings offered during the debates, the record establishes no incorporationist understanding. Moreover, the drafters' intent is only one piece of assessing the public understanding of constitutional terms, since the point is to discern how the words were understood "by the voters." *Heller*, 128 S. Ct. at 2788. Congressional intent is therefore valuable only if "Congress clearly, publicly, and candidly conveyed its intent to the country." Thomas, *Riddle*, *supra*, at 1656. Here, evidence is "vague and scattered" of "any strong public awareness of nationalizing the *entire* Bill of Rights." Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1600 (2007).

d. *Ratification.* While scholars tend to agree that there is a dearth of evidence about state ratification debates, two careful studies of the available material reveal no incorporationist understanding. In Illinois, Ohio, and Pennsylvania, the ratifiers—like many Members of Congress—generally understood Section 1 as an antidiscrimination rule or embodying either Art. IV, § 2 or the Civil Rights Act. See James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 448-49 (1985). Some said privileges or immunities were natural or other important rights including First Amendment rights, but neither Fourteenth Amendment advocates nor its opponents contended that it conferred "all the rights guarantied in the Bill of Rights." *Id.* at 450. In southern States, similarly, argument over the scope of the Privileges or Immunities Clause "raged as both proponents and opponents repeatedly tried to categorize the rights included within its ambit," but no one "ever stated that it was a concise summary of the Bill of Rights." James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 253 (1997).

As an early survey of the press coverage and speeches during ratification observed, "[t]he declarations and statements of newspapers, writers and speakers . . . show very clearly . . . the general opinion in the North . . . that the Amendment embodied the Civil Rights Act" and not "whether the first eight Amendments were to be made applicable to the States or not." Horace E. Flack, *The Adoption of the Fourteenth Amendment* 153-54 (1908). And a recent survey of the press coverage found a "mountain of evidence" that the Fourteenth Amendment was portrayed as protecting certain fundamental rights, natural rights, and equal protection, but not the Bill of Rights, much less as undoing *Barron* and imposing the first eight amendments upon the States. See Thomas, *Newspapers*, *supra*, at 4.

Some of petitioners' own examples of news coverage demonstrate the same broad themes of natural rights and equality, while failing to mention the Bill of Rights. For example, an editorial by "Madison" (see Pet. Br. 35-36) discussed the Fourteenth Amendment's mandate that every person be "sustained in every way as an equal without distinction to race, condition or color" and as "carrying out the advanced sentiment of the great masses in favor of *equal rights and protection to all*," but the first eight amendments were not on his list of "rights and privileges of a citizen of the United States." "Madison," Letter to the Editor, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2, cols. 2-3 (emphasis added). And the letter by Interior Secretary Orville Browning cited by petitioners (Pet. Br. 38) discusses "the Due Process Clause"—not the Privileges or Immunities Clause—as the clause that would "subordinate the State judiciaries in all things to the Federal Supervision and control" and "annihilate the[ir] independence . . . in the administration of State laws." *The Political Situation: Letter from Secretary Browning*, N.Y. Times, Oct. 24, 1866. See also *Mr. Browning's Letter and Judge Handy's Decision*, N.Y. Times, Oct. 28, 1866 (law that deprived black person "of a right which every white man possessed" could not have been enforced "if the proposed amendment had formed part of the Constitution").

Even Republicans who espoused incorporationist views of the Fourteenth Amendment during congressional debate often explained it during ratification as requiring States to treat citizens equally. See Cornell, *supra*, at 174. For instance, Rep. Bingham portrayed the Fourteenth Amendment as "the golden rule . . . to do as we would be done by," requiring "equal laws and equal and exact justice," and declared that "[i]t takes from no State any right which hitherto pertained to the several States of the United States." *Id.* at 174-75 (quoting speeches in Cincinnati Commercial). And the republication of one of his speeches in Congress assured readers that "[t]he proposed amendment imposed no obligation on any State nor on any citizen in a State which was not now enjoined upon them by the very letter of the constitution." *Another Amendment to the Constitution*, N.Y. Herald, Feb. 27, 1866. Rep. Bingham's assurances of no change in state obligations did not alert the public that the entire Bill of Rights would be imposed upon the States.

Sen. Howard's speech was reprinted in some newspapers. See Pet. Br. 34-35. But it was lengthy, discussing five sections in the Amendment, and none of the papers reprinting the speech drew special attention to the single paragraph about the Bill of Rights. See, *e.g.*, *The Thirty-Ninth Congress*, N.Y. Times, May 24, 1866; *The Reconstruction Committee's Report*, N.Y. Herald, May 24, 1866. Even when the New York Times gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the states . . . there was no mention of incorporation." Wildenthal, *supra*, at 1595; see *Close of Session of Congress–the General Result*, N.Y. Times, July 30, 1866 (characterizing Section 1 as "embodying . . . an equality of civil rights"). Nor is there evidence about how widely these newspapers were read by the ratifying public across the nation.

Moreover, it is telling that numerous laws of the ratifying States fell short of the standards in the Bill of Rights—providing, for example, for indictment by information, rather than grand jury as required by the Fifth Amendment—yet there was no effort to bring those laws into conformity. See Fairman, *supra*, at 82-84 (citing constitutional provisions). To the contrary, soon after ratification, California, Colorado, Georgia, Kansas, Illinois, and Wisconsin modified their grand jury requirements in ways inconsistent with the Grand Jury Clause. See Thomas, *Riddle*, *supra*, at 1654-55; Donald Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1478716, at 12-13). It is unlikely that the States would have flouted the Fourteenth Amendment in this way if they understood they had just agreed to comply with the Bill of Rights.

e. *Treatises*. Reconstruction-era treatises also provide weak evidence of a public understanding that the Bill of Rights would be imposed upon the States. Thomas Cooley's "massively popular" treatise (*Heller*, 128 S. Ct. at 2812) failed to reflect that the Bill of Rights applied to States in the wake of Fourteenth Amendment ratification. Even leading advocates of incorporation acknowledge that both the 1868 and 1871 editions of Cooley's treatise (Thomas W. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 19 (1868); Cooley, *Constitutional Limitations* 20 (1871)) restated the rule of *Barron*, and Cooley's writings after that even "more clearly rejected the incorporation doctrine" (Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholar-*

ship and Commentary on the Fourteenth Amendment in 1867-73, 18 J. Contemp. Legal Issues (forthcoming 2009) (available at http://ssrn.com/abstract=1354404, at 25). Cooley's 1873 revision of Story's treatise described the Privileges or Immunities Clause as a non-discrimination obligation, explaining that "privileges and immunities" are "to be protected in life and liberty, and in the acquisition and enjoyment of property, under equal and impartial laws which govern the whole community." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1936 (4th ed. Cooley rev. 1873).

Some scholars did embrace the notion that the Fourteenth Amendment made the Bill of Rights applicable to the States (see Pet. Br. 40-41 (discussing Pomeroy, Farrar, and Paschal)), but still others besides Cooley including two leading criminal law treatises, plainly did not. See 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* §§ 99, 145, 891-92 (2d ed. 1872) (neither the Fifth Amendment Grand Jury Clause nor the Sixth Amendment right to trial by jury applied in state criminal proceedings); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States: Principles, Pleading and Evidence* §§ 213, 573 (7th ed. 1874) (Grand Jury and Double Jeopardy Clauses do not apply to States); 3 *id.* § 3405 (Eighth Amendment provision against cruel and unusual punishment does not apply to States). Another prominent legal figure, John Forrest Dillon, edited an article that cited *Barron* and said the Second Amendment does not apply to the States. See *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L. J. 295 (John F. Dillon ed. 1874). The divided views of the 19th-century legal scholars add greater uncertainty, not clarity, to the public understanding of the reach of the Privileges or Immunities Clause. They do not support petitioners' argument that the Privileges or Immunities Clause was understood by the public to incorporate the Bill of Rights.

2. Concerns about discriminatory disarmament do not show public understanding that the Fourteenth Amendment incorporates the Second Amendment.

Nor is there evidence that the public understood any of the words in Section 1 to mean that the Second Amendment was specially singled out to be imposed upon the States. See NRA Br. 10. The text does not say this; congressional and ratification debates do not support it; and judicial decisions—including, notably, *Cruikshank*—reject the idea that the Fourteenth Amendment was designed to carve out an exception to the rule of *Barron* for the Second Amendment. NRA argues that "[m]ore evidence exists that the right to keep and bear arms referenced in the Second Amendment was intended or commonly understood to be protected by the Fourteenth Amendment than exists for any other element of the Bill of Rights." *Ibid.* Yet aside from Sen. Howard, who listed Bill of Rights guarantees, NRA points to no one who clearly believed the Second Amendment would be substantively imposed on the States—either as a privilege or immunity of national citizenship or as an aspect of due process.

In the separate debates over civil rights legislation, Members of Congress who raised concerns about disarmament mostly stressed the need to give freedmen equal treatment with respect to arms. Sen. Sumner urged "constitutional protection in keeping arms" in response to concerns about South Carolina's discriminatory arms laws, with no hint that an equality requirement would not suffice. Cong. Globe, 39th Cong., 1st Sess. 337 (1866). And while Sen. Wilson stressed that rebel forces in Mississippi were "visiting the freedmen, disarming them," and called attention to oppressive labor laws that discriminated against freedmen (*id.* at 40), he urged support for a civil rights bill that would declare null and void laws in which "any inequality of civil rights and immunities among the inhabitants of said States is recognized" based on "color, race, or descent" or "previous condition or status of slavery" (*id.* at 39). Sen. Trumball also endorsed legislation that would prohibit "discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery" to address, among other facially discriminatory laws, statutes that prohibited "any negro or mulatto from having fire-arms." *Id.* at 474.

NRA cites congressional debates surrounding post-ratification Fourteenth Amendment enforcement legislation (NRA Br. 18-21), but those comments, too, referred to discriminatory disarmament. See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 2719 (1870) (Sen. Pool) ("one of their operations in my State has been . . . to order the colored men to give up their arms"); *id.* at app. 322 (Sen. Thayer) ("[t]he rights of . . . self-defense . . . were denied to the colored race"). And as even NRA recognizes, the only post-ratification civil rights bill that specifically mentioned enforcement of a right to keep and bear arms other than in terms of equal rights was amended to delete that specific protection before passage. NRA Br. 19-21 (citing H.R. 189, 42d Cong. (1st Sess. 1871); H.R. 320, 42d Cong. (1st Sess. 1871); and Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13). At most, NRA shows that some in Congress were concerned with the denial of arms rights, at least if discriminatory, but not that the public understood those rights were considered privileges or immunities of national citizenship or an aspect of due process.

Moreover, the manner in which firearms were regulated during Reconstruction shows the absence of a public understanding that States would be subjected to a more stringent nationalized standard. History shows that "nineteenth-century Americans, even the most conservative among them, were not opposed to the idea that the state should be able to control the use of firearms." Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621-22 (2006). For example, even while General Daniel Sickles issued an order protecting the right to bear arms by those under his jurisdiction, he made clear that the policy "shall not be construed to sanction the unlawful practice of carrying concealed weapons." Order of Gen. Sickles, Disregarding the Code, Jan. 17, 1866, in *The Political History of the United States of America During the Period of Reconstruction* 37 (Edward McPherson, ed., 2d ed. 1969). Army prohibitions in certain locations included the sale of knives and guns and even the carrying of "guns, pistols, or other weapons of war." Emberton, *supra*, at 621 (citation omitted). Congress itself completely disbanded the militia in southern States, and prohibited any further arming of those militias. See Act of Mar. 2, 1867, ch. 170, § 6, 14 Stat. 485, 487. That statute was repealed a year later, in response to concerns that state militias were needed to stabilize a disorderly South, but stringent control of civilian gun use was prevalent. See Emberton, *supra*, at 620. Fresh from the battlefields of a devastating civil war, Reconstruction-era Republicans were certainly not promoting any sort of right to armed revolution, and they were not opposed to heavily restricting arms use. To be sure, many state governments sought to arm more freedmen who would serve in state militias, and the federal government took steps to put an end to discriminatory disarmament; but at the same time, neutral and generally applicable regulation of arms among the civilian populace was substantial. See *id.* at 622.

State regulations and judicial decisions post-ratification also fail to reflect a public understanding that the Amendment had now imposed on the States a new national norm protecting, for example, the same sort of weapons in common use that *Heller* holds the Second Amendment protects. In the years following ratification, several States banned the carrying of certain guns, including pistols, and even the carrying of firearms altogether. See, *e.g.*, Ark. Act of Apr. 1, 1881, ch. 96, § 1 (prohibiting the "wear[ing] or carry[ing]" of "any pistol . . . except such pistols as are used in the army or navy"); 1879 Tenn. Pub. Acts ch. 186, § 1 (prohibiting the carrying "publicly or privately, [of] any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol usually used in warfare"); Tex. Act of Apr. 12, 1871, ch. 34 (prohibiting the carrying of pistols unless there are "immediate and pressing" reasonable grounds to fear attack or for militia service); 1876 Wyo. Comp. Laws ch. 52, § 1 (forbidding "concealed or ope[n]" bearing of "any fire arm or other deadly weapon, within the limits of any city, town or village"). And state courts routinely upheld restrictions on the carrying of pistols and revolvers. See, *e.g.*, *Andrews*, 50 Tenn. at 186; *English*, 35 Tex. at 478; *Hill v. State*, 53 Ga. 472, 475 (1874); *Fife v. State*, 31 Ark. 455, 461 (1876); *State v. Workman*, 35 W. Va. 367, 373 (1891).

Federal and state governments alike recognized that stringent firearms regulations could continue, and that the Fourteenth Amendment required only the repeal or amendment of discriminatory arms provisions, not neutral laws. Thus, during or shortly after the Fourteenth Amendment ratification process, three States that had limited arms rights to "the free white men" amended their constitutions to remove that limitation. See Volokh, *supra*, at 193 (Ark.), 195 (Fla.), 203 (Tenn.). In short, the Fourteenth Amendment required non-discrimination tailored to discriminatory disarmament.

D. Petitioners Fail To Carry Their Burden Of Showing That This Court Should Abandon Its Traditional Due Process Approach To Incorporation.

Overruling *Slaughter-House* and its progeny, and overturning the settled law governing the application of the first eight amendments to the States, should require an overwhelming justification. Petitioners' position was rejected by the post-Civil War Justices, who were in the best position to understand the meaning of the Privileges or Immunities Clause. Far from showing that the Court that decided *Slaughter-House* and its progeny was mistaken, the historical record demonstrates a wide array of views, from within the halls of Congress and beyond, on the meaning of the Clause. The current scholarship on the subject reveals an equally wide divide.[26]

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[26] While petitioners emphasize the work of scholars who argue that the Framers and the public intended the privileges or immunities of national citizenship to include the Bill of

Under similar circumstances, the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), expressly refused to "turn the clock back to 1868" when reassessing *Plessy v. Ferguson*, 163 U.S. 537 (1896) (*Brown*, 347 U.S. at 492), stressing that, while some congressional members believed that the Amendment removed "all legal distinctions" based on race, others read it to have "the most limited effect" (*id.* at 489). With such varying views, "[w]hat others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty." *Ibid.* And recently, in *Boumedienne v. United States*, 128 S. Ct. 2229 (2008), this Court declined to rest its decision about the scope of the protection of the writ of habeas corpus upon a historical understanding because the historical evidence "reveals no certain conclusions." *Id.* at 2248. Likewise here, petitioners' only argument for upsetting longstanding precedent is based upon a historical record that simply fails to reveal a unified public understanding that the Privileges or Immunities Clause would incorporate the Second Amendment. Petitioners' argument should be rejected.[27]

Rights, many other scholars have reached contrary conclusions. The claim of a "near unanimous" agreement on "the history and meaning of the Clause" (Brief of Constitutional Law Professors as *Amici Curiae* in Support of Petitioners 3) simply disregards a vast amount of scholarship finding a lack of evidence that Bill of Rights guarantees were considered privileges or immunities of national citizenship. See, *e.g.*, Berger, *supra*, at 133-56; Currie, *supra*, at 406; Fairman, *supra*, at 139; Nelson, *supra*, at 123; Rosenthal, *New Originalism*, *supra*, at 27; Thomas, *Riddle*, *supra*, at 1628; see also Brief of Legal Scholars as *Amici Curiae* in Support of Respondents.

[27] Petitioners and NRA both limit their argument in this Court to handgun bans. In the courts below, both raised other issues. Petitioners challenged Chicago's annual and pre-acquisition registration requirements and the penalty of unregisterability for failure to comply with those requirements. J.A. 27-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 30, 2009

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30. NRA's separate suits against Chicago and Oak Park, which are not before the Court, challenged Chicago's exceptions for handguns registered before the ban; owned by detective agencies and security personnel; and possessed by non-residents participating in or traveling to lawful firearm-related recreation, and Oak Park's exceptions for licensed firearm collectors and theater organizations. If the judgment is reversed, the lower courts should be directed to address those claims in the first instance.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
NOV 16 2009
OFFICE OF THE CLERK

10

No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD ET AL.,
Petitioners,
V.
CITY OF CHICAGO ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. ET AL. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

PARTIES TO THE PROCEEDING

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc. and Illinois State Rifle Association initiated the proceedings below by filing a complaint against Respondent City of Chicago and its Mayor, Richard M. Daley, in the United States District Court for the Northern District of Illinois. Mayor Daley was dismissed at an early stage of the proceedings and is no longer a party in the matter.

The day after Petitioners filed their complaint in the District Court, similar cases were brought against Respondent City of Chicago and Mayor Daley; and the Village of Oak Park, Illinois and its President, David Pope, by other parties. The plaintiffs in the related Chicago case were the National Rifle Association of America, Inc., Dr. Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson. The plaintiffs in the related Oak Park case were the National Rifle Association of America, Inc., Robert Klein Engler, and Dr. Gene A. Reisinger.

The three cases were related, but not consolidated, in the District Court. Petitioners and the plaintiffs in the related cases separately appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit, which consolidated the appeals.

CORPORATE DISCLOSURE STATEMENT

Respondent National Rifle Association of America, Inc. ("NRA"), is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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The decision under review, from the Court of Appeals for the Seventh Circuit, concerns firearms ordinances of two Illinois municipalities, Chicago and Oak Park, that effectively ban the private possession of handguns and unreasonably burden the possession of all firearms. There is no question that, under this Court's decision in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), the categorical ban on handguns, at a minimum, would run afoul of the Second Amendment to the United States Constitution were it enacted by the Federal government or the District of Columbia. The question presented by this case is whether the Constitution also prevents State and local governments from infringing the right to keep and bear arms. For the reasons given herein and in the brief submitted by Petitioners, the answer must be yes. The Court should find either that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment, or that the right to keep and bear arms is a privilege or immunity of citizens of the United States.

STATEMENT OF THE CASE

1. Chicago prohibits possession of a firearm unless it is registered. See Chicago, Ill., Code § 8-20-040(a). Chicago law also provides that "[n]o registration certificate shall be issued for any of the following types of firearms: * * * (c) Handguns * * *."[1] *Id*. § 8-20-050(c). Handguns, accordingly, are banned. The only non-governmental exceptions to this blanket ban on handguns are for (i) "[t]hose

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[1] "'Handgun' means a firearm designed to be held and fired by the use of a single hand, and includes a combination of parts from which such firearm can be assembled." *Id*. § 8-20-030(k).

validly registered to a current owner in the City of Chicago prior to the effective date of this chapter" which was *27 years ago* (1982), *id.* § 8-20-050(c)(1); (ii) those owned by security personnel or private detective agencies, *id.* § 8-20-050(c)(2) & (3); and (iii) those brought by "[a]ny nonresident of the City of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another jurisdiction * * *," *id.* § 8-20-040(b)(5). Other than private eyes, nonresidents under limited circumstances, and residents who have had the handgun in question registered for at least 27 years, no one in Chicago may possess a handgun.

Chicago ordinances further provide that failure to exhibit a registration certificate to a police officer on demand is presumptive evidence that a person is not authorized to possess a firearm and is cause for confiscation thereof. See *id.* § 8-20-150. A first violation is punishable by a fine of not less than $300 or more than $500, and incarceration for not less than ten days or more than 90 days. A subsequent conviction is punishable by a fine of $500 and by incarceration of not less than 90 days or more than six months. *Id.* § 8-20-250.

The Village of Oak Park, Illinois also prohibits possession of a handgun. The Oak Park Municipal Code provides that "[i]t shall be unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm" that is defined as a handgun. Oak Park, Ill., Code § 27-2-1.[2]

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[2] "FIREARMS: For the purpose of this Article firearms are: pistols, revolvers, guns and small arms of a size and character

Exempted from this otherwise blanket prohibition are "Licensed firearm collectors," *id.* § 27-2-1(K); "Members of established theater organizations," *id.* § 27-2-1(L); and transportation of a handgun not originating or terminating in Oak Park, *id.* §§ 27-2-1, 27-2-1(I). Thus, the only persons in Oak Park who may keep or bear a handgun are actors, non-residents under limited circumstances, and licensed "collectors."

Violation of the Oak Park law is punishable with a fine of not more than $1,000 for the first offense and $2,000 for a subsequent offense. See *id.* § 27-4-1(A). Weapons involved in offenses are to be confiscated and destroyed. See *id.* § 27-4-1(C). The Municipal Code further provides that a motor vehicle that a police officer has probable cause to believe contains a weapon in violation of the above is subject to seizure and impoundment, and may be released on payment of a $500 fine. See *id.* § 27-4-4.

2. On June 26, 2008, this Court issued its decision in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008). *Heller* was the first decision of this Court unambiguously recognizing that the right to keep and bear arms referenced in the Second Amendment is an individual right, not a collective right belonging to the States. See U.S. Const., amend. II ("A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."); *Heller*, 128 S. Ct. at 2788–816. *Heller* also held that various restrictive ordinances of the District of Columbia—including a handgun ban with only very

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that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1.

limited exceptions, akin to those in the Chicago and Oak Park ordinances—violated the Second Amendment. *Heller*, 128 S. Ct. at 2816–22.

In reaching its decision in *Heller*, the Court considered and rejected a number of arguments against recognizing an individual Second Amendment right and against striking down the handgun ban. Among other arguments rejected by the Court were the propositions that the Second Amendment was intended only to protect the authority of State governments to organize State militias, *id.* at 2799–803; the argument that the Second Amendment does not extend to self-defense, see *id.* at 2801; and the argument that alleged dangers associated with handguns can justify a ban on that category of firearm, see *id.* at 2821–22.

3. On the same day this Court announced its decision in *Heller*, Petitioners filed suit in the Northern District of Illinois seeking a declaration that the Chicago ordinances violate the Second and Fourteenth Amendments. The complaint alleges that the city of Chicago has denied each Petitioner's application to register handguns for possession in his Chicago home; that each Petitioner fears arrest, criminal prosecution, incarceration and fine if he were to possess a handgun within his Chicago home; and that, but for the ordinances being challenged, Petitioners would possess handguns in their homes.

The following day, Respondent National Rifle Association ("NRA"), together with Respondents Robert Klein Engler and Dr. Gene A. Reisinger, brought actions in the Northern District of Illinois seeking a declaration that the Oak Park ordinances are invalid under the Second and Fourteenth Amendments to the United States Constitution. A similar action was filed the same day by the NRA and Respondents Dr. Kathryn Tyler, Van F. Welton, and Brett Benson with respect to the Chicago ordinances. The complaints in the two NRA actions allege that, but for the ordinances, the individual plaintiffs would forthwith keep handguns in their homes for self protection and other lawful purposes. The complaints further alleged that some of the plaintiffs own handguns that they must, because of the ordinances, store outside these jurisdictions, and would retrieve them to keep at home if lawfully allowed to do so, and that other plaintiffs would acquire handguns if it were lawful to keep them at home. In addition to having numerous members in the same predicament who reside in Chicago and Oak Park, the NRA has numerous members who would lawfully transport firearms through Chicago but must divert their travel plans to avoid that jurisdiction. Separate Appendix to Brief for Plaintiff-Appellants National Rifle Ass'n, Court of Appeals, A34-35 (Chicago Compl., ¶¶ 14–19); A45–46 (Oak Park Compl., ¶¶ 18–22).

The actions filed by Petitioners and Respondents in Support of Petitioners were assigned to a single district judge. The district court entered judgment on the pleadings for the municipalities on December 4, 2008. The court explained that, as a district court, it was bound by precedents from the court of appeals, "even though the logic of more recent caselaw may point in a different direction." *Nat'l Rifle Ass'n of Am., Inc.* v. *Village of Oak Park*, 617 F. Supp. 2d 752, 753 (N.D. Ill. 2008). The court thus looked at the Seventh Circuit's nearly thirty-year old decision in *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), as controlling precedent. In *Quilici* the court of appeals had rejected an argument that the

Second Amendment is incorporated into the Fourteenth Amendment, either through selective incorporation or as part of a wholesale incorporation of the Bill of Rights. *Id.* at 269–71.

4. On June 2, 2009 the Seventh Circuit affirmed the decision of the District Court. 567 F.3d 856. The court of appeals gave two principal bases for its decision. First, the court purported to explain that this Court had previously "rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment." *Id.* at 857 (citing *United States* v. *Cruikshank*, 92 U.S. 542 (1876); *Presser* v. *Illinois*, 116 U.S. 252 (1886); and *Miller* v. *Texas*, 153 U.S. 535 (1894)). Second, the court stated that this Court had never considered whether the Second Amendment should be incorporated through the Due Process Clause of the Fourteenth Amendment since that approach "had yet to be devised when" *Cruikshank*, *Presser*, and *Miller* were decided. Nonetheless, the Seventh Circuit went on to hold that, as an inferior court, it was bound by those precedents of this Court which it saw as holding that the Second Amendment applies only to the Federal government. See *id.* at 857 (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The court of appeals, however, acknowledged the truism that "*Cruikshank* is open to reexamination by the Justices themselves when the time comes." *Id.* at 858.

After announcing that its decision was based on adherence to precedent, the court of appeals then indulged in some *obiter dicta* on the interplay between principles of federalism and the right to keep and bear arms. See *id.* at 858–60. This discussion, however, played no role in the decision of the court of appeals; as that court acknowledged, "[h]ow arguments of this kind will affect proposals to 'incorporate' the second amendment are for the Justices rather than a court of appeals." *Id.* at 860.

6. Although Petitioners' action and the NRA actions were consolidated on appeal before the Seventh Circuit and although Respondents in Support of Petitioners filed their own petition for writ of certiorari (No. 08-1497), this Court granted a writ of certiorari only in Petitioners' case. Thus, all parties to the case below other than Petitioners are Respondents before this Court. See Sup. Ct. R. 12.6. However, because Respondents NRA, Engler, Reisinger, Tyler, Welton and Benson support the Petitioners in this case, these Respondents are filing this brief in accordance with Petitioners' time schedule. See Sup. Ct. R. 12.6; 25.1.

SUMMARY OF THE ARGUMENT

The handgun bans of Chicago and Oak Park, Illinois, are not in any meaningful way different from the District of Columbia's ban that this Court held to be unconstitutional in *Heller*. The issue presented by this case is whether, notwithstanding the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses, Chicago and Oak Park may abridge the right to keep and bear arms in ways that the District of Columbia may not, or whether the citizens of the States have federal constitutional protection of their right to keep and bear arms against overreaching State and local laws.

The history of the Fourteenth Amendment demonstrates that it was intended and publicly understood, *inter alia*, to protect the right of individuals to keep and bear arms. Confronting efforts by Southern governments to oppress the freedmen by confiscating their firearms, the same Congress that proposed the Fourteenth Amendment also passed statutes protecting the right of all citizens to keep and bear arms. Statements from legislators, legal commentators, and the popular press, before, during, and after passage of the Fourteenth Amendment, demonstrate a consistent understanding that the Amendment would secure freedmen against efforts to strip them of their arms. The only real question is in which provision or provisions of the Fourteenth Amendment the right to keep and bear arms is located.

This Court has never addressed the question whether the Second Amendment should be incorporated against State and local governments through the Due Process Clause of the Fourteenth Amendment. Each of the decisions of this Court addressing whether the Second Amendment applies to the States was decided before the Court had even initiated its incorporation jurisprudence.

Incorporation into the Due Process Clause would be fully consistent both with the common understanding of the Fourteenth Amendment when it was adopted, and with this Court's selective incorporation precedent—indeed, not incorporating the Second Amendment would be a jarring and unjustifiable departure from that history and precedent. In deciding whether to incorporate a particular right enumerated in the Bill of Rights, this Court asks whether the right is a fundamental principle of liberty that is basic to a free society. The preamble of the Second Amendment and this Court's decision in *Heller* both confirm the fundamental importance of the right to keep and bear arms to liberty and our free society. Given this Court's prior decisions, incorporation of the Second Amendment should be essentially automatic.

If the Court declines to selectively incorporate the Second Amendment into the Due Process Clause of the Fourteenth Amendment, then the Court should hold that the right to keep and bear arms is one of the privileges and immunities of national citizenship guaranteed by the Fourteenth Amendment. The Court has explained that the privileges and immunities of national citizenship are those that arise from the existence of the national government and bear on the relationship of a citizen to that government. Although the fundamental right to keep and bear arms preexists the Constitution, it also is related to the constitutional authority of the national government and the relationship of citizens to that government. This Court has previously stated that, for this very reason, the States cannot restrict the right of individuals to keep and bear arms.

Finally, if the Court does not incorporate the Second Amendment into the Due Process Clause of the Fourteenth Amendment or recognize the right to keep and bear arms as a privilege of national citizenship under the existing test for such rights, then the Court should overrule *The Slaughter-House Cases*, 83 U.S. 36 (1873), and hold that even rights preexisting the foundation of this country can be privileges or immunities of national citizenship. There has long been a scholarly consensus that *The Slaughter-House Cases* were wrongly decided. The fact that the fundamental right to keep and bear arms predates the founding of this country should not be a barrier to its recognition as a privilege or immunity of U.S. citizens.

ARGUMENT

I. The Fourteenth Amendment Was Intended and Understood To Protect the Right To Keep and Bear Arms

More evidence exists that the right to keep and bear arms referenced in the Second Amendment was intended and commonly understood to be protected by the Fourteenth Amendment than exists for any other element of the Bill of Rights. The only real question, and the subject of the subsequent sections of this brief, is where within the Fourteenth Amendment that right is nestled.

1. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 128 S. Ct. at 2809–10 (citing STEPHEN P HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998)). When the 39th Congress convened in 1865, members were confronted with the recently-enacted Black Codes. The laws of Mississippi, for example, stated: "That no freedman, free negro or mulatto * * * not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind * * *." Laws of Miss., 1865, at 165. To invalidate such laws, Senator Henry Wilson introduced a civil rights bill, explaining that "[i]n Mississippi rebel State forces * * * are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages

on them * * *."[3] Cong. Globe, 39th Cong., 1st Sess., 40 (1865).

A similar South Carolina law led a convention of prominent blacks in that state to draft a petition stating: "We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed * * * that the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution * * *." 2 *Proceedings of the Black State Conventions, 1840–1865*, at 302 (P. Foner & G. Walker eds. 1980). Senator Charles Sumner paraphrased the petition as seeking "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press." Cong. Globe, 39th Cong., 1st Sess. 337 (1866).

In response to the mistreatment of freedmen in the South, Senator Lyman Trumbull introduced two pieces of legislation: S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill, both of which protected, *inter alia*, the right "to full and equal benefit of all laws and proceedings for the security of person and property." Cong. Globe, 39th Cong., 1st Sess., at 129, 209, 211. He cited the prohibitions on possession of firearms by blacks and noted that it was "the intention of this [civil rights] bill to secure those rights" and other "privileges which are essential to freemen" from state deprivation. *Id.* at 474. Senator Willard Saulsbury opposed the bill on the basis that: "In my State for many years * * * there has existed a law * * * which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power * * *." *Id.* at 478.

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[3] *Harper's Weekly*, Jan. 13, 1866, at 3, reported: "The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of this section of the country. They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms."

As passed, the Freedmen's Bureau Bill protected for blacks "the civil rights or immunities belonging to white persons, including the right * * * to have full and equal benefit of all laws and proceedings for the security of person and estate, *including the constitutional right of bearing arms* * * *." Cong. Globe, 39th Cong., 1st Sess., at 1292 (emphasis added). President Andrew Johnson, however, vetoed the Freedmen's Bureau Bill, prompting an outcry by Sen. Trumbull, who cited a report from Mississippi that the militia typically would "hang some freedman or search negro houses for arms." *Id.* at 941.

The right to keep and bear arms was repeatedly referenced in debate on the Civil Rights Bill as well. Senator Samuel Pomeroy specified the "safeguards of liberty under our form of Government" as including "*the right to bear arms for the defense of himself and family and his homestead.*" Cong. Globe, 39th Cong., 1st Sess., 1182 (1866) (emphasis added). Rep. John Bingham explained that portions of the vetoed Freedmen's Bureau Bill, including the right to bear arms, "enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill," which served to "arm Congress with the power to * * * punish all violations by State Officers of the bill of rights * * *." *Id.* at 1292. The Act was also understood by the public to prohibit "attempts to prevent their [blacks] holding public assemblies [and] keeping fire-arms * * *." *New York Evening Post*, Apr. 7, 1866, at 2.

The House then debated a second Freedmen's Bureau Bill, H.R. 613. Section 8 of that bill protected "the constitutional right to bear arms." Cong. Globe, 39th Cong., 1st Sess., 3412 (1866). Averring that Section 8 "simply embodies the provisions of the civil rights bill," Rep. Eliot quoted a report about freedmen in Kentucky: "Their arms are taken from them by the civil authorities * * *. Thus *the right of the people to keep and bear arms as provided in the Constitution is infringed* * * *." *Id.* at 2773–74 (emphasis added). The report added that the freedmen "are defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders." *Id.* at 2775.

The second Freedmen's Bureau Bill ultimately was passed and vetoed, only to have the veto overridden by the same two-thirds-plus members who had (by this point) also voted for the Fourteenth Amendment.[4] Section 14 of that Freedmen's Bureau Act declared that in States or districts where ordinary judicial proceedings were not restored, and until such time as such States were restored to the Union and represented in Congress:

> the right * * * to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and

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[4] The same Senators who proposed the Fourteenth Amendment by a vote of 33-11, also overrode the veto of H.R. 613 by a vote of 33 to 12, or 73%. See Cong. Globe, 39th Cong., 2d Sess., 3042, 3842 (1866). The same Representatives who proposed the Fourteenth Amendment by a vote of 120-32, overrode the President's veto of H.R. 613 by a vote of 104-33, or 76%. *Id.* at 3149, 3850. On the roll call votes, see Halbrook, *Freedmen*, 41–43.

> personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.

14 Stat. 173, 176–77 (1866) (emphasis added).

2. At the same time that Congress was debating bills with the purpose of protecting, *inter alia*, the right of freedmen to keep and bear arms, it was also considering amending the Constitution to the same end. On February 13, 1866, the Joint Committee of Fifteen on Reconstruction recommended a constitutional amendment empowering Congress to make laws "to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property." Cong. Globe, 39th Cong., 1st Sess., at 806, 813. The term "civil rights and immunities" was recognized as including "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms," in the words of General D. E. Sickles' General Order No. 1 for South Carolina. *Id.* at 908–09.

On May 23, Jacob Howard introduced the Fourteenth Amendment in the Senate, referring to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press [and] *the right to keep and bear arms* * * *." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (emphasis added). He averred that "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. He added that the amendment would "disable every one of [the States] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction."[5] *Id.* Howard's speech was widely reprinted.[6]

On June 13, 1866, the Fourteenth Amendment had passed both houses by the necessary two-thirds and was proposed to the States. While records are sparse, the Fourteenth Amendment was understood to guarantee broad rights in the State legislatures and conventions which considered it.[7]

In Massachusetts, the Committee on Federal Relations quoted the Second Amendment and three other Bill of Rights guarantees and stated: "Nearly every one of the amendments to the constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights * * *. [T]hese provisions cover the whole ground of section first of the proposed amendments." Mass. H. R. Doc. No. 149, at 3 (1867).

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[5] Howard's speech was cited as authority in *Jones* v. *Helms*, 452 U.S. 412, 424 n.23 (1981) (opinion by Stevens, J.); *Plyler* v. *Doe*, 457 U.S. 202, 214-15 (1982).

[6] See, *e.g.*, *New York Times*, May 24, 1866, at 1; *New York Herald*, May 24, 1866, at 1; *National Intelligencer*, May 24, 1866, at 3; *Philadelphia Inquirer*, May 24, 1866, at 8.

[7] Adoption of the Amendment by the States was critical because, as Rep. George W. Julian explained, the Civil Rights Act was declared void by Southern courts, which thereby upheld bans on firearm possession by freedmen. Cong. Globe, 39th Cong., 1st Sess., 3210 (1866). A Mississippi court did so in upholding the conviction of a freedman for possession of a firearm. *New York Times*, Oct. 26, 1866, at 2. Another court found the ban void: "Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen? It is a natural and personal right—the right of self-preservation." *Id.* These decisions were taken notice of in a report from General U.S. Grant stating: "The statute prohibiting the colored people from bearing arms, without a special license, is unjust, oppressive, and unconstitutional." Cong. Globe, 39th Cong., 2d Sess., 33 (1866).

Advocates in the Pennsylvania General Assembly averred that "the spirit of this section [1] is already in the Constitution, and that we are only reenacting it in plainer terms * * *." Pa. Leg., App., 59 (1867). Section one protected "the rights to life, liberty and property," which are "inalienable rights." *Id.* at 65. The proposed amendment was said to embody the Pennsylvania Declaration of Rights guarantee that all men "have certain inherent and indefeasible rights," including those of "*defending life and liberty*." *Id.* at 94 (emphasis added).

Even opponents of the Fourteenth Amendment understood it to protect the right to self defense. The Wisconsin Senate minority report averred that "[t]he absolute rights of *personal security*, personal liberty and the right to acquire and enjoy private property * * * form a part of the bill of rights" of the state and the federal constitutions, and it thus asked: "Why, then, is it necessary to engraft into the federal constitution that part of section one [of] the amendments which says: 'Nor shall any state deprive any person of life, liberty or property, without due process of law?'" Wisc. Sen. J. 106 (1867) (emphasis added).

Contemporaneous legal commentary was consistent with this view of the Fourteenth Amendment. Judge Timothy Farrar wrote that the people "do not create or confer on themselves any new right, but they expressly reserve all the rights they then held," including "many natural and civil common-law rights" such as "[a] *right to keep and bear arms*." Farrar, *Manual of the Constitution of the United States* 58–59 (Boston 1867) (emphasis added). He would elsewhere in the same volume write "[t]he right of every person to 'life, liberty, and property,' to *'keep and bear arms'* * * * and divers other, are recognized by, and held under, the Constitution of the United States, and cannot be infringed by individuals *or States*, or even by the government itself." *Id.* at 145 (emphases added).

Likewise, George W. Paschal wrote that the Second Amendment "is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed," and that "[t]he new feature declared [in the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." Paschal, *The Constitution of the United States* 86, 256 (Washington, D.C., 1868).

Finally, John N. Pomeroy wrote that if a state statute provided that "certain classes of the inhabitants—say negroes—are required to surrender their arms," the federal Bill of Rights offered no relief. Pomeroy, *An Introduction to the Constitutional Law of the United States* 150-51 (1868). However, the Fourteenth Amendment "would give the nation complete power to protect its citizens against local injustice and oppression * * *." *Id.* at 151. The Second Amendment guaranteed that "government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms." *Id.* at 152.

3. Debate in Congress on related statutory issues in the years shortly after ratification of the Fourteenth Amendment provides further confirmation that the Amendment was commonly understood to guarantee the right to keep and bear arms against State action.

In 1868, addressing the disarming of freedmen, Thaddeaus Stevens referred to "those great rights, privileges, and immunities" of life, liberty, and the pursuit of happiness, adding:

> Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty* * *.
>
> The fourteenth amendment, now so happily adopted, settles the whole question * * *.

Cong. Globe, 40th Cong., 2d Sess., 1967 (1868).

The Enforcement Act of 1870 made it a felony to conspire to injure a citizen with intent to prevent exercise "of any right or privilege granted or secured to him by the Constitution or laws of the United States * * *." § 6, 16 Stat. 140, 141 (1870). In debate, Senator John Pool observed that Klansmen would "order the colored men to give up their arms; saying that everybody would be Kukluxed in whose house fire-arms were found * * *." Cong. Globe, 41st Cong., 2d Sess., 2719 (1870). Senator John Thayer added: "The rights of citizenship, *of self-defense*, of life itself were denied to the colored race * * *." *Id.*, App., 322 (emphasis added).

The Enforcement Act was followed by the Civil Rights Act of 1871. Introduced initially as H.R. No. 3011 by Rep. Benjamin Butler, a report noted that persons who oppressed the freedman "preceded their outrages upon him by disarming him, *in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed.*" H. R. Rep. No. 37, 41st Cong., 3d Sess., 3 (1871) (emphasis added). The bill was based on the Second Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* at 4. The report explained:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same * * *. Before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims.

Id. at 7–8.

After failing to pass in the 41st Congress, the bill was reintroduced in the next Congress as H.R. No. 189. While it provided remedies for violations of "any right guarantied" by the Constitution, *the only substantive right specifically mentioned* was that of a citizen to keep arms "in his house or possession for the defense of his person, family, or property," deprivation of which was punishable as a larceny. Cong. Globe, 42nd Cong., 1st Sess., 174 (1871).[8]

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[8] Senator Adelbert Ames noted how that right protected others: "Republicans were compelled to arm in self-defense * * *. In some counties it was impossible to advocate Republican

The full House ultimately considered a condensed bill, H. R. No. 320. 42nd Cong. Globe, 1st Sess. 317 (1871). Section 1 provided civil remedies against state agents who deprived a person of "any rights, privileges, or immunities" to which the person is "entitled under the Constitution or laws of the United States." *Id.*, App., at 68. Section 2 punished a conspiracy to violate such rights. *Id.* Section 3 provided that failure of a State to protect such rights would be a denial of equal protection of the laws. *Id.* at 70–71.

In support of the bill, Rep. John Coburn observed that "[a] State may by positive enactment cut off from some the right * * * to bear arms * * *. How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?" *Id.* at 459 (April 4, 1871). Congress, he argued, must "enforce by appropriate legislation the rights secured by this clause of *the fourteenth amendment* of the Constitution." *Id.* (emphasis added). Likewise, Rep. Henry Dawes explained that the citizen "has secured to him *the right to keep and bear arms* in his defense. It is all these * * * which are comprehended in the words 'American citizen,' and it is to protect and secure to him in these rights, privileges, and immunities this bill is before the House." *Id.* at 475–76 (emphasis added).[9]

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principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends." *Id.* at 196.

[9] *See Patsy*, 457 U.S. at 503 (quoting Dawes' explanation). *Patsy* further relied on the speeches of Butler, Coburn, and Thurman, all of whom agreed that the right to arms was protected. *Id.* at 504–06.

As passed, the Civil Rights Act provided that any person who, under color of State law, subjects a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States" is civilly liable. 17 Stat. 13, § 1 (1871), today's Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Subsequently, President Grant issued a report on enforcement of the Civil Rights Act which noted that parts of the South were under the sway of the Klan, which sought "to deprive colored citizens of the right to bear arms," and to reduce them "to a condition closely akin to that of slavery * * *." Ex. Doc. No. 268, 42nd Cong., 2d Sess., 2 (1872).

4. Summarizing this history, the status of the right to keep and bear arms during the drafting and ratification of the Fourteenth Amendment is unmistakable. It was viewed as a fundamental right in the most literal sense: The foundation necessary to secure all of the other rights of free citizens. The Reconstruction Congress that drafted the Due Process Clause condemned violation of that right by the Black Codes enacted by the Southern States as a gross injustice requiring a national remedy. That remedy came in the form of (1) federal legislation regulating state action (the Freedmen's Bureau Acts and the Civil Rights Act) and (2) protection of the right to keep and bear arms by the Fourteenth Amendment.

There can be, all told, no real debate that the right to keep and bear arms is guaranteed against infringement by the States somewhere in the Fourteenth Amendment. The only question, in light of the 140 years of jurisprudential development between ratification of the Amendment and this case, is where that right is found.

II. The Right To Keep and Bear Arms Should Be Incorporated Into the Due Process Clause of the Fourteenth Amendment

This Court need overrule *no* precedent in order to reverse the Seventh Circuit. As the Seventh Circuit recognized, 567 F.3d at 858–59, and the City of Chicago conceded, see Pet. Opp. at 6, this Court has *never* addressed the question whether the Second Amendment should be incorporated into the Due Process Clause of the Fourteenth Amendment under the Court's so-called selective incorporation jurisprudence. The Court had not yet begun selectively incorporating the Bill of Rights into the Due Process Clause when it last ruled on the constitutionality of a State or local restriction on the right to keep and bear arms. *See Miller* v. *Texas*, 153 U.S. 535 (1894).

Viewing the question of the Second Amendment's applicability to State and local regulations through the prism of the history discussed above and through this Court's selective incorporation precedent, it is clear that the Second Amendment must be incorporated. Indeed, not to incorporate the Second Amendment would mark a radical and unjustifiable departure from decades of this Court's incorporation precedents.

1. Over one century ago, but two years *after* the Court decided *Miller*—its last case considering the constitutionality of a State or local firearm law prior to the instant case—the Court began selectively incorporating provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. Throughout the century-long series of cases in which the Court has employed selective incorporation, the Court's consistent focus in determining which rights

to incorporate has been on the relationship between protection of that right and protection of liberty under our free government.

The earliest provision of the Bill of Rights to be incorporated into the Due Process Clause of the Fourteenth Amendment was the "just compensation clause" of the Fifth Amendment.[10] In *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1896), the Court explained:

> *[I]n a free government almost all other rights would become worthless* if the government possessed an uncontrollable power over the private fortune of every citizen.

Id. at 236 (quoting 2 Story Const. § 1790) (emphasis added). Using the "just compensation clause" as an example, the Court expounded upon the types of liberties protected by the Due Process Clause of the Fourteenth Amendment: "There are limitations on [State] power which grow out of the essential nature of all *free governments*, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* at 237 (quoting *Loan Assoc.* v. *Topeka*, 20 Wall. 655, 663 (1874)) (emphasis added).

The most natural place to find rights essential to free government has been within the list enumerated by the first eight Amendments of the Bill of Rights. Thus, in the seventy years following *Chicago B. & Q. R.R.*, this Court incrementally incorporated nearly all the protections contained therein. The general principle followed by this Court in deciding incorporation questions has been that "those guarantees of the Bill of Rights which are *fundamental safeguards of liberty* immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1962) (emphasis added).

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[10] "[N]or shall private property be taken for public use, without just compensation."

Incorporation of the First Amendment began with the speech and press clauses. In *Gitlow* v. *New York*, the Court stated, "[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the *fundamental personal rights and 'liberties'* protected by the due process clause of the Fourteenth Amendment from impairment by the States." 268 U.S. 652, 666 (1925) (emphasis added). Six years later, in *Near v. Minnesota*, the Court opined:

> It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. *It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.*

283 U.S. 697, 707 (1931) (emphasis added).

In *Grosjean* v. *American Press Co., Inc.*, the Court explained that:

> The First Amendment to the Federal Constitution provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' While this provision is

> not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.
>
> * * *
>
> We [have] concluded that *certain fundamental rights*, safeguarded by the first eight amendments against federal action, were also safe-guarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

297 U.S. 233, 243–44 (1936) (emphasis added).

The concept of First Amendment rights as "fundamental" was further explicated in *Schneider* v. *New Jersey*:

> This Court has characterized the freedom of speech and that of the press as *fundamental* personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights *lies at the foundation of free government by free men*.

308 U.S. 147, 161 (1939) (emphases added); see also *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these [First Amendment] rights * * * is essential to *free government*" (emphasis added)).

By the time the Court reached incorporation of the religion clauses of the First Amendment, it was able to state in *Cantwell* v. *Connecticut*, without dissent or even much in the way of explanation, that:

> The *fundamental concept of liberty* embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

310 U.S. 296, 303 (1940) (emphasis added).

The protections of the Fourth Amendment were incorporated because they too were deemed fundamental to liberty: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a *free society*. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf* v. *Colorado*, 338 U.S. 25, 27–28 (1949) (emphasis added).[11] The Fifth Amendment was incorporated piecemeal using similar language. The privilege against self-incrimination, for example, was deemed to be "one of the 'principles of a *free government*.'" *Malloy* v. *Hogan*, 378 U.S. 1, 9 (1963) (quoting *Boyd* v. *United States*, 116 U.S. 616, 632 (1886)) (emphasis added). In incorporating that privilege against the States, *Malloy* specifically "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Id.* at 10–11 (quoting *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).

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[11] The exclusionary rule was not deemed to be "an essential ingredient of the Fourth Amendment," and therefore incorporated against the States, until a decade later. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1960).

The Sixth Amendment right to counsel was first considered for incorporation in *Powell* v. *Alabama*, 287 U.S. 45 (1932), in which the Court described the right as being "of such a character that it cannot be denied without violating those '*fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*.'" *Id.* at 67 (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)) (emphasis added).[12] This sentiment was reiterated when *Gideon* fully incorporated the right to counsel 35 years later:

> [T]his Court in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) * * * was careful to emphasize that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of *ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states" and that guarantees "in their origin * * * effective against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption.

Id. at 342 (quoting 302 U.S., at 324–25, 326) (emphasis added).

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[12] *Powell* incorporated the Sixth Amendment right to counsel under the facts of the case, but declined to consider incorporation of the right more broadly.

Other provisions of the Sixth Amendment were incorporated in subsequent cases: *Pointer* v. *Texas*, 380 U.S. 400, 403 (1964), held that "the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right." The same analysis led to the incorporation of the right to a speedy trial: Upon examining Coke's Institutes and Framing-era documents such as the Virginia Declaration of Rights of 1776, the Court in *Klopfer* v. *North Carolina*, 386 U.S. 213, 225–26 (1966), concluded: "That [the right to a speedy trial] was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation, as well as by its prominent position in the Sixth Amendment."

Completing Sixth Amendment incorporation, *Washington* v. *Texas*, 388 U.S. 14 (1966), and *Duncan* v. *Louisiana*, 391 U.S. 145 (1967), recognized the fundamental nature of, respectively, the rights to compulsory process and criminal jury trials. In *Duncan*, as in prior cases, the Court pointed out:

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, *the Court has looked increasingly to the Bill of Rights for guidance*; many of the rights guaranteed by the first eights Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

391 U.S. at 147–48 (emphasis added).

By the time the Court reached the Eighth Amendment's prohibition of cruel and unusual punishment, incorporation was simply assumed, *Francis* v. *Resweber*, 329 U.S. 459, 462 (1947), and then applied without analysis or dissent, *Robinson* v. *California*, 370 U.S. 660, 666 (1961).

The Court has declined to incorporate only two rights found in the Bill of Rights, both involving legal procedure rather than fundamental rights, and the rationale for not incorporating those two is wholly inapplicable here. First, the Court declined to incorporate the Fifth Amendment's Grand Jury Clause because, it reasoned, state courts are entitled to some procedural independence and "examination by a neutral magistrate provide[s] defendants with nearly the same protection as the abrogated common-law grand jury procedure." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 431 (1994). Likewise, the Court's refusal to incorporate the Seventh Amendment's requirement of civil jury trials rested on issues of procedure. *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211, 221–22 (1916); *Howlett* v. *Rose*, 496 U.S. 356, 370 n.17 (1990).

In sum, while the Court has phrased the incorporation test in various ways over the years, the lynchpin has been the importance of the right in question to what has variously been described as "liberty," "a free society," "free government," the "liberty * * * at the base of all our civil and political institutions," or "ordered liberty." As well, the central, abiding, and indispensable element of every formulation is that rights be deemed fundamental in *our* system of government. See *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932) (referring to "those fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions.") (emphasis added); *In re Oliver*, 333 U.S. 257, 273 (1948) (asking whether a right is "basic in *our* system of jurisprudence") (emphasis added); *Palko*, 302 U.S. at 325 (asking whether a right is "so rooted in the traditions and conscience of *our people* as to be ranked as fundamental") (emphasis added); *Washington* v. *Glucksberg*, 521 U.S. 702, 762 (1997) (asking whether denial of the right is something "*our polity* will not endure.") (emphasis added); see also *Duncan*, 391 U.S. at 148-49 (1968) ("*our* civil and political institutions"); *id.* at 153 ("fundamental to *our* system") (emphasis added); *id.* at 149 n. 14 (distinguishing this inquiry from the more abstract question whether any "civilized system could be imagined that would not accord the" right).

2. This Court's selective incorporation precedent compels the conclusion that the fundamental right to keep and bear arms must be incorporated into the Due Process Clause of the Fourteenth Amendment. As with the religion clauses and the protection against cruel and unusual punishment, incorporation of the Second Amendment should be a foregone conclusion in light of everything that has come before. Given the extensive history recited in Part I above the case for incorporation of the Second Amendment is stronger than for any other right in the Bill of Rights.

There can be no doubt that the right to keep and bear arms protected by the Second Amendment easily meets the test set forth in this Court's selective incorporation precedent: It is a right "fundamental" to "liberty," "a free society," "free government," the "liberty * * * at the base of all our civil and political institutions," and "ordered liberty." The Second Amendment is the only provision of the Bill of Rights that declares its own essential link to liberty and a free society. As the Amendment itself states, "A well regulated militia being *necessary to the security of a free State*, the right of the People to keep and bear arms shall not be infringed." U.S. Const., amend. II (emphasis added); see *Heller*, 128 S. Ct. at 2800 (defining "security of a free State" to mean "security of a *free polity*, not security of each of the several States") (emphasis added).

The fundamental nature of the right to keep and bear arms was recognized even before the founding of this country. As the Court explained in *Heller*, "[b]y the time of the founding, the right to have arms had become *fundamental* for English subjects," and was cited by Blackstone "as one of the *fundamental* rights of Englishmen." *Id.* at 2798 (emphases added).[13] The attempted disarmaments of the pre-Revolutionary period, *Heller* explains, "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms * * * to defend themselves." *Id.* at 2799.

The Court in *Heller* repeatedly referenced the fundamental link between the right to keep and bear arms and individual liberty. It explained that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." 128 S. Ct. at 2801; see also *id.* ("It was well understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."). The Court then went on to quote St. George Tucker as stating, with respect to the Second Amendment:

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[13] This Court has held that the Fourteenth Amendment protects from State infringement the "indefeasible right of personal security, personal liberty and private property." *Griswold* v. *Connecticut*, 381 U.S. 479, 484 n.* (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). As was articulated from 1 Blackstone, Commentaries *143–44 to the Freedmen's Bureau Act, see *supra* at 11–14, these rights are in turn protected by the right to have arms.

> This may be considered as *the true palladium of liberty* * * *. The right to self-defense is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, *liberty*, if not already annihilated, is on the brink of destruction.

Id. at 2805 (emphases added; internal quotation marks and citations omitted).

The link between the right to keep and bear arms and the essential tenets of liberty remained front of mind at the time the Fourteenth Amendment was adopted. As the Court observed in *Heller*, the contemporaneous Freedmen's Bureau Act stated:

> [T]he right * * * to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal security*, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens * * *.

128 S. Ct. at 2810 (emphasis added). Similarly, Thomas Cooley wrote in his constitutional treatise in 1868 that "among the other defenses to *personal liberty* should be mentioned the right of the people to keep and bear arms * * *." *Id.* at 2811 (emphasis added; internal quotation marks and citations omitted)).

The right to keep and bear arms also has long been guaranteed by many State constitutions, another factor this Court has often considered when determining whether other rights are fundamental for purposes of incorporation. See, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963); *Klopfer* v. *North Carolina*, 386 U.S. 213, 225–26 (1966). Currently, forty-four states have constitutional guarantees for the right to keep and bear arms, and no state constitution denies the right. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEXAS REV. OF LAW & POLITICS 191, 193–205 (2006). This enduring state consensus is strong evidence of the fundamental nature of the right to keep and bear arms. See *Duncan*, 391 U.S. at 154 (citing current state practice as evidence that the jury right is fundamental); see also *Benton* v. *Maryland*, 395 U.S. 784, 794 (citing current state practice as evidence that the prohibition on double jeopardy is fundamental).

Importantly, the liberty protected by the right to keep and bear arms is liberty not only from government tyranny, but the liberty to defend oneself and one's family from violent acts of private citizens as well. As the Court explained in *Heller*, the Framing generation:

> understood the right [to keep and bear arms] to enable individuals to defend themselves. * * * Americans understood the "right of self-preservation" as permitting a citizen to repel by force when the intervention of society in his behalf, may be too late to prevent an injury.

Id. at 2799 (internal quotation marks and citations omitted). As set forth in the history recited in Part I, *supra*, this aspect of the liberty secured by firearms was an essential basis behind the adoption of the Fourteenth Amendment.

In summary, the framework already established by this Court when it incorporated the First Amendment and other provisions of the Bill of Rights compels incorporation of the Second Amendment. No expansion or contradiction of existing jurisprudence is required. Quite the contrary, *not* incorporating the Second Amendment would be a stark and unjustifiable departure from the Court's treatment of the other "fundamental" rights enumerated in the first eight Amendments.

3. Putting aside the traditional test for selective incorporation, the Reconstruction-era history set forth above would still compel a conclusion that the right to keep and bear arms guaranteed by the Second Amendment is an aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment. Indeed, even if this Court had never incorporated another right, and even if one were to entertain doubts about the Court's selective incorporation jurisprudence with respect to the incorporation of any other elements of the Bill of Rights, the Second Amendment would still need to be incorporated because the Fourteenth Amendment was intended and commonly understood to secure

the federal right to keep and bear arms against deprivation by state governments.

In addition to the Reconstruction-era history, one cannot ignore that this case is before the Supreme Court *of the United States of America* precisely because Redcoats marched on Concord in April of 1775 to seize weapons and gunpowder, and were met by colonists jealous of their right to keep and bear arms who fired the first shots of the War of Independence. See *Heller*, 128 S. Ct. at 2798–99, 2801. When General Gage then ordered the confiscation of all of the arms of the people of Boston, the designs of the Crown became clear for all the colonists to see, and that order would be among the grievances detailed in the Declaration of Causes of Taking Up Arms of July 6, 1775. *See* S. Halbrook *The Founders' Second Amendment,* Ch. 4 (2008).

Moreover, through the end of the Nineteenth Century and beyond, a significant percentage of Americans depended upon private ownership of arms to provide food for their families and to defend themselves and their families from attack. Americans' personal right to possess such firearms for hunting or self-defense has long been an essential and fundamental component of Americans' view of themselves as a free people. To paraphrase this Court in *Near*, "[i]t [is] impossible to conclude that [the] essential personal liberty," not only of the freedman in the South, see *supra* at 10–21, but also of the frontiersman in his log cabin, or the city merchant living above his store, to keep arms for his livelihood and self-defense, "was left unprotected by the general guaranty of fundamental rights of person and property." 283 U.S. at 707; cf. *Heller*, 128 S. Ct. at 2807 (quoting Senator Sumner's "Bleeding

Kansas" speech with respect to the importance of arms on the American frontier).

In light of the "fundamental" nature of the right to keep and bear arms in our English legal heritage, the emphasis placed on this right by Revolutionary-era Americans, the post-bellum importance placed on self-defense rights of African-Americans during the framing of the Fourteenth Amendment, and the widespread use of firearms by Americans across the country throughout this nation's history, it is "impossible to conclude" that State and local governments were meant to have the capacity to infringe the right to keep and bear arms. In comparison to the right to keep and bear arms, no right has deeper roots in our history, no right is more essential to the preservation of all rights, and no right has a stronger claim to fundamental status. Even putting aside the traditional test for selective incorporation, the Second Amendment must be incorporated.

4. Even if the Second Amendment's original purpose may have been to cabin overreaching by the federal government, that is no bar to incorporation. After all, the First Amendment, unlike the Second Amendment, explicitly refers to Congress, and numerous Framing-era sources posited the First Amendment as guarding against the establishment of a national church,[14] leaving State establishments

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[14] "At the time that the first amendment was adopted, five states had established churches—Massachusetts, Connecticut, New Hampshire, Maryland, and South Carolina." William Van Alstyne, "Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on *Lynch* v. *Donnelly*," 1984 Duke L. J. 770, 773, fn 8 (1984); see also, *e.g.*, Thomas Jefferson ltr. to Samuel Miller, 1808. 11 The Writings of Thomas

of religion in place, yet it still was incorporated. Compare U.S. Const., amend. I ("*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.") with *id.*, amend. II ("A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.").

This Court's pre-incorporation era precedent holding that the Second Amendment does not apply directly to the States also is no bar to incorporation today. As with the Second Amendment, this Court was unequivocal in the pre-incorporation era that the First Amendment does not apply against the states. See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 551–52 (1876). Yet inapplicability to the States in the pre-incorporation era proved to be no bar to later incorporation of the First Amendment, and is no barrier here either.

5. In summary, the case for incorporating the Second Amendment into the Due Process Clause of the Fourteenth Amendment is overwhelming. The right to keep and bear arms easily meets the test for incorporation set forth in a century of precedent. This history of this country, furthermore, demonstrates the vital importance of the right to keep and bear arm for the preservation of the liberty interest at the heart of the Due Process Clause. For

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Jefferson, Memorial Ed., 428 (Lipscomb and Bergh, ed. 1903–04) ("[N]o power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government. It must then rest with the states, as far as it can be in any human authority.")

the reasons given above, the Second Amendment must be incorporated into the Due Process Clause.

III. In the Alternative, This Court's Precedent Requires Recognizing the Right To Keep and Bear Arms as a Privilege or Immunity of National Citizenship

If the Court does not decide this case in favor of Petitioners on selective incorporation grounds, then the Court should find that the right to keep and bear arms is one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment. See U.S. Const., amend. XIV ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). Respondents in Support of Petitioners do not believe it is necessary to revisit the entire analytical framework the Court has developed for the Privileges and Immunities Clause, under which that Clause protects only rights connected to national citizenship, in order to recognize that the right to keep and bear arms is protected.

1. The scope of the Privileges and Immunities Clause was examined by this Court in *The Slaughter-House Cases*, 83 U.S. 36 (1873). In particular, the Court considered, *inter alia*, whether that Clause made the entirety of the Bill of Rights applicable to State governments. *Id.* at 74–79. Holding in the negative, the Court explained that the Privileges and Immunities Clause only concerns those rights "which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* at 79. These include the right to travel to the seat of the national government, the right to petition the national

government, the right to demand protection of the national government when on the high seas or in foreign lands, and the right to use the navigable waters of the United States. *Id.* at 79–80.

After *The Slaughter-House Cases*, this Court at times has repeated that the privileges and immunities of citizens of the United States are those "which owe their existence to the Federal government, its national character, its Constitution, or its laws." See, *e.g.*, *Madden* v. *Kentucky*, 309 U.S. 83, 90–91 (1940) ("[T]he privileges and immunities clause protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship"). The Court has also stated that if a "privilege claimed is one which arises in virtue of national citizenship," then "no state can abridge it." *Colgate* v. *Harvey*, 296 U.S. 404, 429 (1935).

2. Whether the Privileges and Immunities Clause places limits on a State's ability to prohibit or regulate the right to keep and bear arms has never squarely been decided by this Court. Although *The Slaughter-House Cases* held that the inclusion of a right in the Bill of Rights does not automatically mean such right is protected by the Privileges and Immunities Clause against State encroachment, it did not rule out the possibility. To the contrary, *The Slaughter-House Cases* explained that the right to petition the national government is a privilege of national citizenship protected by the Privileges and Immunities Clause, even though, of course, the right "to petition the government for a redress of grievances" is included within the First Amendment. 83 U.S. at 79; U.S. Const., amend. I.

Subsequently, in *United States* v. *Cruikshank*, 92 U.S. 542 (1875), the Court considered the case of individuals charged with violating the Enforcement Act of 1870, 16 Stat. 140, 141, by "'conspiring' together to injure, oppress, threaten, and intimidate * * * citizens of the United States, of African descent" by, *inter alia*, interfering with their "right to keep and bear arms for a lawful purpose." *Cruikshank*, in other words, did not involve State law or State action abridging the right to keep and bear arms, but private actors. The Enforcement Act required a finding that defendants acted to "prevent or hinder [another's] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." *Id.* at 548. The Court, in that pre-incorporation case, held that the Second Amendment only prevents Congressional interference with the right to keep and bear arms, and thus that there was no violation of the statute. See *id.* at 553. It did not, however, directly address whether the Privileges and Immunities Clause of the Fourteenth Amendment places limits on the ability of State governments to regulate and restrict the keeping and bearing of arms, because no such regulations or restrictions were at issue.

In *Presser* v. *Illinois*, the Court considered criminal charges of parading and drilling as part of an unauthorized militia. 116 U.S. 252, 253 (1886). Among the arguments the criminal defendant asserted in challenging the constitutionality of his conviction was that it violated the Privileges and Immunities Clause. *See id.* at 261. In disposing of this argument, the Court wrote:

> The question is, therefore, had he a right as a citizen of the United States, in disobedience of state law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the state? * * *. The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of government of every country. They cannot be claimed as a right independent of law.

Id. at 266. The Court in *Presser* did *not* hold that the Privileges and Immunities Clause does not protect the right to keep and bear arms; it only addressed the supposed right to "drill and parade with arms in the towns and cities of the state." Indeed, *Presser* expressly recognized the limited scope of the issue before it, observing that "the sections" of Illinois law "under consideration do not have [the] effect" of "prohibit[ing] the people from keeping and bearing arms." *Id.* at 265–66. If the Court had previously concluded, in *The Slaughter-House Cases* or *Cruikshank*, that there was no constitutional restraint on the ability of State governments to restrict the right to keep and bear arms, this observation would have been a *non sequitur*.

Finally, in *Miller* v. *Texas*, the Court held that the Privileges and Immunities Clause challenge to the state firearms law at issue had been waived below:

> [I]f the Fourteenth Amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court.

153 U.S. 535, 538 (1894); see also *id.* at 539 ("a privilege or immunity under the Constitution of the United States cannot be set up here * * * when suggested for the first time in a petition for rehearing after judgment"). Any stray language in that decision concerning the status of the right to keep and bear arms under the Privileges and Immunities Clause is therefore *dicta*.

In the 115 years since *Miller*, this Court has never had occasion to consider whether the Privileges and Immunities Clause may be implicated by State or local firearms laws.

3. Considering the precise question whether a State or local firearm law violates the Privileges and Immunities Clause by infringing the right of a citizen to keep and bear arms, the answer must be yes.

In fact, this Court already provided the answer in *Presser*, albeit in *dicta*. Recall, as explained above, that *Presser* concerned only the question whether defendant's conviction for drilling and parading as part of an unauthorized militia could stand. The Court was not asked to, and did not need to, consider whether there are constitutional limits on a State's authority to prohibit the keeping and bearing of arms under the Privileges and Immunities Clause. Nonetheless, while addressing the criminal defendant's argument raised under the Second Amendment, the Court explained that:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, *the states cannot, even laying the constitutional provision in question* [*i.e.*, the Second Amendment] *out of view, prohibit the people from keeping and bearing arms*, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

116 U.S. at 584 (emphases added). In other words, the fundamental right of "keeping and bearing arms," which preexists the founding of the nation and therefore is not dependent upon it, see *supra* at 31–32, is *also independently* a right of national citizenship. See also *Heller*, 128 S. Ct. at 2809–11.

For the reasons given above, the fundamental right to keep and bear arms should be incorporated into the Due Process Clause of the Fourteenth Amendment. If it is not, however, then the logic of *Presser*, together with this Court's existing test for what constitutes a privilege or immunity of the United States, compel the conclusion that the preexisting right to keep and bear arms as guaranteed by the Second Amendment is also fully incorporated into the Privileges and Immunities Clause of the Fourteenth Amendment.

IV. In the Alternative, the Court Should Revisit the Scope of the Privileges and Immunities Clause

If the Court concludes that the right to keep and bear arms is not, based on current precedent, one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment, then the Court should revisit that precedent.

1. It has long been the precedent of this Court that the Privileges and Immunities Clause does not incorporate the Bill of Rights against the States. See generally *Twining* v. *New Jersey*, 211 U.S. 78, 93–99 (1908) (describing *The Slaughter-House Cases* and its progeny as holding that "[the Privileges and Immunities] clause of the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight Amendments."). *The Slaughter-House Cases*, however, was wrongly decided and is not worthy of deference. "Stare decisis is not, like the rule of res judicata, a universal inexorable command." *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)). Generally speaking, this Court has expressed a willingness to depart from precedent when "governing decisions are unworkable or are badly reasoned," in which such cases "'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944)).

As early as 1908 this Court recognized the unworkable and badly reasoned logic of *The Slaughter-House Cases*:

> Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others.

Twining, 211 U.S. at 96. One hundred years later, the decision continues to fare no better. "Virtually no serious modern scholar—left, right, and center—thinks that [*The Slaughter-House Cases*] is a plausible reading of the [Fourteenth] Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001). Indeed, as Justice Thomas has pointed out, "[l]egal scholars agree on little beyond the conclusion that the [Privileges and Immunities] Clause does not mean with the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting).

This case provides the perfect—and rare—opportunity to reevaluate the illogical holding of *The Slaughter-House Cases*, restoring the Privileges and Immunities Clause to the rightful importance that its framers, and the post-Civil War public, intended.

2. The historical record culminating in passage of the Fourteenth Amendment provides compelling support for the proposition that the Privileges and Immunities Clause was intended to incorporate much of the Bill of Rights, and certainly the Second Amendment, against the States.

The Amendment's principal drafter (Rep. Bingham), for example, declared that the Clause would "arm the Congress * * * with the power to enforce the bill of rights as it stands in the Constitution today." CONG. GLOBE, 39th Cong., 1st Sess., 1088 (1866) (statement of Rep. John Bingham). He explained that he drafted the Fourteenth Amendment with *Barron* v. *Baltimore*, 32 U.S. 243 (1833), in mind. 42nd Cong., 1st Sess., App., at 84. He stated that "the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." *Id.* Reading each of the amendments, he added: "These eight articles * * * never were limitations upon the power of the States, until made so by the fourteenth amendment." *Id.*

Supporters and opponents of the Amendment each recognized the Amendment's purpose to incorporate the Bill of Rights against the States. See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess., 2765–66 (1866)); Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 98 (1993). State ratification records confirmed this intent. See, *e.g.*, Mass. H. R. Doc. No. 149, at 3 (1867), quoted in Halbrook, *Freedmen*, 71–72. Legal scholars were also in agreement. See, *e.g.*, John N. Pomeroy, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 149, 151 (1868). And the general public understood incorporation to be the Amendment's design. See, *e.g.*, Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 78 OHIO ST. L.J. 1509, 1590 (2007).

For the reasons given at greater length in the brief of Petitioners, it is time for this Court to depart from the *The Slaughter-House Cases* and recognize the incorporation of the Bill of Rights, or at a minimum the Second Amendment, into the Fourteenth Amendment's Privileges and Immunities Clause. Even if this Court finds it unnecessary to hold that the entire Bill of Rights is so incorporated, it would be faithful to the original understanding to hold that the Second Amendment is incorporated. As set forth in Part I, *supra*, those who explained that the entire Bill of Rights would be applicable to the States prominently mentioned the right to keep and bear arms in particular.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit below should be reversed.

Respectfully submitted,

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REPLY
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OTIS MCDONALD ET AL.,
Petitioners,
v.
CITY OF CHICAGO ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR RESPONDENTS THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. ET AL. IN SUPPORT OF PETITIONERS

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BOTH SCMXES

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CORPORATE DISCLOSURE STATEMENT

Respondent National Rifle Association of America, Inc. ("NRA"), is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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I

Two Terms ago, this Court analyzed at great length the history and scope of the Second Amendment, concluding that it had "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia* v. *Heller*, 218 S. Ct. 2783, 2799 (2008). The only question presented by this case is whether the same right to keep and bear arms described in *Heller* applies against the States via incorporation into the Fourteenth Amendment.

Despite the limited scope of this case, Respondents devote much of their brief ("Resp. Br.") to two tasks: (1) revisiting the history of the Second Amendment in an apparent attempt to convince this Court to reconsider *Heller*; and (2) arguing that courts should apply only a weak "reasonableness" standard when reviewing state and local laws—an analysis that is only necessary if the Second Amendment is incorporated in the first place. In advancing these arguments—which are irrelevant to the question presented and meritless—Respondents only underscore the extent to which the decision in *Heller* foreordained incorporation of the Second Amendment.[1]

---

[1] It is noteworthy that the Brady Center and the NAACP Legal Defense and Education Fund—two of the principal amici that submitted briefs in *Heller* arguing against recognition of an individual right to keep and bear arms—have submitted briefs in this case arguing not against incorporation of the right, but in favor of particular contours for the right on the assumption that it will be incorporated. See generally Brief for Amici Curiae Brady Center to Prevent Gun Violence, et al., in Support of Neither Party; Brief of Amicus Curiae NAACP Legal Defense and Education Fund in Support of Neither Party.

As an initial matter, Respondents' attempt to marginalize the right to keep and bear arms by declaring that "the purpose" of the Second Amendment was "to protect the militia rather than to further a fundamental aspect of personal liberty," Resp. Br. 36, was already rejected in *Heller*. *Heller* declared that, far from being exclusively "tie[d] * * * to militia or military service," the right codified by the Second Amendment was predicated upon " 'the natural right of resistance and self-preservation.' " 128 S. Ct. at 2798 (citing 1 Blackstone 139 (1765)). Indeed, *Heller* concluded that "self-defense * * * was the *central component* of the right itself," not merely a " 'subsidiary interest.' " 128 S. Ct. at 2801 (quoting Justice Breyer's dissent at 2841). Respondents' analysis of the Framing-era history of the Second Amendment, see Resp. Br. 31–37, which includes recasting the Second Amendment as tied to militia service, is nothing more than a naked attempt to relitigate *Heller*. The time for a rehearing petition in *Heller*, however, has long since expired.

This case, like *Heller*, also does not present an occasion on which to decide the standard of review to be applied in analyzing laws touching on the right to keep and bear arms. The ruling below rested exclusively on the holding that the right to keep and bear arms has *not yet* been incorporated against the States, and the only question presented in this case is whether it should be. The standard of review issue is not part of the question presented and is not fairly included within that question. Even if it were, the handgun bans at issue in this case are substantively identical to the ban in *Heller*, which the Court struck down while pointedly declining to identify a standard of review with precision. See 128 S. Ct. at 2817–18 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster" (internal quotation marks and citation omitted)). Thus, to the extent the Second Amendment is incorporated, *Heller* dictates the demise of the bans at issue here without the need to settle upon a comprehensive standard of review.[2]

When Respondents actually argue against incorporation, they present little more than a series of *non sequiturs* and faulty logic. Respondents argue that the Second Amendment, alone among the enumerated substantive rights, should be subject to unfettered "experimentation" by the States, an argument without precedent or principle. They argue for a definition of "ordered liberty" that better describes a police state than our Republic. They focus on purported social science evidence concerning handgun violence, overlooking not only that Chicago's ban has been in place—and failing—since 1982, but also the widespread use of handguns by law-abiding citizens in other jurisdictions to prevent and deter violence. They ask the Court to look to handgun regulations in England and other common-law countries, notwithstanding that it was English efforts to disarm the colonists that provided the immediate spark to the Revolution. And they provide no answer to the argument that even if *Slaughterhouse* is not overruled the right to keep and bear arms should still be deemed a privilege and immunity of national citizenship.

---

[2] The decision by the United States, which surely has an interest in the standard of review, not to participate in this case underscores that the issue is not properly presented.

For the reasons set forth below, and in the opening brief of the Respondents in Support of Petitioners ("NRA Br."), the Second Amendment must be incorporated into the Fourteenth Amendment.

ARGUMENT

I. Respondents' Historical Arguments Are Meritless.

Respondents look to history in arguing that the Second Amendment should not be incorporated into the Due Process Clause of the Fourteenth Amendment. See Resp. Br. 31–37. They first look, however, to the wrong history, focusing on the adoption of the Second Amendment during the Framing rather than the adoption of the Fourteenth Amendment during Reconstruction. They then compound that error by drawing the wrong lessons from the Framing-era history. When Respondents eventually consider the Reconstruction-era history (in the course of discussing the Privileges or Immunities Clause), they paint an inaccurate historical portrait.

1. Respondents' principal historical argument against incorporation is their theory that the Second Amendment was intended only to protect the right of States to field militias, not to protect an individual right to keep and bear arms. See Resp. Br. at 31–37. This argument is irreconcilable with *Heller* and wrong for at least three reasons.

First, Respondents' argument looks at the wrong history. This Court's incorporation precedents exploring the scope of the Fourteenth Amendment quite naturally and consistently look to

Reconstruction-era history for assistance in determining whether to incorporate a right. See, *e.g.*, *Adamson* v. *California*, 332 U.S. 46, 71 (1947) (deciding the question whether to incorporate the 5th Amendment by looking to a "study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage"); *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 239–40 (1897) (interpreting the meaning of the Due Process Clause of the Fourteenth Amendment by looking at "the meaning and scope of the Fourteenth Amendment," and citing treatises from the 1860s). Particularly with respect to the right to keep and bear arms in the face of state laws, much had changed between the Framing and Reconstruction. Among other developments, the nation had a fresh appreciation for the risk posed by States to the keeping and bearing of arms, as exemplified by the efforts of some States to disarm the Freedmen. See Brief for Amici Curiae Senator Kay Bailey Hutchinson, et al., in Support of Petitioners at 14–15 (hereinafter "309 U.S. Senators and Representatives Br."). As explained in the opening briefs of Petitioners and Respondents in Support of Petitioners, this Reconstruction-era history firmly supports incorporation of the Second Amendment. See NRA Br. at 10–21.

Second, Respondents' characterization of the Second Amendment's history as supporting only a "militia right" and not a right to self defense, Resp. Br. at 31–40, was flatly rejected in *Heller* when it was put forward in support of the substantively identical "collective right" position. The Court in *Heller* dispatched the argument that the Second

Amendment right to keep and bear arms is "tie[d] * * * to militia or military service." 128 S. Ct. at 2798. Instead, the Court explained that the right codified by the Second Amendment was predicated upon " 'the natural right of resistance and self-preservation.' " *Ibid.* (citing 1 Blackstone 139 (1765)). Indeed, *Heller* concluded that "self-defense * * * was the *central component* of the right itself," not merely a " 'subsidiary interest.' " 128 S. Ct. at 2801 (quoting Justice Breyer's dissent at 2841).

Third, and also in response to the Seventh Circuit's ruminations on federalism, see *infra* at 12–18, Respondents appear to forget that, as a result of the First Militia Clause of the Constitution, the militia serves not only as a check on, but also as a resource for, the national government. See U.S. Const., Art. I, Sec. 8, Cl. 15 ("The Congress shall have the power * * * to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions."). The most direct threat to the militia is disarmament of the people, and the best bulwark against disarmament is protection of an individual right. Therefore, even assuming that the right to keep and bear arms is inextricably tied to the militia (which it is not), such linkage *still* supports finding a right enforceable against the States.

In fact, with an eye on the First Militia Clause, the Court long ago explained in *Presser* v. *Illinois* that "the states cannot * * * prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government." 116 U.S. 252, 265 (1886); see also NRA

Br. at 42–43; 309 U.S. Senators and Representatives Br. at 16–18. That is because, as this Court explained in *Heller*, an individual accustomed to bearing arms through everyday ownership and use will be a more effective soldier when called into duty by the Federal government (whether as part of the militia, the volunteer military, or in a draft) than an individual who is shackled by law from acquiring such experience:

> [The Georgia Supreme Court in *Nunn* v. *State*, 1 Ga. 243 (1846)] perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right:
>
> > "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State."

128 S. Ct. at 2809; see also *id.* at 2811 ("Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms * * *."); *id.* at 2809 (right to keep and bear arms " 'is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.' " (quoting *State* v. *Chandler*, 5 La.

Ann. 489, 490 (1850))). Congress has, unsurprisingly, repeatedly acted to protect and encourage the right to keep and bear arms. See 309 U.S. Senators and Representatives Br. at 28–33.

The cases quoted at length in *Heller* make clear the importance of everyday private ownership and private use of arms to the national government. And *Presser* confirms that no individual State can decide for itself that widespread familiarity with arms through the everyday possession and use of certain classes of arms is not of value.[3] The notion that there should be no limits under the federal Constitution on the ability of States to "experiment" in an area so vital to our free national government finds no support in logic or experience. Thus, even if the right to keep and bear arms were exclusively tied to the militia, which it is not, incorporation of the right into the Fourteenth Amendment would still be dictated.

2. Once Respondents turn to Reconstruction-era history, they argue that such history does not reflect an intention to protect the right to keep and bear arms, but only an intention to prevent discrimination against the Freedmen in their exercise of that right. Resp. Br. 62–70. In Respondents' telling, the only vice of the infamous Black Codes was that their deprivations did not apply to everyone equally. That blinks reality.

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[3] Nor, under the Second Amendment and *Heller*, may Congress restrict the full exercise of Second Amendment rights. The Second Amendment and the Fourteenth Amendment thus work hand in hand to preserve our free and federal form of government.

As an initial matter, Respondents' argument that Reconstruction concerned only equality and not substance would, if accepted, require rejection of this Court's Incorporation doctrine *in toto*. After all, state governments are not allowed *carte blanche* to restrict free speech and the free exercise of religion so long as they do so equally. They cannot engage in unreasonable searches and seizures on the condition that bias does not enter the picture. And there is a reason that the Bill of Rights has been incorporated through the Fourteenth Amendment's Due Process Clause and not its Equal Protection Clause. Respondents' argument, therefore, that there was "*no* incorporationist understanding" in the States, and that contemporaneous public statements did not show "whether the first eight Amendments were to be made applicable to the States or not," Resp. Br. 70 (emphasis added), proves either nothing or far too much. Respondents provide no basis for singling out the Second Amendment's right to keep and bear arms as the only enumerated right for which non-discrimination by state governments is the only Constitutional imperative.

Moreover, Respondents' argument does not comport with the historical record. Examples of the Reconstruction-era understanding that the Fourteenth Amendment protected not only equality but substantive rights are legion. For instance, the Freedmen's Bureau Act protected the "*full* and equal benefit" of laws for "personal liberty" and "personal security," "including the constitutional right to bear arms." § 14, 14 Stat. 173, 176 77 (1866) (emphasis added). The Civil Rights Act of 1866 likewise protected the "*full* and equal benefit" of laws "for the security of person and property." § 1, 14 Stat. 27 (1866) (emphasis added). The use of the word "full" *in addition to* "equal" belies Respondents' claim that the enactments protected only equality. As yet another example, while Respondents quote Rep. Henry Raymond on "equality of rights," Resp. Br. at 64, they ignore his statement that, as a citizen, the African American has "a right to defend himself and his wife and children; a right to bear arms * * *." Cong. Globe, 39th Cong., 1st Sess. 1266 (1866).

Of the petition of South Carolina Freedmen complaining that they were prohibited from firearms possession, Respondents claim that there was "no hint that an equality requirement would not suffice." Resp. Br. 75–76. But Sen. Charles Sumner said that Freedmen "should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press"—not that they could be equally deprived of these rights. Cong. Globe, 39th Cong., 1st Sess. 337 (1866). Nor would Sen. Henry Wilson's concern that state forces were "visiting the freedmen, disarming them, perpetrating murders and outrages on them" have been assuaged if these same state forces also disarmed and perpetrated outrages upon their white opponents. See Cong. Globe, 39th Cong., 1st Sess. 39–40 (1866).

3. As set forth more fully in Respondents-in-Support-of-Petitioners' Opening Brief, the original understanding of the Fourteenth Amendment was that it protected the right to keep and bear arms, either alone or together with the other rights set forth in the first eight Amendments to the Constitution. See NRA Br. at 10–21. Introducing the Fourteenth Amendment, Senator Jacob Howard referred to "personal rights" like "the right to keep and bear arms," and explained that the Amendment would compel the States "to respect these great

fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2765–66 (1866). Not even the *opponents* of the Amendment on whom Respondents rely, see Resp. Br. 66, disputed Howard's explanation.

Respondents discount Representative Bingham's reiteration of incorporation in debate on the Civil Rights Act of 1871 because it was "long after the ratification of the Amendment." Resp. Br. 67–68. But this Court has relied on that same speech in explaining the scope of the Amendment. See *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 685 n. 45 (1978) (citing Cong. Globe, 39th Cong., 1st Sess., App. 84 (1866)). On the same page of the speech that the Court cited in *Monell*, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States * * * made so by the Fourteenth Amendment." *Id.* at App. 84.

Respondents assert that the state firearm laws were not understood to be subject "to a more stringent nationalized standard." Resp. Br. at 77. Yet Gen. Sickles' order, see NRA Br. at 14, recognized "civil rights and immunities" as including "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms," except for unlawful concealed weapons. Cong. Globe, 39th Cong., 1st Sess. 908–09 (1866). Likewise, and contrary to Respondents' argument, see Resp. Br. at 77, the history of the disbanding by Congress of militias in the Southern States does not support Respondents' position. Sen. Wilson's original bill not only would have "disbanded" those militias, it would also have "disarmed" them. See Cong. Globe, 39th Cong., 2nd Sess. 1848–49 (1867). But, because the militia were defined to include all male citizens, Sen.

Willey noted the "constitutional objection against depriving men of the right to bear arms * * * ." *Id.* at 1848. The term "disarmed" subsequently was stricken from the bill, which then passed. 14 Stat. 487 (1867).

Finally, the nineteenth century decisions Respondents cite on concealed weapons laws, see Resp. Br. 28–30, are actually adverse to their position. *Aymette* v. *State*, 2 Humph. (21 Tenn.) 154, 158 (1840), supported the right to possess any arms used in "civilized warfare," so that citizens could "repel any encroachments upon their rights * * * ." *English* v. *State*, 35 Tex. 472, 476 (1872), upheld protection for militia arms—muskets, holster pistols, and carbines. *Andrews* v. *State*, 50 Tenn. 165, 179 (1871), similarly held that rifles, shotgun, and repeating pistols may not be "forbidden by the Legislature."

II. "Our Federalism" Has No Bearing on Whether a Constitutional Right Is Incorporated Against the States.

In addition to their (meritless) historical arguments, Respondents also assert that incorporating the Second Amendment would be an affront to the principle of federalism. Relying on Justice Brandeis's oft-quoted passage that States may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), Respondents argue that States must be allowed to experiment in the realm of firearms regulation without any oversight under the Constitution. But the Fourteenth Amendment was designed precisely to prevent certain state "experiments." States are no more free to perform unfettered experiments with firearms regulations than they are with the suppression of speech.[4]

1. It is undoubtedly true that variations in state and local laws are often justified by geographically localized concerns. Respondents forget, however, that the States' flexibility within the construct of "Our Federalism," *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), may be trumped by the Constitutional rights of individuals. The very purpose of the Fourteenth Amendment is to prevent States from "experiment[ing]," *New State Ice*, 285 U.S. at 311, with the elimination of personal liberties. Important though the benefits of federalism may be, States have been afforded no room to experiment in the complete elimination of freedom of speech or religion, or in the conduct of unreasonable searches and seizures, or in the imposition of cruel and unusual punishment. In each of these areas, while room remains for local variation, Federal law imposes some fixed national standards for the protection of individual rights.

Thus, Respondents are emphatically wrong to contend that the question whether to recognize the right to keep and bear arms is the "type of social problem to be worked out by state and local governments, without a nationally imposed solution excluding one choice or the other." Resp. Br. at 11–12. The rights set forth in the Bill of Rights and incorporated by the Fourteenth Amendment represent the ground rules for state and local government behavior, the irreducible minimum liberties that states and local governments may not infringe. See *New State Ice*, 285 U.S. at 279–80 (stating that "[t]he principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments," and recounting that in *Near* v. *Minnesota*, 283 U.S. 697 (1931), "experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press"). As this Court held in *Heller*, "[t]he very enumeration of the right takes out of the hands of government * * * the power to decide * * * whether the right is *really worth* insisting upon." 128 S. Ct. at 2821; *see also id.* at 2822 ("the enshrinement of constitutional rights necessarily takes certain policy choices off the table").

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[4] In contrast to Respondents' federalism argument, it is certainly telling that 38 States signed an *amicus* brief in support of Petitioners, arguing that the Second Amendment should be incorporated. See generally Brief of the States of Texas, et al. as Amici Curiae in Support of Petitioners.

To be sure, as this Court explained in *Heller*, no Constitutional right is unlimited and the right to keep and bear arms is no exception. See 128 S. Ct. at 2799. Thus, even after incorporating the Second Amendment against the States, the localized concerns that Respondents describe may be relevant to determining whether certain laws and regulations can withstand the scrutiny of the courts. Those local concerns, however, are not material to the antecedent question of incorporation, a process that, by definition, imposes some uniform national standard. Further, the question of what standard of review should apply to laws infringing on Second Amendment rights is not at issue here: As in *Heller*, the Chicago and Oak Park handgun bans would not withstand any constitutional analysis. *See* 128 S. Ct. at 2817–18.[5]

2. Respondents seek to buttress their federalism argument by reference to the variety of state regulatory regimes governing firearms today, some of which (like Respondents' handgun bans) may run afoul of *Heller*. To the extent, however, that the Due Process Clause of the Fourteenth Amendment was meant, and understood at the time, to prevent state and local governments from encroaching on individuals' right to keep and bear arms, it is no answer to point out that some States and municipalities presently are doing so. Ubiquitous violations of a fundamental right would be an argument *for*, not against, incorporation.

Indeed, the fact that some States do not have Constitutional provisions protecting the right to keep and bear arms at all, and that other States' judiciaries have arguably nullified or diluted such right, serves only to highlight the importance of incorporating the Second Amendment. Absent incorporation, citizens of those States could be disarmed without having recourse to a federal remedy in federal court. Congress' power to protect citizens in those states would also be called into question. See 309 Senators and Representatives Br. at 30–33. Moreover, allowing a patchwork of local laws to ban various types of firearms in different parts of the country would chill the exercise of Second Amendment rights everywhere and hinder travel between jurisdictions.

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[5] Respondents suggest that *Heller* invented the common-use test, Resp. Br. at 26, when in fact that test is well grounded in State law. See, *e.g.*, *Rinzler* v. *Carson*, 262 So. 2d 661, 666 (Fla. 1972) (holding that arms which "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles" are protected); *North Carolina* v. *Kerner*, 181 N.C. 574, 577 (1921) ("all 'arms' as were in common use"); *Texas* v. *Duke*, 42 Tex. 455, 458–59 (1875) ("such arms as are commonly kept, according to the customs of the people").

In a related section of their brief, Respondents also claim that there is a "consensus" in the States to "subject [the right to keep and bear arms] to interest-balancing," applying a "reasonable regulation standard" to laws infringing on such a right. Resp. Br. at 24; see also Resp. Br. at 23–31.[6] From this, Respondents ask this Court to conclude that "State law accordingly does not support incorporation." Resp. Br. at 23. Again, however, Respondents' conclusion does not logically follow from the premise. As an initial matter, States' recognition of the right to keep and bear arms in their founding documents is far more relevant to the incorporation question than would be subsequent efforts by state judiciaries to engage in interest balancing. More fundamentally, this Court in *Heller* already rejected an interest-balancing approach to scrutinizing laws that infringe on Second Amendment rights. 128 S. Ct. at 2821 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."). The fact that some States' courts employ an interest-balancing approach under state law is irrelevant in light of *Heller's* explanation that such an approach is irreconcilable with the protection of rights enumerated in the U.S. Constitution.

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[6] The asserted "consensus" in state law on a "reasonableness" test does not, in fact, exist. See, *e.g.*, *Rabbitt* v. *Leonard*, 36 Conn. Supp. 108, 112 (1979) (noting the "fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process."); *City of Lakewood* v. *Pillow*, 180 Colo. 20, 23 (1972) (invalidating firearm ban because a legitimate government purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."). Moreover, the application of what is "reasonable" by some state courts is hardly consistent with what Chicago has in mind. See, *e.g.*, *Bleiler* v. *Chief, Dover Police Dep't*, 155 N.H. 693, 699 (2007) (requirement of license to carry a concealed handgun held "reasonable" where no license required to carry openly or to possess at home).

3. Finally, in response to Respondents' argument based on the virtues of experimentation, it is surely worth noting that Respondents' bans on the lawful possession of handguns as a means to limit the use of handguns by criminals are failed experiments. Respondents somehow think the fact that "[h]andguns were used in 402 of the 412 firearm homicides in Chicago in 2008," Resp. Br. at 13—notwithstanding the nearly thirty-year ban on lawful possession of handguns in the city—supports continuing to prevent law abiding citizens from keeping and bearing handguns for self-defense. Respondents' own statistics show that they are engaging in mere wishful thinking when they assert that "[h]andgun restrictions can be an effective tool for curbing criminal street gangs." Resp. Br. at 16. The *criminals* have guns and are using them. Respondents' experiments in disarming *law-abiding citizens* so that they cannot defend themselves from criminals was never wise and, after *Heller*, is clearly unconstitutional. If Respondents wish to cut crime, they can and should experiment with stricter

enforcement of laws against, *inter alia*, unlawful gang activities.

III. "Ordered Liberty" Does Not Prescribe Enhancing Order at the Expense of Individual Liberty.

1. In arguing against incorporation of the Second Amendment, Respondents contend that the rights protected by the Second Amendment are not "implicit in the concept of ordered liberty." Resp. Br. at 8 (quoting *Mapp* v. *Ohio*, 367 U.S. 643, 650 (1961)). To support this argument, Respondents invent a novel definition of "ordered liberty" out of whole cloth: Without citing any precedent, Respondents declare that "ordered liberty" means little more than "limit[ing] violence" and "reduc[ing] injury and death." Resp. Br. at 13. Thus, they reach the Orwellian conclusion that, in certain cases, the infringement of Constitutional rights can actually "lead to the preservation of, not the intrusion upon, a system of ordered liberty." Resp. Br. at 13.

In essence, Respondents define "ordered liberty" as the government's ability to restrict individual liberties in order to ensure a more "orderly" society. Such an unprecedented and unsupported definition, however, perverts the entire purpose of Constitutional rights. Of course, any government would find it easier to control their populations—to create more "order" and less "violence"—if they could eliminate personal liberties. The most orderly society imaginable would be one in which all persons resided in prison-like conditions. Fortunately, however, the Bill of Rights protects "ordered *liberty*," not just order.

Undoubtedly aware of the tyrannical implications of their argument, Respondents try desperately to distinguish the Second Amendment from all other enumerated rights that have been incorporated against the States. Thus, Respondents assert that the right to keep and bear arms is uniquely "dangerous" and capable of leading to "violence." Resp. Br. at 11. Their attempt, however, falls flat, for the Second Amendment is not unique in this regard. Many provisions of the Bill of Rights protect liberties that have the potential to be "dangerous" and to lead to "violence." The presence of such rights in the Constitution, however, indicates a determination that the benefits of protecting those rights outweigh their potential for harm. *Heller*, 128 S. Ct. at 2821 (explaining that Constitutional rights are "the very *product* of an interest-balancing by the people").

The First Amendment is the perfect example. As the familiar adage declares, "the pen is mightier than the sword." It is indisputably true that the spoken and written word contain enormous potential to promote societal disorder, to encourage civil disobedience and even to spark revolutions. Thomas Paine's *Common Sense* may have sparked a revolution that cost many lives, yet no serious American legal scholar could dispute that such speech would be protected under the First Amendment and, post-incorporation, immune to encroachment by the States.

Speech is not the only other "dangerous" right protected by our Constitution. The Court's First Amendment jurisprudence also protects pornography, *Miller* v. *California*, 413 U.S. 15 (1973), and nude dancing, *Schad* v. *Mount Ephraim*, 452 U.S. 61 (1981), despite the fervent belief of many that they corrupt society and create disorder. Far from withdrawing such activities from the purview of First Amendment protection, thereby allowing States to eliminate individuals' right to engage in them, the Court has concluded that the potential risks these activities pose are properly mitigated with appropriately narrow time, place, and manner restrictions. See, *e.g., Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986).

Similarly, the Fourth Amendment protects a variety of rights that, by their very definition, make it more difficult for the police to catch criminals. Yet the Court incorporated the Fourth Amendment against the States without so much as a whisper about its potential harm to society. See *Wolf* v. *Colorado*, 338 U.S. 25, 27–28 (1949). Indeed, the Court reached its result under the Fifth and Sixth Amendments in *Miranda* v. *Arizona* notwithstanding Justice White's warning that:

> [i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined.

384 U.S. 436, 542 (1966) (White, J., dissenting)

The reality is that Respondents' elastic concept of "ordered liberty" could be used to argue against incorporation of any one of the first eight Amendments. But the act of enumeration of a substantive right requires overwhelming democratic support throughout the United States for designating that right as fundamental and thereby sheltering it from unrestrained policymaking of the type urged by Respondents. Protecting a fundamental enumerated right from undermining by individual States thus does not raise the difficulties inherent in recognition of an unenumerated right. See 309 U.S. Senators and Representatives Br. at 25 (citing *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment, joined by Thomas, J.)). Absent further Constitutional amendment, it is beyond the province of this Court to declare that the protection of such enumerated rights is "outmoded" or "extinct." *Heller*, 128 S. Ct. at 2822.

2. Respondents' position ultimately boils down to concern with their own efficaciousness—or rather their lack thereof—in fighting crime. In response to Respondents' inability to stop criminals from unlawfully acquiring and abusing handguns, Respondents seek to prevent everyone, including law-abiding citizens, from lawfully keeping and bearing such arms. Because, in light of *Heller*, incorporation would be the death knell for such an overly broad and unguided policy, Respondents resist the recognition of any federal right to keep and bear arms whatsoever.

It would be unprecedented, however, for the Court to decline to incorporate a right simply because that right has the potential to be abused. It is the task of government to ensure that rights are exercised responsibly by punishing those who act irresponsibly. Governments cannot avoid this task, however difficult, by simply eliminating rights wholesale. If Respondents' test for incorporation were correct, it is difficult to imagine a single Constitutional right that would have been incorporated against the States. Life outside of Washington, D.C., would be extremely "orderly," though far from the society envisioned during the Framing and Reconstruction.

Moreover, even if a State's quest for greater order and security could justify intrusions on personal liberty of a kind the federal government is prohibited from undertaking, Respondents do not explain how their handgun bans further that aim. The Chicago handgun ban has been in place since 1982, yet Respondents concede that Chicago continues to suffer from "an exceptionally serious problem of firearm—and, in particular, handgun—violence and crime," Resp. Br. at 13. Indeed, all the violence and crime that Respondents worry about is *already* against the law, regardless of the handgun ban. *See* Brief for Amicus Curiae Anti-Defamation League at 6–10 (describing the murderous rampages of Richard Baumhammers, Wade and Christopher Lay, James Von Brunn, and other violent extremists, all of whom were sentenced to lengthy prison terms and/or death for their violation of numerous criminal laws).

Respondents' argument knows no stopping point, and would permit jurisdictions to outlaw the possession of any firearm, not only handguns. Respondents concede as much, suggesting in a footnote that to stop gangs from "seeking to assassinate rivals" they could ban not only handguns but also hunting rifles. See Resp. Br. at 19 n. 9. Presumably, however, it is against the law "to assassinate rivals" whether done with a firearm or a carving knife. Banning firearms in common possession by law abiding citizens in an effort to prevent gangland assassinations is neither necessary nor wise, and under *Heller* and the Fourteenth Amendment it is surely unconstitutional as well.

3. As did the District of Columbia and its amici in *Heller*, Respondents and their amici in this case put forth a cornucopia of purported social science evidence concerning violent acts involving firearms generally and handguns in particular. Such evidence failed to persuade this Court not to recognize an individual right to keep and bear arms in *Heller*, and it is no more relevant to the question whether to incorporate presented by this case.[7]

Obviously, handguns—particularly, as in the case of Chicago and Oak Park, illegally owned and carried handguns—are used by some criminals to commit some crimes. Equally obviously, however, the use of firearms, including handguns, by law-abiding citizens for lawful purposes—including not only hunting and competition shooting but also self-defense and the deterrence of crime—is far more common. Overwhelming evidence shows that firearms, including handguns, are the most effective and safe means of deterring burglars and other home invaders. See Ikeda *et al.*, *Estimating Intruder-Related Firearm Retrievals in U.S. Households, 1994*, 12 Violence and Victims 4, 363 (Winter 1997) (according to CDC, an estimated 497,646 homeowners believed that they scared away an intruder using a firearm in 1994); Kopel, *Lawyers, Guns, and Burglars*, 43 Ariz. L. Rev. 345, 346 (Summer 2001). Victims who resist with a firearm are less likely than other victims to lose their property to a burglar. See Kleck & Gertz, *Armed Resistance To Crime: The Prevalence and Nature of Self-defense with a Gun*, 86 J. Crim. L. & Criminology 150, 151 (Fall 1995); Tark & Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 Criminology 861, 882 (Nov. 2004). In the majority of cases, the burglar flees as soon as he discovers the victim is armed, and before a shot is ever fired. See Kleck & Gertz, *supra*, at 164 (explaining survey data showing 2.2 million to 2.5 million defensive gun uses annually in the United States, the vast majority of which are handgun uses).

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[7] Respondents cite a single State case in American history, *Kalodimos* v. *Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984), that upheld a complete handgun ban. (Notably, that same court in another decision implied that the Second Amendment applies to the States. *People* v. *Liss*, 406 Ill. 419, 424 (1950)). No other court has ever upheld a ban on possession of any of the three basic types of firearms—handguns, rifles, and shotguns.

Notably, aware of high rates of home ownership of firearms, burglars in the United States have a strong tendency to forego intrusion when homeowners are likely to be present. See Kopel, *supra*, at 346. By contrast, British and other European homeowners, who are generally subject to stricter gun control laws, are three times as likely as American homeowners to be home when burglaries occur. See Dorfman & Koltonyuk, *When The Ends Justify The Reasonable Means: Self-Defense and the Right to Counsel*, 3 Tex. Rev. L. & Pol. 381, 395 (Spring 1999); Kopel, *supra*, at 346.

Because they are easy to handle effectively, firearms, especially handguns, are proven defensive arms. See Caplan & Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—And the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073, 1105 (2004–2005) (arguing that, "[i]n modern times, effective self-defense implies a handgun; long guns can also be very effective * * * but in some homes they may be unwieldy or awkward to use."); Dorfman & Koltonyuk, *supra*, at 392 (observing that handguns function as the "great equalizer," because of their small size, effectiveness, and relative simplicity). For many people, especially many women, a handgun, which is smaller, lighter and causes less recoil than a rifle or shotgun, may be the safest and most effective means of self-defense.

All told, reliance on crime data to support the proposition that handguns and potentially other firearms could be banned to prevent crime and enhance "ordered liberty" (as improperly defined) ignores much relevant evidence. The keeping and bearing of firearms, including handguns, by law-abiding citizens serves to deter and prevent crime; it is the banning of the lawful possession of handguns that allows criminals to terrorize the disarmed, law-abiding populace.

IV. Respondents' Reliance on the Modern Laws of Foreign Jurisdictions Is Misplaced.

Respondents' constitutional analysis suffers from another fatal flaw. In arguing against incorporation, Respondents point to the modern "legal systems of

England, Canada, and Australia," which they describe as relevant to this Court's analysis simply because the laws of those countries "each have their roots in the same English law as does this country." Resp. Br. at 21.

Of course, Respondents are correct that this Court often looks to the common law traditions of England in interpreting U.S. Constitutional rights. In fact, the Court did just that in *Heller*. See 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."). But the only relevant common law traditions are those that were in place at the time our Constitution was adopted. Those traditions help us understand how the Constitution itself was understood by those who ratified it. Since the time of our Founding, however, our own laws have diverged from the laws of England in many areas, in particular with respect to the right to keep and bear arms. In interpreting the rights enumerated in the U.S. Constitution, therefore, the modern laws of other countries with common law traditions are as irrelevant as the modern laws of any other country—they simply have no bearing on what those rights meant when adopted. Moreover, whatever the hazards of relying on foreign jurisprudence in interpreting our Constitution's basic guarantees, they are surely magnified when interpreting the Fourteenth Amendment and uniquely American doctrines like incorporation and "our"—not *their*—"Federalism."

Indeed, in this case reliance on developments in English law is particularly inappropriate because our respective views of the right to keep and bear arms have not only diverged since the Framing, but were different even prior. The Crown's attempts to disarm the colonists during period from 1768 to 1775, after all, were a significant cause of the American Revolution. Halbrook, The Founders' Second Amendment, chapters 1–4 (2008). James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to Europe, where "the governments are afraid to trust the people with arms." *The Federalist* No. 46, in 15 Documentary History of the Ratification of the Constitution 492–93 (1984). In calling the right to arms "the true palladium of liberty," St. George Tucker contrasted England, where "the people have been disarmed." 1 St. George Tucker, Blackstone's Commentaries, ed. app. at 300 (1803). The English approach to firearms regulation, in other words, is what our Second Amendment protects *against*, not what it aspires toward.

V. In the Alternative, The Right To Keep and Bear Arms Is a Privilege or Immunity of National Citizenship.

As described above, Respondents' arguments as to incorporation under the Due Process Clause are misplaced, employing circular logic, flawed history, incorrect and incomplete social science data, and a dangerous, unprecedented interpretation of "ordered liberty." But at least Respondents endeavor to offer arguments. With respect to the Privileges or Immunities Clause, by contrast, while Respondents address the arguments offered by Petitioners in support of the wholesale incorporation of the Bill of Rights via the Privileges or Immunities Clause, see Resp. Br. at 42–81, they provide absolutely no rebuttal to the NRA's more specific argument that, in light of this Court's explanation in *Presser* of the interplay between the right to keep and bear arms and the First Militia Clause, the right should be deemed a privilege or immunity of national citizenship even under the test set forth in *The Slaughter-House Cases*. See NRA Br. 38-43. Thus, even if the Court declines to incorporate the Second Amendment through the Due Process Clause of the Fourteenth Amendment, it should still incorporate it through the Privileges or Immunities Clause.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioners' and NRA's respective opening briefs, the decision of the Seventh Circuit below should be reversed.

Respectfully submitted,

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REPLY
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OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF

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SUMMARY OF ARGUMENT

1. Respondents offer no coherent alternative interpretation of the Privileges or Immunities Clause, nor do they defend the reasoning of *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Relying on illogical assumptions, selective quotation of the Fourteenth Amendment's opponents and discredited scholarship, Respondents aver only that the Clause is either indeterminate or redundant of other provisions. It is neither. And included within the Clause's protection is the right to keep and bear arms as understood in 1868 America.

2. Ignoring their present violation of Petitioners' Fourteenth Amendment rights, Respondents condemn imaginary future consequences of accurate constitutional interpretation, failing to acknowledge that applying constitutional text as plainly intended by the Framers and understood by the ratifying public possesses high intrinsic value. Nowhere is that value higher than when enforcing basic national civil rights standards, a task Respondents suggest is undesirable.

Enforcing the Privileges or Immunities Clause does not threaten the rights of immigrants and corporations. The threat—to all individuals—is posed by Respondents' argument that the Fourteenth Amendment was never understood to secure civil rights.

3. Regarding selective due process incorporation, Respondents' veneration of precedent would have well-served their treatment of *District of Columbia* v.

Heller, 128 S. Ct. 2783 (2008); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); and *Washington* v. *Glucksberg*, 521 U.S. 702 (1997).

Respondents misstate the due process incorporation standards. This Court applies enumerated and unenumerated rights of substantive due process by way of *Duncan* and *Glucksberg*, respectively. Both approaches are rooted in the unique history of the American people. Only by denying the role of Anglo-American tradition and ignoring this Court's clear recent pronouncements on the right to arms can Respondents deny that right is a fundamental aspect of American constitutional liberty.

4. Unable to articulate the correct standard for substantive due process incorporation, or interpret the Privileges or Immunities Clause, Respondents offer irrelevant political arguments against application of the right to keep and bear arms against the States, failing to accept that the decision to secure the right in our Constitution has already been made.

◆

ARGUMENT

I. RESPONDENTS FAIL TO DISPROVE THE ORIGINAL PUBLIC MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE.

Respondents do not seek to explain Section One's opening command to the States, averring only that the Privileges or Immunities Clause is unfathomable or merely duplicative of other provisions.

"It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). "[T]he usual canon of [constitutional] interpretation . . . requires that real effect should be given to all the words it uses." *Myers* v. *United States*, 272 U.S. 52, 151 (1926) (citations omitted).

> [T]he difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common law, and it has been the method of this Court with other no less general statements in our fundamental law.

Edwards v. *California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

Under Respondents' view, the core principle animating civil rights law—that States are bound by federal civil rights—is a judicial fiction, lacking any persuasive historical or textual basis in the Constitution. The Constitution's text and history instruct otherwise.

A. Respondents Offer No Evidence of the Text's Original Public Meaning.

Respondents reason that so long as a word appearing in the Constitution admits of multiple definitions, it has no meaning at all and must be disregarded: "Because 'privileges' and 'immunities' had more than one meaning, it cannot be concluded that the public would have understood those words to invoke [fundamental civil rights]." Respondents Br. 58.

Similarly, Respondents' amici concede that "the terms 'privileges' and 'immunities' were widely used as synonyms for 'rights,' including constitutional rights," but complain that Section One is indeterminate because "it simply fails to specify at all the particular rights to which it applies." Historians & Legal Scholars Br. 14 (citations omitted).

These are not approved approaches to constitutional interpretation. "This Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as 'due process,' 'general welfare,' 'equal protection,' or even 'commerce among the several States.'" *Edwards*, 314 U.S. at 183 (Jackson, J., concurring). As the Due Process Clauses illustrate, not all rights must be specifically described. *Cf.* U.S. Const. amend. IX.

Had Respondents established alternative definitions for "privileges" and "immunities," the Clause would not automatically be rendered inoperative. Faced with numerous examples of "privileges" and "immunities" describing fundamental civil rights—including the right to keep and bear arms—Respondents would need to show that such usage did not reflect the words' "normal and ordinary as distinguished from technical meaning," or was not in the "sense most obvious to the common understanding." Petitioners Br. 9, 15 (citations omitted).

Yet Respondents fail to even establish an alternative meaning for these words. Reliance on amici's computer search of newspaper databases for the words "privileges and/or immunities" misconstrues the study's asserted value. Respondents Br. 57 (citing George Thomas, *Newspapers and the Fourteenth Amendment: What did the American Public Know About Section 1?* 18 J. CONTEMP. LEGAL ISSUES (2009), available at http:/ssrn.com/abstract=1392961 ("Newspapers")).

> I should make clear at this point what my project is *not*. Michael Curtis has made a beautiful, elegant argument that "privileges and immunities" were terms that would be understood by most educated readers as including the Bill of Rights guarantees. My paper is in no way a response to that theory.

Newspapers, at 4 (footnote omitted).[1]

Seeking evidence disputing the original public meaning of "Privileges or Immunities," Respondents next point to Rep. Kerr's post-ratification statement that "[i]t is most erroneous to suppose that the words 'rights,' 'privileges,' and 'immunities' are synonymous." Respondents Br. 57-58 (citation omitted).

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[1] The study's defects in describing original intent are discussed *infra*.

This is disingenuous. In the same speech, Kerr declared:

> But I want also to invite attention to the meaning of the words "privileges and immunities" as used in this section of the amendment. It appears to be assumed in the popular mind, and too often by the law makers, that these are words of the most general and comprehensive nature, and that they embrace the whole catalogue of human rights, and that they confer the power and the obligation to enact affirmative and most dangerous laws.

Cong. Globe, 42d Cong., 1st Sess. app. 47 (1871).

Kerr clearly recognized that "the popular mind" and "law makers" rejected his personal view of "privileges and immunities."[2]

Respondents' reliance on Webster's Dictionary and *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) to dispute the meaning of "privileges" and "immunities" is also misplaced. With respect to Webster's, Respondents Br. 57, these are the very dictionary entries Professor Tribe properly invokes for the contrary argument. Petitioners Br. 22. The claim that *Corfield*'s definition of these words in Article IV omits rights secured in the Bill of Rights is Respondents' view, decidedly not that of nineteenth-century Americans, including the Fourteenth Amendment's framers. Petitioners Br. 18-26.[3]

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[2] Kerr also believed the Citizenship Clause merely restated existing law. *Id.* In 1864, he had joined a treasonous organization. TREASON HISTORY OF THE ORDER OF SONS OF LIBERTY 93 (Felix Stidger, ed. 1903).

Finally, Respondents claim that had the Fourteenth Amendment encompassed the Bill of Rights, it should have used narrower language to evince that meaning. Respondents Br. 55. Such reasoning can attack the meaning of almost any constitutional provision. The First Amendment, for example, specifically protects "speech" and "press," but not expressive conduct.[4] Yet Respondents also claim the Privileges or Immunities Clause merely constitutionalized principles of equal protection contained in the Civil Rights Act of 1866, Respondents Br. 64-65, although it does not recite the words of either that act *or* of the more-specific Equal Protection Clause. These arguments are neither consistent nor compelling.

B. Respondents Assert an Impossible Standard of Original Intent.

If anyone in 1866-68 disputed the meaning and intent of the Privileges or Immunities Clause as declared by its framers, such statements are missing from the opposing briefs. No one challenged the Framers' declarations that federal civil rights standards would bind the States. Petitioners Br. 32. The ratification process evinces this intent was understood. Petitioners Br. 33-40.

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[3] *Corfield*'s definition included rights "which have, at all times, been enjoyed by the citizens of the several states which compose this Union," and disclaimed offering an exhaustive list. *Corfield*, 6 F. Cas. at 551-52.

[4] That the Privileges and Immunities of citizenship are not strictly defined as those secured by "the Bill of Rights" does, however, indicate that these rights are not so limited.

Respondents are thus reduced to asserting the Clause is meaningless by the negative inference of allegedly missing expressions of legislative intent. Not all newspapers, courts, and treatises that *should* have reflected the Amendment's original public meaning did so, therefore, it was ratified without discernible reason and cannot be given any effect. In their amicus's words, this Court should seek an ever-elusive "critical mass" of expressed intent. George Thomas, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1630 (2007) ("Riddle").

For an 1868 constitutional amendment, "critical mass" might be five newspaper accounts of a congressional speech, plus an amorphous "public embrace." Newspapers, at 4.[5] The volume of media accounts, court decisions, and treatises reflecting the public's understanding is apparently inadequate evidence of a "public embrace." "History cannot settle all questions

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[5] Senator Howard's speech appeared in well over five newspapers. Petitioners Br. 34-35.

. . . the Fourteenth Amendment [incorporation] riddle is one of them." Riddle, at 1657.

Respondents' heavy reliance on computerized searches of ancient newspapers for the proposition that the public was unaware of the Fourteenth Amendment's meaning defies credulity. Professor Thomas offers a "caveat" that he was not "sure how accurate the search engines are," Newspapers, at 4, especially as identical searches did not always return identical results. *Id.* at 4-5.

A paper based on little more than a Google search should not be used against decades of detailed, disciplined scholarly work by some of the Nation's leading legal historians. *See* Constitutional Law Professors Br. Indeed, Thomas acknowledges his methodology failed to locate several articles Professor Curtis had found "the old-fashioned way." Newspapers, at 9. Nor did Professor Thomas's search unearth various relevant newspaper usages of "privileges" and "immunities" identified by Petitioners.

Technological limitations explain these underinclusive results. David Hardy, *Originalism and Its Tools: A Few Caveats*, 2 UNIV. AKRON STRICT SCRUTINY 1, 15-19 (2009) ("Limitations"). "Retrieving the text files underlying the images" in the newspaperarchive.com database,

> these were found to be unreliable and, in many places, sheer gibberish. Some characteristic errors suggested text files had been created, not by human readers, but by an

> optical character recognition program. The program faced major obstacles—19th century newspaper fonts, 140 years of fading and staining of the result, with longitudinal scratches indicative of well-used microfilm. The software was unable to overcome these barriers.

Limitations, at 15. The Google Archive search also appeared underinclusive of newspaper content. *Id.* at 16-17.

Respondents are not content to conjecture about hypothetical newspapers that should have discussed the Amendment's impact. Referring to those that unmistakably did so, Respondents retort: "Nor is there evidence about how widely these newspapers were read by the ratifying public across the nation." Respondents Br. 72.

On this logic, all constitutional amendments must be meaningless, for no matter how widely they are reported, a tally of readers is unavailable. But circulation figures are a different matter. The leading Eastern newspapers were primarily responsible for reporting national news, and their national distribution was significant. Limitations, at 18-19.

Responding to the fact that pre-*SlaughterHouse* courts interpreted the Privileges or Immunities Clause to apply basic civil rights, including those secured in the Bill of Rights, against the States, Respondents allege three cases should have incorporated Bill of Rights provisions were that plausible. Respondents

Br. 59 (citing *Twitchell* v. *Commonwealth*, 74 U.S. (7 Wall.) 321 (1869); *United States* v. *Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871); *Rowan* v. *State*, 30 Wis. 129 (1872)).

Courts and litigants routinely overlook available arguments. Failure to raise an argument does not mean, necessarily, that it was untenable. *Compare Mistretta* v. *United States*, 488 U.S. 361 (1989) with *United States* v. *Booker*, 543 U.S. 220 (2005). *Twitchell*, a case filed, argued, and decided in under a week, failed to address the Fourteenth Amendment at all. Three of the justices who held against Twitchell later dissented in *SlaughterHouse*.

Crosby, contrary to Respondents' claims, had nothing to do with incorporation of the Bill of Rights. The case concerned a conspiracy to deny freedmen the vote. The indictment's portion cited by Respondents failed because it did not allege the victim was qualified to vote and, in any event, because "[t]he right of a citizen to vote depends upon the laws of the state in which he resides . . . " *Crosby*, 25 F. Cas. at 704.

Rowan found that the Fourteenth Amendment was limited by "the object" of "protect[ing] this class [African-Americans] especially from any arbitrary exercise of the powers of the state government . . . " *Rowan*, 30 Wis. at 149. The Due Process Clause was thus held to secure only the right to application of state procedures, a view at odds with modern concepts of procedural (let alone substantive) due process.

Addressing the various legal treatises contemporaneous to the Amendment's ratification that explicitly declared its incorporationist effect, Respondents claim that others "plainly did not" accept incorporation, reflecting "divided views." Respondents Br. 74.

This is disingenuous. The scholars offered by Respondents and their amici either did not mention the Fourteenth Amendment, reflecting only lack of diligence in updating their volumes, or addressed it only following *SlaughterHouse*.[6] Respondents' reliance on Joel Bishop is particularly misguided:

> [T]hough most of the amendments are restrictions on the General Government alone, not on the States, [the Second Amendment] seems to be of a nature to bind both the State and National legislatures; and doubtless it does.

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[6] Cooley claimed his 1873 treatise was largely printed when *SlaughterHouse* was announced. 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 693 app. (4th ed. 1873). His discussion echoing *SlaughterHouse* did not appear in the treatise's 1871 edition, which may be read as supporting incorporation. Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 91-93 (1993). Cooley's 1868 treatise did not mention the amendment.

Joel Bishop, 2 COMMENTARIES ON THE CRIMINAL LAW 74 (4th ed. 1868).

C. Ambiguity Claims Do Not Deprive Text of All Meaning.

Another tactic employed by the "indeterminate" camp is to re-state various aspects of the Privileges or Immunities Clause, and offer such restatement as evidence of "cacophony." Mayors Br. 25. "There is some support in the legislative history for no fewer than four interpretations of the . . . Privileges and Immunities Clause . . . " (citation omitted).

But competing interpretations of all constitutional provisions abound. *Heller* is testament enough to that, where no Justice suggested that the Second Amendment not be interpreted. One noted scholar found the Free Speech Clause is susceptible to four different originalist interpretations with respect to seditious libel. "After studying this for twenty years, I can't tell you what was the meaning of the First Amendment in 1791. I just don't know. All four of these choices are available . . . " Lucas Powe, Jr., *Civil Rights: The Heller Case*, 4 NYU J.L. & LIBERTY 293, 300 (2009). This Court would not ignore the First Amendment in reviewing seditious libel convictions.

At least with respect to the Privileges or Immunities Clause, the supposedly different interpretations are overlapping and consistent. The Clause encompasses the same rights understood to be secured against non-discrimination under Article IV, as well as the Bill of Rights. Together these would be the "basic rights that all citizens must enjoy," Mayors Br. 25, against state action. Thus abridgement of these rights, total and partial (discrimination), would be unconstitutional. Congress could remedy violations under Section 5.

Ambiguity claims are especially inapt when drawn from the Fourteenth Amendment's opponents. Critics pointed to the Amendment's broad impact—including its imposition of federal civil rights standards upon the States—as reasons for its rejection. Petitioners Br. 37-38. But some opposition took the form of claiming the Amendment was meaningless or unnecessary. Some "were antagonistic to both the letter and the spirit of the [Reconstruction] Amendments, and wished them to have the most limited effect." *Brown* v. *Bd. of Education*, 347 U.S. 483, 489 (1954).

> It is clear that attempts were made by the Democratic minority to obscure the meaning of these words and it is common to cite, for example, speeches of Senator Reverdy Johnson (D-Md.) for claims about defects in the proposed amendment.

Richard Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PENN. J. CONST. L. 1295, 1301 n.36 (2009) ("Meaning") (citation omitted). Indeed, Respondents and their amici repeatedly invoke Johnson. Respondents Br. 66-67; Mayors Br. 25; Historians & Legal Scholars Br. 18. As Sandford's counsel, Johnson argued that liberty required the perpetuation of slavery. During Reconstruction, he frequently argued to limit the federal government's ability to check Klan violence. Johnson's record "places him on the wrong side of history and, more importantly, among the worst people of his generation." Meaning, at 1301-02 n.36.

But most important, Johnson and his cohorts were decidedly in the minority. The Nation rejected their views by ratifying the Fourteenth Amendment. These are valid sources of the Amendment's original public meaning only to the extent their statements are considered antithetical.

In a similar vein, Respondents and their amici rely heavily on the now-discredited works of Charles Fairman and Raoul Berger, incorporation's leading opponents whose work has failed to withstand serious critical evaluation. In a brief surveying many of Fairman and Berger's errors, one amicus observes:

> Both Fairman and Berger are unreliable sources in the debate over incorporation in that they approached their work from a now-repudiated historical perspective that was hostile toward the Reconstruction and contemptuous of the Framers of the Fourteenth Amendment.

Calguns Foundation Br. 5; *cf.* Michael Curtis, *The Bill of Rights After Heller*, 60 HASTINGS L.J. 1445, 1483 (2009) (Fairman endorsed political results of Colfax Massacre; Berger favorably cited racially-tinged critique of Sen. Howard).

D. The Privileges or Immunities Clause Does Not Duplicate the Equal Protection Clause.

Were the Privileges or Immunities Clause redundant of the Equal Protection Clause, then both *SlaughterHouse* and *Saenz* v. *Roe*, 526 U.S. 489 (1999) were wrongly decided.[7] The existence of a perfectly-specific Equal Protection Clause alongside the Privileges or Immunities Clause indicates the two are not the same. So does the Amendment's legislative history.

Petitioners, at 37, recounted how Southern leaders unsuccessfully sought to replace the Privileges or Immunities Clause with a non-discrimination provision. And as noted by amici Constitutional Law Professors, at 7 n.2, Section One's drafting history supplies additional relevant evidence.

On April 21, 1866, Senator Stevens proposed a multi-part amendment, its first section providing: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Benjamin Kendrick, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 83 (1914). Bingham then successfully moved that his eventual contribution to Section One be added as the fifth section of that amendment. *Id.* at 87. For the next four days, Bingham's language coexisted with Stevens' nondiscrimination provision.

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[7] *Saenz* correctly found the Clause protects the right of interstate travel. Petitioners Br. 17.

On April 25, Bingham's language was struck, and he responded by moving it be submitted as a separate amendment, again showing that he, at least, did not believe the meaning of his language was the equivalent of Stevens' proposal. *Id.* at 98-99. On April 28, Bingham successfully moved to replace the exclusively nondiscrimination language of the first section with his previously stricken Section One language. *Id.* at 106.

Thus, Section One contains a separate nondiscrimination clause; it coexisted with, and eventually displaced an exclusively nondiscrimination text; and its Privileges or Immunities Clause survived an attempt at displacement by nondiscrimination text.

The distinction between Bingham's February, 1866 formulation and the Amendment as adopted was that the former allowed Congress, rather than this Court, to define constitutional standards. *City of Boerne* v. *Flores*, 521 U.S. 507 (1994). Bingham correctly rejected the argument that this change altered Section One's substantive scope. The Fourteenth Amendment

> is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

Cong. Globe, 42d Cong., 1st Sess. app. 83 (1871). The February version "never was rejected by the House or Senate." *Id.*

Indeed, regardless of whether Congress or this Court defines the rights of citizenship, it is difficult to see why the meaning of "Privileges or Immunities" would have changed from one version to the next. Bingham proceeded to explain that the Equal Protection Clause dealt with equal protection, while Section One as a whole barred the violation of civil rights. *Id.*

E. The Right to Arms Was Understood to Be a Privilege or Immunity of Citizenship.

Petitioners and amici have submitted numerous examples of 19th-century Americans referring to a private right to arms as a constitutional privilege or immunity. Respondents counter by re-arguing *Heller*, and demonstrating that arms were regulated at the time. Neither argument is responsive to the overwhelming evidence that the right to arms is within the constitutional test.

The fundamental flaw underlying Respondents' approach is their erroneous conception of rights as something granted by the Constitution when judges deem it suits public policy. *See, e.g.*, Respondents Br. 11; Mayors Br. 2, 30. The Second Amendment, like the First, grants nothing. These secure pre-existing rights against the federal government. *Heller*, 128 S. Ct. at 2812. In 1868, the Nation decided to secure them against the States as well.

Conceiving of rights as positively granted by text, Respondents adopt an erroneous view of incorporation as mechanistically transmuting the Bill of Rights' literal text against the States, rather than the rights reflected by that text. This has never been the law. "In what is regarded as the first selective incorporation case," wherein this Court allegedly "incorporat[ed] [the] Takings Clause" over Chicago's objections, Respondents Br. 9, the Fifth Amendment was never mentioned. *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226 (1897). Similarly, every right listed in the First Amendment has been incorporated as against the States, notwithstanding the fact that the text admonishes "Congress." U.S. Const. amend. I.

Respondents err in assuming that the 1868 Framers' conception of the right to arms was necessarily limited or altered by the Second Amendment's militia preamble. Respondents' focus on the Second Amendment's ratification history is simply irrelevant here. Even were *Heller* wrongly decided, the relevant inquiry in this case concerns the original intent and public meaning of the *Fourteenth* Amendment.

And even if that Amendment's Framers and their public erred in interpreting the Second Amendment (or Article IV, or anything else), their understanding nonetheless defines the content of the Amendment they enacted. No serious question exists that the Fourteenth Amendment was designed to secure the right to arms against state infringement. Constitutional Law Professors Br. 28.

Indeed, there is no evidence that anyone discussing the right to arms during Reconstruction held the collectivist, militia-centric view of the Second Amendment Respondents advance notwithstanding its recent rejection. To the contrary: Reconstruction Americans' disconnection of the individual Second Amendment right from its militia preamble manifested itself in Congress's approach to the problem of Southern militias.

Originally Republicans proposed that Southern militias "be forthwith disarmed and disbanded," in part because these militias had "disarm[ed] portions of the people." Cong. Globe, 39th Cong., 2d Sess. 1848 (1867). Senator Willey noted that "there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in times of peace." *Id.* Quoting the Second Amendment, Senator Hendricks complained the proposal "does not relate to states alone, it relates to people." *Id.* at 1849. The sponsor agreed to "strik[e] out the word 'disarmed.' Then it will provide simply for disbanding these organizations." *Id.* at 1849. This proved "much more acceptable" to Senator Willey, as "disarming the whole people of the South seemed to me to be so directly in the face of the Constitution itself, as to strike me as somewhat strange." *Id.*

That the Thirty-Ninth Congress invoked the Second Amendment in allowing violent ex-Confederates to retain their weapons—even as they were denied state militia service—conclusively proves that the Amendment's framers did not accept a collectivist, militia-centric right to arms.

F. The *SlaughterHouse* Line Remains Indefensible.

Notwithstanding its unsuitability as a tool of constitutional interpretation, negative inference is useful in surveying the opposing briefs to evaluate *SlaughterHouse*'s current vitality. Aside from pointing out the decision is old, no attempt is made to defend it. "When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished." *Citizens United* v. *Federal Election Comm'n*, 2010 U.S. Lexis 766 at *90 (2010).

Decisions improperly limiting enjoyment of constitutional rights create no valid reliance interests. *Id.* at *92-93. Nor can legislative reliance on erroneous precedent diminish this Court's ability to interpret the Constitution. *Id.* Moreover, as Chicago concedes, the Second Amendment's selective incorporation has never been considered. Br. in Opp. to Cert. 6-8. There cannot be reliance interests against its application via one clause that would not hold true for its application via the other.[8]

In endorsing the *SlaughterHouse* line, Respondents endorse decisions that "have been thoroughly discredited," NAACP Br. 12, and "that are rightly regarded as among the most misdirected in the history of the Court." NAACP Br. 13. From the moment it issued, the press, Members of Congress (including those who enacted the Fourteenth Amendment), and legal commentators generally agreed *SlaughterHouse* was wrongly decided, even when applauding the error. Richard Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and The Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 678-86 (1994) ("Constricting").

Yet Respondents suggest that the *Slaughter-House* Court was "in a uniquely advantageous position to discern the meaning of the Privileges or Immunities Clause" owing to its historical proximity to the framing. Respondents Br. 60. This view ignores *SlaughterHouse*'s failure to discuss the framing, and the fact that the Court bitterly divided 5-4. The dissenters, too, lived through the ratification.

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[8] Deciding cases based on constitutional text, rather than judicially-inferred theory, also supplies a narrower ground of decision. *Cf. Citizens United*, at *106 (Roberts, C.J., concurring).

Moreover, the Justices' personal experience might render their views less, not more, reliable. Justice Miller, for example, did not support ratification of the Privileges or Immunities Clause and instead supported the alternative version of the Fourteenth Amendment pressed by President Johnson. Constricting, at 660. Sometimes, the "cold historical record," Respondents Br. 62, is preferable to the passions and prejudices of the moment.

SlaughterHouse clearly bifurcated rights into mutually-exclusive "state" or "federal" spheres. The notion that *SlaughterHouse* might allow the Bill of Rights, or at least the Second Amendment, to bind the States as so-called "national citizenship" rights, repeats Respondents' errors that rights are created by the government, and that incorporation involves application of literal text rather than rights previously enumerated. Both errors improperly diminish the meaning of rights.

United States v. *Cruikshank*, 92 U.S. 542 (1876), which Justice Miller joined, recognized that fundamental rights pre-exist the Constitution, and thus faithfully excluded First and Second Amendment rights from the Fourteenth Amendment's protection under *SlaughterHouse*'s erroneous paradigm. *Id.* at 549. This Court subsequently clarified that under *SlaughterHouse*, the Bill of Rights does not bind the States. Respondents Br. 44.

NRA's novel theory, at 40, that *Cruikshank* did not bar the Second Amendment's application to the States, contradicts over a century of understanding.

See, e.g., *Heller*, 128 S. Ct. at 2813 ("States, we said, were free to restrict or protect the right under their police powers"). Erroneous precedent should be overruled, not tortured further to achieve politically-desirable results.

II. CORRECTLY APPLYING THE PRIVILEGES OR IMMUNITIES CLAUSE WOULD INCREASE, NOT REDUCE, PROTECTION OF INDIVIDUAL RIGHTS.

This Court interprets the Constitution as enacted, not as it might optimally have been written. Fortunately, the document properly interpreted and applied does not lend itself to Respondents' predicted parade of horribles.

Petitioners reject the nativist view that reliance on the Privileges or Immunities Clause excludes immigrants from constitutional protection. Respondents Br. 49 n.23. These regrettable sentiments flow from the erroneous notion "that 'the people' referenced in the Constitution, such as in the Second Amendment, refer [sic] to the U.S. citizenry." ACRU Br. 8. And contrary to GOA's view, at 15, this Court has never held that "documented" or "undocumented" aliens are excluded from "the people" as understood in the Bill of Rights. Nor could it. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).[9]

Aliens enjoy the rights to worship, speak, be secure against unreasonable searches and seizures—and keep and bear arms for self-defense—free from unwarranted interference. *Cf. Saenz*, 526 U.S. at 524 (Thomas, J., dissenting) (at founding, "privileges" and "immunities" included rights "specifically enjoyed by English citizens, and more broadly, by all persons").

Even inhabitants of territories not destined for statehood enjoy fundamental constitutional rights. *Verdugo-Urquidez*, 494 U.S. at 268 (citations omitted). Alienage status may justify regulation, but usually does not vitiate the right—not least a right necessary for the exercise of self-defense. American citizenship may be the original font of rights that States may not abridge, but once recognized such rights are secured to all persons from state deprivation under the Equal Protection Clause, assuming the alienage classification is not pre-empted by the federal immigration power.[10] Petitioners Br. 62-63.

Puzzling is the lamentation that this Court might be required "to sort out which unenumerated and previously unrecognized rights are protected by the Privileges or Immunities Clause." Respondents Br. 50. If the Clause secures civil rights, should they not be enforced? Respondents suggest the enforcement of civil rights is in and of itself something to be avoided. Those who ratified the Fourteenth Amendment surely would disagree.

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[9] Federal law does not prohibit resident aliens from obtaining firearms. Non-resident aliens may also acquire firearms under some circumstances. 18 U.S.C. § 922(y)(2).

[10] Corporations have long enjoyed equal protection. *Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U.S. 243, 253 (1906).

This Court has a rich tradition of upholding unenumerated rights. That such rights are secured in the Privileges or Immunities Clause does not make the task of enforcing them impossible. *Edwards*, 314 U.S. at 183 (Jackson, J., concurring); Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed*, 8 GEORGETOWN J.L. & PUB. POL'Y 1 (2010), available at http://ssrn.com/abstract=1503583. To the contrary, as the Clause was always understood and intended to contain substantive civil rights protection, there is a greater historical record guiding this Court's interpretation of the Clause to evaluate unenumerated right claims than exists for evaluating such arguments as aspects of substantive due process.

The Framers left much evidence as to what they considered to be the privileges and immunities of citizenship. Obvious historical "guideposts" for defining Privileges or Immunities include those rights as described by *Corfield*, rights that Congress sought to protect in Reconstruction legislation (*e.g.*, the Civil Rights Act of 1866), or other rights the violations of which were matters of grave concern as reflected in important historical texts, *e.g.*, the widely-distributed Report of the Joint Committee on Reconstruction.

In the end, the process for enforcing the Privileges or Immunities of citizenship may not differ much from that enunciated in *Glucksberg*. *Nordyke* v. *King*, 563 F.3d 439, 447 n.5 (9th Cir. 2009) (in *Glucksberg*, substantive due process doctrine "appears to arrive at a result similar to that urged by the [*SlaughterHouse*] dissenters.") By extending this existing jurisprudence, the Court could find well-established "guideposts for responsible decisionmaking in this unchartered area." *Glucksberg*, 521 U.S. at 721 (citation omitted).

Accordingly, future Privileges or Immunities questions may not be much more difficult than the question presented in this case, where the privilege at issue is enumerated in the Bill of Rights, within *Corfield*, within established lexical usage, and was a matter of top concern during Reconstruction.

Application to the States of the grand jury right in "capital, or otherwise infamous crime[s]," U.S. Const. amend. V, and the civil jury right, would pose no problems. When the Fourteenth Amendment was ratified, seventy-eight percent of the states guaranteed a grand jury right, and approximately eighty-nine percent of Americans lived in states that at least utilized the grand jury. Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. CONTEMP. LEG. ISSUES (2009), available at http://ssrn.com/abstract=1354404 at 59-61. In contrast, at the time this Court applied the Fourth Amendment exclusionary rule to state courts, twenty-four to twenty-eight states had rejected it. *Id.* at n.181

(citation omitted). Federal courts, where the Grand Jury Clause applies, have just seen record numbers of criminal defendants, and the highest number of criminal cases since Prohibition. 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY app. 3, available at http://www.uscourts.gov/newsroom/2009/2009YearEndReport.pdf. The District of Columbia's courts operate under the Seventh Amendment without issue.

Had Petitioners' arguments threatened much disruption, Respondents might have garnered support from more than three states.

III. RESPONDENTS MISSTATE THE SELECTIVE INCORPORATION STANDARD.

The concept of "ordered liberty" Respondents invoke twenty-seven times never referred to the government's liberty to issue orders. Petitioners acknowledge that liberty requires order, the two existing side-by-side. Respondents mistakenly view liberty as a government-conferred condition, denying that order may coexist with individual freedom. Respondents err:

> There is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference.

Poulos v. *New Hampshire*, 345 U.S. 395, 408 (1953) (footnote omitted). A right's incorporation under the "ordered liberty" standard has not always been held to absolutely proscribe an area of government regulation.

"Ordered liberty" has not exclusively defined the selective incorporation standard for over four decades. Referring to the standard, Respondents assert that "'[I]f a civilized system could be imagined that would not accord the particular protection,' incorporation is not appropriate." Respondents Br. 9 (quoting *Duncan*, 391 U.S. at 149 n.14). But the quoted passage describes the test *rejected* by this Court. *Duncan*'s test asks whether a right is "necessary to an *Anglo-American* regime of ordered liberty," 391 U.S. at 149 n.14 (emphasis added), or "fundamental to the *American* scheme of justice." *Id.* at 149 (emphasis added).

Respondents misread *Duncan*, averring that the more-restrictive rule applies in considering substantive rights, while the analysis is system-specific only with respect to procedural rights. This is erroneous. The right against double-jeopardy at issue in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) is procedural as well as substantive. In overruling *Palko*, this Court made clear that the *Duncan* test applies to all provisions of the Bill of Rights without reference to a procedural/substantive distinction:

> *Palko* represented an approach to *basic* constitutional rights which this Court's recent

> decisions have rejected . . . Our recent cases have thoroughly rejected the *Palko* notion that *basic* constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the *American* scheme of justice," the same constitutional standards apply against both the State and Federal Governments.

Benton v. *Maryland*, 395 U.S. 784, 794-95 (1969) (citations omitted) (emphasis added).

Nor is it correct that "the great substantive rights of the First, Fourth, and Fifth Amendments," Respondents Br. 10 n.3, were incorporated pursuant to a restrictive *Palko* standard. *See, e.g.*, *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931) ("Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press . . . ").

And although this case concerns incorporation of an enumerated right under *Duncan*, Respondents also notably misstate the due process incorporation test for unenumerated rights. *Palko*'s language might be referenced in *Glucksberg*, but the latter case stands for the proposition that unenumerated rights of substantive due process must be both "carefully refined by concrete examples [and] deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722. *Glucksberg*'s emphasis on the importance of history counsels the Second Amendment's incorporation. *Nordyke*, 563 F.3d at 451.

Respondents' formulation of "ordered liberty" as a but-for requirement for modern civilization would leave few rights incorporated. England may be civilized, but it establishes an official church headed by that nation's monarch, who presides over a legislative body partially composed of birthright nobles. England's lack of protection for free speech has transformed that nation into a center for libel tourism, rendering English judgments of dubious enforceability in American courts. *See, e.g.*, *Governor Patterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights by Foreign Libel Judgments*, http://www.state.ny.us/governor/press/press_0501082.html (May 1, 2008); N.Y. C.P.L.R. § 5304(b)(8).[11]

Japan, too, is civilized. However, last year saw the first use of juries in Japanese criminal trials in over half a century, in a form fundamentally inconsistent with Sixth Amendment standards. Douglas Levin, *Saiban-in-Seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay*

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[11] Modeling constitutional standards on English practice would defeat the purpose of the American Revolution. In any event, English gun prohibition failed to produce much "ordered liberty." James Slack, *Culture of violence: Gun crime goes up by 89% in a decade*, THE DAILY MAIL, Oct. 29, 2009, http://www.dailymail.co.uk/news/article-1223193/Culture-violence-Gun-crime-goes-89-decade.html

Assessor System May Determine Its Fate, 10 ASIAN-PACIFIC L. & POL'Y J. 199, 205 (2008).

It is too easy to identify nations that in some respect fail to maintain an American standard of individual liberty, yet remain more-or-less free. But American constitutional liberty is not defined by the lowest common denominator of freedom prevailing among other nations. The right to arms is consistent with our relatively greater protection of individual liberty.[12]

Unhinging the protection of liberty from historical standards threatens the continued incorporation of all other rights. Indeed, Respondents suggest exactly that, offering that "due process is to be defined by the gradual and empiric process of inclusion and *exclusion*." Respondents Br. 12 (citations and quotation marks omitted) (emphasis added). One wonders what other enumerated rights must be gradually excluded from the Fourteenth Amendment owing to litigants' evolving notions of public necessity. Respondents' selective incorporation standard unsettles all incorporation precedent.

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[12] High gun ownership corresponds to greater political, civil and economic freedom, and lower corruption. David Kopel, et al., *Is There a Relationship Between Guns and Freedom? Comparative Results from 59 Nations*, 13 TEX. REV. L. & POLITICS 1 (2008).

The notion that Second Amendment rights are, among those enumerated in the Bill of Rights, uniquely controversial, Respondents Br. 11, is specious. The notion that such controversy itself justifies a right's violation, *id.*, defeats the entire enterprise of judicially-enforcing constitutional rights against political majorities. A right's controversial status has not led to its demise in this Court. *See, e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

Respondents' re-argument of *Heller* would not satisfy the "ordered liberty" test in any event. Respondents claim that because "the Second Amendment protects weapons regardless of whether they are useful for self-defense," the "scope of the Second Amendment right" does not encompass "an individual right related to self-defense." Respondents Br. 5. This is illogical and contradicts *Heller*.

The militia preamble illuminated a purpose for the right's codification, but did not limit the right. *Heller*, 128 S. Ct. at 2801. Individuals obtain firearms for private purposes, not to prepare for militia duty.

> The traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense. In the colonial and revolutionary war era, small-arms weapons used by militiamen and weapons used in defense of person and home were one and the same.

Heller, 128 S. Ct. at 2815 (citation and quotation marks omitted). *Heller* did not hold that the Second Amendment protects a right to weapons with high "militia" but no self-defense value.

The Second Amendment's framers assumed that the People's ability to act as militia, preserved by the ownership of self-defense weapons, "is necessary to the security of a free state." U.S. Const. amend. II. The constitutional text thus reflects the Framers' conclusive judgment that the right to arms is essential to "ordered liberty," were that the selective incorporation standard.

IV. POLICY DIFFERENCES DO NOT TRUMP CIVIL RIGHTS.

Respondents overstate the relevance of federalism principles in this case. Were federalism the overriding consideration in regulating guns, the federal government would be unable to enact gun laws conflicting with a local community's contrary preferences. Notably, the States' traditional police power to regulate firearms lacks a federal analog.

That firearm regulation is within the police power hardly answers the question. *Loving* v. *Virginia*, 388 U.S. 1, 7 (1967) ("state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power") (citation omitted). States have traditionally regulated speech and administered criminal justice systems, too, but rights limiting those powers are nonetheless incorporated.

That the Bill of Rights naturally burdens government officials is no reason for ignoring it. *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009). One can imagine the benefits to state crime-fighting efforts if only the accused were not entitled to costly lawyers. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Unique local efforts to reduce criminal activity, though arguably effective, must nonetheless satisfy constitutional standards. *Kennedy* v. *Louisiana*, 128 S. Ct. 2641 (2008); *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000); *City of Chicago* v. *Morales*, 527 U.S. 41 (1999).[13]

Indeed, pervasive state intrusion into matters impacting individual liberty, autonomy and dignity is a compelling reason to ensure compliance with basic standards. Concern for peculiar local customs and institutions has long been the rallying cry for opponents of national civil rights.

Once invoked to protect slavery, federalism since 1868 has not excused compliance with national civil rights standards. States are decidedly *not* unfettered laboratories of democracy when it comes to the establishment of religion, *Engel* v. *Vitale*, 370 U.S. 421 (1962); suppression of the press, *Near*; racial segregation, *Brown*; interference with family planning, *Casey*; intrusion into personal relationships, *Lawrence* v. *Texas*, 539 U.S. 558 (2003); imposition of criminal punishment, *Kennedy*; search and seizure, *Edmond*; *Morales*—or disarmament. *Cf. Heller*, 128 S. Ct. at 2818 n.27.

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[13] Disturbingly, Respondents endorse criminalization of constitutionally-protected activity as a useful pretext to arrest suspected criminals. Respondents Br. 16; Mayors Br. generally. The argument endorses nothing less than a total police state. Petitioners—and millions upon millions of American gun owners—are not drug-dealing gangsters. *Heller* makes clear that dangerous people can be deprived of arms. *Heller*, 128 S. Ct. at 2817. Yet even Chicago's drug-dealing gangsters enjoy some constitutional rights. *See Morales*. Enforcing the Constitution qualifies as "law enforcement," too.

The Second Amendment "surely elevates above all other interests"—including federalism—"the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821. That people disagree about gun policy, or that firearms pose unique dangers in the wrong hands, Respondents Br. 11, is irrelevant. The Fourth Amendment is uniquely dangerous in that it shields criminals and their activities from police detection, and debate about the limits of police search and seizure authority is robust. But the Second Amendment, like the Fourth, affords uniquely valuable benefits traditionally held fundamental in American society.

Petitioners do not contend that states must have uniform gun laws, only that such experimentation be consistent with constitutional standards.[14] Science does not always suffer when laboratories are regulated.

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[14] Contrary to Respondents' claims, states courts have successfully applied meaningful standards in reviewing gun laws. David Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1 (2010), available at http://ssrn.com/abstract=1542544

Social science is a poor substitute for constitutional rights. *Buck* v. *Bell*, 274 U.S. 200 (1927). The people's decision to constitutionally-protect the right to arms is not necessarily unsound.[15] In any event, it was the people's decision to make, and that decision must now be enforced.

◆

CONCLUSION

The judgment of the court below should be reversed.

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[15] *See, e.g.*, Florenz Plassman & John Whitley, *Comment: Confirming "More Guns, Less Crime,"* 55 STAN. L. REV. 1313, 1365 (2003) ($2-$3 billion average crime-reduction benefit in first five years of liberalized gun laws).

AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

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OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

AMICUS BRIEF FOR ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF THE PETITIONERS

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5922TX

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INTEREST OF THE *AMICUS*

Amicus curiae Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *United States v. Lopez* and in *District of Columbia v. Heller*.[1]

◆

SUMMARY OF ARGUMENT

Lincoln's hope that his age would see a "new birth of freedom" took tangible form in the Civil War amendments. The nation and the Constitution as we know them today were not created in the events of 1776, nor those of 1787, but forged in the cataclysm of 1861-65.

To interpret these events we must look initially to the intent of Congress in 1866 and to the understanding of the public in 1866-68. It is difficult to overstate the differences between Americans of 1789 and those of the late 1860s, differences that went far deeper than railroads and telegraphs. Americans of 1789 anticipated, and often feared, an untried national government, a new "Crown" that they were imposing on themselves; the victors of 1866 had experienced three generations under a federal system and a strong central government. The former saw regular troops as a menace to the Republic; the latter saw them as its saviors. The former looked to the several States as protection for individual rights against the national government; the latter to the national government for protection of individual rights against some States.

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[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is a not-for-profit corporation, and obtains contributions from individual supporters primarily via internet appeals. If the Court desires, *Amicus* will provide a proprietary list of recent contributors. This brief is filed with the written consent of the parties. *Amicus* complied with the conditions by providing ten days advance notice.

Clayton E. Cramer, author of ARMED AMERICA (2006) and FOR THE DEFENSE OF THEMSELVES AND THE STATE (1994), provided historical assistance in the preparation of this brief.

Nowhere was this change more obvious than in the public understanding of the American right to arms.

> [B]etween 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms are outlawed only the central government would have arms. In Reconstruction a new vision was aborning: when guns are outlawed, only the Klan will have guns.

AKHIL REED AMAR, THE BILL OF RIGHTS 266 (1998) [hereinafter AMAR, BILL OF RIGHTS]. Americans of 1789 saw their right to arms as linked to self-defense, and also to a universal militia system, the only safe defense of a free nation. By 1866 the universal militia as a source of soldiers had gone extinct, with no loss of liberty. Americans of that era saw the right to arms purely as an individual right: the right to shoot a Klansman at the front door, *even if he was a militiaman.*

◆

ARGUMENT

The process whereby individual rights are protected against State action by the Fourteenth Amendment has come to be termed "incorporation." *Amicus* Academics for the Second Amendment will suggest that the term is misleading. "Incorporation" implies that the determination is whether the 1868 Amendment applies the intent or understanding of 1789 to the States. **Instead, the proper approach involves examining the intent of the framers of the Fourteenth Amendment in 1866 and the understanding of the American people in 1866-68;[2] these are the views that undergird the Amendment.**

One major difference between Americans of 1789 and 1866 lies in the latter's expanded understanding of individual rights, an expansion largely driven by conflicts over abolitionism. Freedom of expression is one example. As late as 1804, American *aspirations* in this area involved immunity for publishing "truth, with good motives, for justifiable ends ... ". LEONARD

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[2] For the sake of brevity, we will hereafter substitute "1866" for the phrase "1866-1868."

W. LEVY, ORIGINS OF THE BILL OF RIGHTS 131 (2001). As late as 1833, JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 736-44 (1833), still argued that freedom of the press prevented only prior restraint – not a protection from punishment for "licentiousness." Story quoted Blackstone that "A man may be allowed to keep poisons in his closet; but not publicly to vend them as cordials."

Then came the abolitionist authors and slavery's response – which took the form of laws broadly penalizing (sometimes with death) distribution of abolitionist publications, demands to extradite authors from free States, interception of the mails, mob attack, and homicide. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 182-93, 202, 250, 271 (2000). By 1866, the *existing* popular concept of freedom of expression largely paralleled the modern view as a right to publish political opinions without fear of punishment after the fact.

The right to arms provides an even clearer example of this transition. In 1789, it was a two-pronged right that arose from the fundamental right of self-defense – defense against capital "T" tyrants and against small "t" thugs.[3] The Second Amendment preserved the armed individual – both for his own sake and for the infrastructure of the universal militia from which enrolled units were formed. The universal militia was seen as essential to a republican "free state."[4] By 1866, the emphasis had undergone a dramatic shift. The practice of enrolling the universal militia for mandatory military service had gone into eclipse, with no loss of freedom. Conversely, prewar conflicts over slavery, and postwar terrorist attacks on freedmen and other Unionists, made individual self-defense the predominant underpinning of the American right to arms.

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[3] Eighteenth century colonials drew no distinction between self-defense against either source of threat. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 230 (1983).

I. THE ANTEBELLUM YEARS SAW EXPANSION AND INCREASING INDIVIDUALIZATION OF THE AMERICAN RIGHT TO ARMS.

Over the period 1789-1860, popular understanding of the American right to arms underwent considerable change. The militia linkage declined into near nothingness, even as the individual nature of the right gained prominence in the writings of early commentators and early case law. Then came the abolitionist movement, with slavery's violent response putting the focus upon the individual's right to personal self-defense.

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[4] *Id.* at 214-218. The universal militia still exists in theory and law. *For example see* 18 U.S.C. §311(b)(2) (2009), Vernon's Texas Code Ann., Gov. Code §431.081(a) (2009), and WYO. STAT. §19-8-101(c) (2009).

A. The Virtual Extinction of the Militia Linkage

The right to arms' militia linkage, which existed to a measurable extent in 1789,[5] had by 1860 virtually vanished.

1. The Militia Linkage circa 1789

In 1789, the States all had universal militias, composed of males of military age. The 1789 view had been that this universal, mandatory, militia – "composed of the whole body of the people," in the words of the first House of Representatives[6] – was not merely useful but "*necessary* to the security of a free State."

There simply were no conceivable alternatives. Standing armies were pathways to tyranny. "Recollect the history of most nations of the world," asked George Mason. "What havock, desolation, and destruction, have been perpetrated by standing armies?" George Mason, *An Amendment to the Constitution is Needed to Prevent the Danger of a Standing Army*, in

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[5] We differentiate here between the concept of a right to arms and the specific language of the Second Amendment. There is a case to be made that the Amendment has two clauses because it had two separable purposes, meant to appease two different bodies of critics of the Constitution. *See* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF LAW & POLITICS 1 (1987).

[6] 1 ANNALS OF CONGRESS 766-67 (20 Aug. 1789).

3 THE PAPERS OF GEORGE MASON 1073, 1074 (Robert A. Rutland, ed. 1970).

Select militias, composed only of a part of the people, with special training, were no better. "Congress may give us a select militia, which will in fact be a standing army," argued a delegate to the Pennsylvania ratifying convention. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (Merrill Jensen, ed. 1976). It would be impossible for a republic to survive without mandatory service by the universal militia consisting of all males of military age. Hence the Second Amendment's militia clause, explaining why the right to arms had been selected for explicit constitutional guarantee. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).[7]

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[7] There is one militia connection that can be ruled out. The *Heller* dissent argues that the Second Amendment was meant to redress George Mason's fear that Congress would fail to order the arming of the militia, and the States would be unable to fill the gap. 128 S. Ct. at 2822, 2833 (Stevens, J., dissenting).

Mason's concern, however, had nothing to do with the Second Amendment. On June 8-11, 1788, Mason drafted for Virginia and New York a proposed bill of rights and a separate list of proposed structural amendments to the Constitution. 3 THE PAPERS OF GEORGE MASON 1054, 1068 (Robert A. Rutland, ed., 1970). The former contained the direct ancestor of the Second Amendment; the latter said nothing about militia arms. The concern about militia armament apparently had not yet occurred to Mason.

On June 14, in the Virginia convention, Mason *for the first time* raised militia armament worries, adding "I wish that, in case the general government should neglect to arm and discipline

(Continued on following page)

2. The Militia Linkage circa 1860

In his 1833 commentaries, Justice Story noted "a growing indifference to any system of militia discipline," and expressed a fear "that indifference may lead to disgust, and disgust to contempt ... " 3 JOSEPH STORY, *supra,* at 746-47 (1833). When Story wrote, Delaware and Ohio had already abandoned their mandatory militias, JAMES K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 83 (1983); *New Militia Law*, OHIO REPOSITORY, March 21, 1814, at 3.[8]

After decades of peace, requiring the enrollment of the universal militia to engage in service and training had come to be seen as a waste of time. The

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the militia, there should be an express declaration that state governments might arm and discipline them." *Id.* at 1075.

On June 27, the convention voted out a bill of rights, containing the Second Amendment's *individual* rights ancestor, and separately adding to the structural amendments "11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." 3 ELLIOT'S DEBATES 660. This *state power* proposal was ignored by Madison as he drafted the federal Bill of Rights and expressly rejected by the First Congress. JOURNAL OF THE FIRST SENATE OF THE UNITED STATES 75. The defeated state power proposal, and not the Second Amendment, would have been the answer to Mason's fears.

[8] This was done pursuant to the exemption power given States by the 1792 Militia Act, §2, 1 Stat. 271 (exempting from militia duty "all persons who now are or may hereafter be exempted by the laws of the respective states ... ").

popular press derided it as "a stupendous farce,"[9] "a bore and a nuisance," and as "odious and oppressive."[10] It referred to muster as "but a season of intoxication and quarrelling,"[11] and praised abolition of militia muster as "emancipation from mock military duty."[12]

In the 1840s, mandatory militia service was abolished in Massachusetts, Maine, Ohio, Vermont, Connecticut, New York, and Missouri; New Hampshire followed in the early 1850s. JAMES K. MAHON, *supra*, at 83. "By the middle of the 1840s, the enrolled militia system had all but faded away into obsolescence." MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 90 (2003). The mandatory enrollment of the universal militia was supplanted by organizing smaller and better-trained volunteer militia units. In the North, following the Civil War, even these voluntary militia units temporarily died off. *Id.* at 110.

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[9] *Stupendous Farce*, OSHKOSH DEMOCRAT, Nov. 14, 1851 at 2. This and the following articles were retrieved via www.newspaperarchive.com.

[10] *Report of the Adjutant General of the Militia of Maine*, [Bangor] DAILY WHIG AND COURIER, January 5, 1842 at 2.

[11] *For the Sentinel*, ADAMS SENTINEL AND GENERAL ADVERTISER, April 1, 1833 at 3. The same issue reported that the State House of Representatives had passed a bill abolishing mandatory militia duty.

[12] *New York*, 70 NILES NATIONAL REGISTER, June 6, 1846 at 213. Theory and practice diverged. As recently as 1832, New York's Adjutant-General had argued that what made the militia "dangerous to the existence of an arbitrary government, render[s] it indispensable to the existence of ours." *Adjutant-General's Office to the New York State Senate*, January 5, 1832, 2, in DOCUMENTS OF THE STATE OF NEW-YORK, FIFTY-FIFTH SESSION 1 report 4 (1832).

The world had changed, and Americans' outlook changed with it. What would have been heresy in 1789 was commonplace in 1860. The universal militia was long gone as the preferred source of soldiers, with no ill effect to the Republic. Select militias and even standing armies were perfectly acceptable and a more efficient means of national defense.

The American of 1789 believed that the loss of a universal militia and the mustering of a standing army would inevitably be followed by military dictatorship. The American of 1860 had experience his colonial counterpart lacked, and knew that this was a *non sequitur*. Neither the Regular Army nor the nascent National Guard would be likely to produce a Cromwell. Millions of men had served in uniform, and the only time they marched on Washington was for the Grand Parade. "A well-regulated militia, being necessary to the security of a free state" was by 1860 an obsolete political principle. "Time and again Founding republicans in 1789 spoke of 'the militia'; Reconstruction Republicans in 1866 almost never did." AMAR, BILL OF RIGHTS at 259 (1998).

B. The "Individual Right" Understanding of the Right to Arms Expanded During the Antebellum Period

As the militia linkage faded, so grew the importance of a purely individual right to arms, with no link at all to a militia system. We can most readily trace this in the work of recognized constitutional commentators, and in antebellum case law.

1. Constitutional Commentators

The early great commentaries were described by this Court in *Heller*, 128 S. Ct. at 2805-06, 2811, and we will accordingly not deal with them at length.[13]

Of the great constitutional commentators of the 19th century, only Story, as noted above, emphasized the militia component[14] and even he did not contend that the right to arms extended only to militia service. Writing in 1803, St. George Tucker stressed the individual right to self-defense as the basis of the Second Amendment. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Appendix 310

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[13] *See generally* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359.

[14] It should be noted that, of the commentators, Story is by far the least concerned with individual rights and the most concerned with preserving government power. His discussion of freedom of expression is largely devoted to supporting crackdowns on "licentious" writings, 3 JOSEPH STORY, *supra*, at 740-42, that threaten to "break up, in an instant, all the foundations of society ... ". *Id.* at 743.

(St. George Tucker, ed. 1803).[15] Writing in 1825, William Rawle saw the militia clause and the right to arms clauses as separate guarantees, one being the corollary of the other. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (2d ed. 1829). Late in the century, Thomas Cooley argued, on pragmatic grounds, that the right to arms would be meaningless if confined to militia duty. THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298-99 (3d ed. 1898).

These commentators represent exceptional minds in exceptionally good positions to observe and understand. Tucker was a pre-eminent teacher of law, who attended the Annapolis Convention, and whose brother served in the First Congress; his Blackstone was, for a quarter of a century, the treatise most often cited by this Court. WILLIAM BRYSON, LEGAL EDUCATION IN VIRGINIA 670, 682 (1982). Rawle was a friend of Washington, Franklin, and other members of the

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[15] A *Heller* dissent expressed the concern that Tucker was not consistent and in writings *circa* 1790 had stressed the militia aspect. 128 S. Ct. at 2839 n. 32 (Stevens, J., dissenting). The dissent was misled by an article that set forth Tucker's 1790 discussion of Congressional militia powers (predictably mentioning the Amendment only in that context), and omitted mention of his 1790 discussion of the Second Amendment, which was entirely consistent with his 1803 text. *See* David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NORTHWESTERN U. L. REV. 1527, 1533-34 (2009); David T. Hardy, *Originalism and its Tools: A Few Caveats*, 2 AKRON L. REV. STRICT SCRUTINY 1 (forthcoming, 2009: Available at SSRN: http://ssrn.com/abstract=1508604).

Constitutional Convention; he served in the Pennsylvania legislature when it ratified the Bill of Rights. ELIZABETH KELLY BAUER, COMMENTATORS ON THE CONSTITUTION 1790-1960, at 61 (1965). Justice Dean Thomas Cooley has been called the most influential legal author of his period, and his constitutional treatise has been described as "the most influential lawbook ever published." David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1462.

2. Antebellum State Case Law

State rulings prior to 1860 overwhelmingly treated the Second Amendment, or State right to arms provisions, as individual in nature. Even those decisions that held the right had some association with the militia still recognized it was individual and not conditioned on enrolled militia service. Those cases simply held that protected "arms" were those suited for militia use, thus excluding weapons such as daggers and brass knuckles. *See Nunn v. State*, 1 Ga. 243 (1846) (applying Second Amendment in a state context: "The right of whole people, old and young, men, women and boys, and not militia only ... "); *State v. Reid*, 1 Ala. 612, 619 (1840); *State v. Chandler*, 5 La. App. 489, 52 Am. Dec. 599 (1850) (referring by analogy to the Constitution of the United States); *Aymette v. State*, 21 Tenn. 154, 159-60 (1840) (right to bear arms under a state constitution expressly limiting the right to actions "in the common defense"[16] only covers militia-type arms; *cf. Andrews v. State*, 50 Tenn. 165 (1871); distinguishing *Aymette*; its militia-type arms limit does not apply to keeping arms, since "keep" arms has no military connotation).

3. The Antebellum Ruling of This Court

In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), Chief Justice Taney, writing for the majority, ruled that free blacks could not be citizens of the United States. He noted that the Militia Act of 1792 excluded them from militia duty. *Id.* at 420. Taney concluded that the slave States could not have ratified the Constitution with the understanding that free blacks could become citizens, knowing that they would then have the rights of citizens, including specifically the right to "keep and carry arms wherever they went." *Id.* at 417.

It is hard to reconcile this reasoning with any belief that rights to arms were coterminous with duty in the enrolled militia. To Justice Taney and a majority of the Court, it was obvious – so obvious as to require no citation of authority – that exclusion from militia service left intact the right to arms. That the dissents did not dispute this underscores our point. To whatever extent the 1789 understanding linked militia duty and the right to arms (a linkage which this brief denies ever existed), this linkage had evaporated by 1857. On this everyone, no matter where they stood on the slavery issue, agreed. "Roger Taney and Joel Tiffany hardly saw eye to eye in the 1850s, but they both agreed on this: *if* free blacks were citizens, it would necessarily follow that they had a right of *private* arms bearing." AMAR, BILL OF RIGHTS 263 (1998) (emphasis original).

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[16] The First Senate *rejected* a motion to add a similar "in the common defense" limitation to the Second Amendment. JOURNAL OF THE FIRST SENATE OF THE UNITED STATES 77.

4. The Impact of the Abolitionist Movement and of Slavery's Violent Response

The abolitionist movement was a major component of the individualization of arms rights in this period. *District of Columbia v. Heller*, 128 S. Ct. at 2807. Beginning as a tiny and unappreciated minority, largely viewed as troublemakers even at the outset of the Civil War, the movement by the end of the war had the supermajority required to pass and ratify *three* constitutional amendments.

Early in the antebellum period, abolitionists found themselves facing violent attack and suppression, with no hope of protection by any government. Publisher Elijah P. Lovejoy had multiple presses destroyed by mobs before his 1837 murder. When a British abolitionist, Joseph Thompson, was invited to speak in Boston, placards circulated announcing a $100 reward for whomever "shall first lay violent hands on Thompson, so that he may be brought to the tar-kettle before dark." 2 WENDELL PHILLIPS GARRISON & FRANCIS JACKSON GARRISON, WILLIAM LLOYD GARRISON 1805-1879, at 9 (1885). Thompson did not show up, and his replacement, William Lloyd Garrison, had to be jailed to protect his life from the mob. *Id.* at 24-26.

Assailed by mobs, unprotected by the law, abolitionists found they had to defend themselves. Attacked by a hired gunman, Cassius Marcellus Clay laid into him with a Bowie knife; when a mob surrounded him, he used the blade to keep them at bay. H. EDWARD RICHARDSON, CASSIUS MARCELLUS CLAY: FIREBRAND OF FREEDOM 34-35 (1976). Abolitionists, such as Clay, echoed the near religious attitude toward arms held by the Framers of the Constitution[17] making statements such as this: " ... 'the pistol and Bowie knife' are to us as sacred as the gown and the pulpit."[18] The individual right to arms received frequent coverage in William Lloyd Garrison's journal THE LIBERATOR. Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right Is Not Allowed by Governments that are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 GEORGE MASON L. REV. ___ (forthcoming 2010; http://ssrn.

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[17] Don B. Kates, Jr., *supra* n. 3 at 228-30.

[18] Cassius Marcellus Clay, *THE WRITINGS OF CASSIUS MARCELLUS CLAY: INCLUDING SPEECHES AND ADDRESSES* 257 (1848).

com/abstract=1491365) [Hereinafter Cramer, Johnson & Mocsary].

Abolitionist authors such as Lysander Spooner and Joel Tiffany wrote in support of an individual right to arms for self-defense. Spooner viewed the Second Amendment as a right belonging to individuals:

> This right "to keep and bear arms," implies the right to use them – as much as a provision securing to the people the right to buy and keep food, would imply their right also to eat it. But this implied right to use arms, is only a right to use them in a manner consistent with natural rights – as, for example, in defence of life, liberty, chastity, &c.[19]

Joel Tiffany agreed and spoke of the right to arms in the abolitionist rhetoric of "privileges or immunities":

> Here is another of the immunities of a citizen of the United States, which is guaranteed by the supreme, organic law of the land ... there is another thing implied in this guaranty; and that is *the right of self defence*. For the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the

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[19] LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 66 (Burt Franklin 1965) (1865).

> guaranty would have hardly been worth the paper it consumed.[20]

Then, in 1855 came Bloody Kansas, as both sides rushed to populate the Territory and win the plebiscite to determine whether the land would be free or slave. Pro-slavery bands used force to drive anti-slavery forces from the Territory, and to disarm Free-Soilers. Abolitionists responded by shipping in Sharps rifles, nicknamed "Beecher Bibles" because their crates were labeled as Bibles. *Id.;* David B. Kopel, *supra,* at 1441.

Attempts to disarm Free-Soilers drew national attention as violations of the American right to arms. Abolitionist leader Senator Charles Sumner argued, in one of his most publicized addresses:

> The rifle has ever been the companion of the pioneer.... Never was this efficient weapon more needed in just self-defense than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached.[21]

Sumner was no outlier. The 1856 Republican Platform complained that "[T]he dearest Constitutional rights of the people of Kansas have been fraudulently and violently taken away from them," and that "tyrannical and unconstitutional laws have been enforced; the right of the people to keep and bear arms has been infringed ... ". DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840-1972 at 27 (1973).

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[20] JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117-18 (1849).

[21] CHARLES SUMNER, THE CRIME AGAINST KANSAS: THE APOLOGIES FOR THE CRIME: THE TRUE REMEDY 64-65 (1856).

Nor was this an exclusively Republican understanding. Eight years later, tables had been reversed; Union armies were occupying Confederate territory, and sometimes disarming the residents. Cramer, Johnson & Mocsary, *supra*, at 18-21. The Democrats' 1864 platform thus complained of "the interference with and denial of the right of the people to bear arms in their defense ... ". DONALD BRUCE JOHNSON & KIRK H. PORTER, *supra*, at 34.

In sum: by the 1860s mandatory service by the universal militia was long gone and *everyone*, Republican and Democrat, accepted that the American right to arms related to *private possession for private purposes*, especially self-defense. This common belief was particularly strong in the abolitionist movement whose members would play a prominent role in the passage and ratification of the Fourteenth Amendment.

This common belief is the key to understanding the response of the 39th Congress to the former Confederate States' attempts to disarm and terrorize the freedmen and Unionists during the months that followed Appomattox.

II. DISARMAMENT MEASURES TAKEN BY FORMER CONFEDERATE STATES IMMEDIATELY FOLLOWING THE WAR THREW THE INDIVIDUAL RIGHT TO ARMS INTO SHARP FOCUS

A. The Importance of Avoiding Anachronism

It is natural to associate the end of the Confederacy with the beginning of Reconstruction, but in fact most of the background to the Fourteenth Amendment occurs *during* an interregnum that spanned 1865 and 1866. During this period the former Confederate States had reconstituted their governments under exclusively white rule. President Andrew Johnson, a pro-Union Democrat, was prepared to throw the freedmen under the bus, or perhaps under the wagon, as a price of reunion and reconciliation.

The 38th Congress was stalemated by Johnson and the threat of veto. The 1864 elections gave Republicans, for the first time, 3-1 majorities in both the House and Senate. When the 39th Congress convened in December 1865, some eight months after the surrender of Lee's army, Republicans and their allies at last had a veto-proof majority. Richard L. Aynes, *The 39th Congress (1865-67) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021, 1024 (2009). At that, the 39th Congress faced a considerable agenda: the first Reconstruction Act was not passed until March 1867, long after the 39th Congress had acted on the Fourteenth Amendment. *See*

14 Stat. 428. The electoral franchise was not secured for blacks until the Fifteenth Amendment was ratified in 1870.

It must thus be borne in mind that the events underlying the Fourteenth Amendment occurred, not in the context of reconstruction governance, but in that of reconstituted, white supremacist, governments bound upon subjugating black freedmen, suppressing white Unionists, and restoring, as far as possible, the antebellum status quo.

B. The Fourteenth Amendment Was Understood as an Answer to State Attempts to Disarm the Freedmen and Their Supporters

1. Original Popular Understanding of the Need for a Constitutional Amendment

Petitioner has ably outlined the events of 1866-1868, as over 100,000 freedmen, now Union veterans, returned to the former Confederacy. These men knew, in the words of Frederick Douglass, that "the liberties of the American people were dependent upon the Ballot-box, the Jury-box, and the Cartridge-box, that without these no class of people could live and flourish in this country ... " FREDERICK DOUGLASS, THE ESSENTIAL FREDERICK DOUGLASS 491 (2008).

Those recalcitrant States, however, did not intend for the freedmen to "live and flourish," and set out to subjugate them as far as was possible. Many former Confederate States enacted statutes, the "Black Codes," forbidding blacks to own arms. The States' postwar white militias enforced these arms restrictions. *See* Stephen P. Halbrook, *Personal Security, Personal Liberty, and The Constitutional Right to Bear Arms*, 5 CONST. L. J. 310, 348-49 (1995); Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 GEORGETOWN L. J. 361, 344-45 (1991). Alabama forbade all gun ownership by blacks; Louisiana forbade blacks to carry guns unless authorized by their employer and a "chief of patrol"; Mississippi required a permit from the board of police. *Id.* at 344-45, nn. 176-78.

Disarmaments were often accompanied by political intimidation and murder: one report from Mississippi stated that the "rebels are going about in many places through the State and robbing the colored people of arms, money, and all they have and in many places killing." Halbrook, *Personal Security*, at 350. Conventions of freedmen petitioned Congress to protect their arms rights; Federal legislators protested that these post-war measures violated the right to arms. AMAR, BILL OF RIGHTS 264-65 (1998). Federal government officials expressed a widespread awareness of violations:

> [I]n some parts of this State armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in plain and

> direct violation of their *personal rights* as guaranteed by the Constitution of the United States, which declares that "the right of the people to keep and bear arms shall not be infringed" (emphasis added).[22]

These events were well known to the 39th Congress, and reinforced the prewar abolitionist position that the right to arms was an individual right, linked to self-defense. *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1866-1876 (1998). They were well known to the public. The Black Codes were discussed in major and minor newspapers of the day. David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 703-07 (2009).

Congressional outrage was so strong that it twice passed a Freedmen's Bureau Act (the first was vetoed and the second passed over another veto) that expressly protected the individual right to arms as follows:

> That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, ... the right to make and enforce contracts ... and

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[22] Statement of General Rufus Saxton, former assistant commissioner of the Freedmen's Bureau in South Carolina. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. No. 39-30, pt. 2, at 229 (1866).

> to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal security*, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed *by all the citizens* of such State or district without respect to race or color, or previous condition of slavery.

Freedmen's Bureau Act, 14 Stat. 173, 176-77 (1866) (emphasis added).

2. Original Popular Understanding of the Purpose of the Proposed Amendment

Members of the 39th Congress were outraged at the actions of the former Confederate States.[23] Rep. Sidney Clarke read into the record Alabama's ban on firearms ownership by blacks and then excoriated Mississippi, "whose rebel militia, upon seizure of the arms of black Union soldiers, appropriated the same to their own use." He added:

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[23] We include in this discussion Congressional remarks relating to the Fourteenth Amendment, the Civil Rights Act, the Freedmen's Bureau Act, and the question of re-admission of States to the Union. The 39th Congress globally treated all these issues, often in overlapping timeframes and with overlapping rationales. A State's misconduct might be motive for legislation, for an amendment to support that legislation, and for exclusion of the State from the Union.

> Sir, I find in the Constitution of the United States an article which declares that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws, before I will even consider their claims to representation in Congress.

CONG. GLOBE, 39th Cong., 1st Sess. at 1838 (April 7, 1866). Rep. Josiah Grinnell likewise complained,

> A white man may come into Kentucky when he pleases; the black man who comes there is a felon, though a discharged soldier and wounded in our battles. A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it, if presuming to keep a musket which he has carried through the war.

Id. at 651 (Feb. 5, 1866). Capping these are, of course, John Bingham's speech introducing the Fourteenth Amendment in the House – in the course of which he referred to the Bill of Rights a dozen times, AMAR, BILL OF RIGHTS 182 (1998), and Jacob Howard's speech introducing it in the Senate, which referred both to unenumerated rights and to those guaranteed by the first eight amendments. CONG. GLOBE, 39th Cong., 2nd Sess. 2764-66 (May 23, 1866).

Congressional opponents of the Fourteenth Amendment were under no misapprehension as to its effect. They knew it would make the first eight amendments enforceable against the states just as

Senator Howard and Representative Bingham had stated. That was precisely why they opposed the bill. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 113-15 (1984).

Here also we find that the ratifying public had extensive notice of the intent. Transcripts of Howard's speech made the front page of the NEW YORK TIMES and the NEW YORK HERALD (then with greater circulation, and claiming to be the largest newspaper in the world), and internal pages of the PHILADELPHIA INQUIRER, D.C.'S NATIONAL INTELLIGENCER, and smaller newspapers. Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L. J. 1509, 1557-65 (2007); David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 711-17 (2009). Congress also promoted its purposes by direct contact. When the Joint Committee on Reconstruction issued its lengthy report on, *inter alia*, the oppressions of the Black Codes, Congress ordered 150,000 reprints for distribution. Richard L. Aynes, *The 39th Congress (1865-67) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021, 1042 (2009). John Bingham ordered reprints of his floor speech on the Fourteenth Amendment, copies of which are to be found in the Library of Congress.[24] The reprint subtitles his speech, in bold font, "IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS."

In short, members of the 39th Congress intended the Fourteenth Amendment to render the Bill of Rights applicable to the States, and the Second Amendment was prominent among the rights that they meant to enforce. This purpose was widely communicated, directly and via the major media of the day. If a critic wishes to contend that the American people had a reading of the Amendment contrary to the widely publicized views of its creators, we would suggest that the critic bears the burden of so establishing this fact.

3. Textualism and the Privileges of U.S. Citizenship

Most examiners of the Fourteenth Amendment have drawn parallels between the privileges or immunities clause and Article IV, §2's guarantee that the citizens of each State "shall be entitled to the privileges and immunities of citizens in the several States," as glossed by Justice Bushrod Washington in *Corfield v. Coryell*, 6 Fed. Cas. 546, no. 3,230 (C.C.E.D.Pa. 1823). Washington saw these as "those privileges and immunities which are, in their nature, fundamental," including "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety ... to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal ... " *Id.* at 551-52.

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[24] AC901.M5 vol. 475, no. 11 Misc. Pam. Online image may be found at: http://ia311026.us.archive.org/0/items/onecountryonecon00bing/onecountryonecon00bing.pdf.

It may be significant that Bingham's first version of the Fourteenth Amendment indeed sought to protect "all privileges and immunities of citizens *in the several States*," CONG. GLOBE, 39th Cong., 2nd Sess. at 1088 (Feb. 28, 1866), whereas its ultimate version used the term "privileges or immunities of citizens *of the United States*."

Professor Kurt Lash has suggested that the change from "citizens in the several States" to "citizens of the United States" is significant. By the nineteenth century, "rights, advantages or immunities of citizens of the United States," or "immunities and privileges of citizens of the United States," had become a *term of art* for those rights guaranteed by the United States Constitution. Kurt D. Lash, *Origins of the Privileges or Immunities Clause, Part I: "Privileges or Immunities" as an Antebellum Term of Art*, GEORGETOWN L. J. (forthcoming 2010; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457360), at 39-50. Those terms were commonly used when the United States acquired territory and agreed that its residents, should they choose to remain, would have all the rights of citizens. This phrasing was used in the Louisiana Cession Act of 1803, 8 Stat. 200, 202, the 1819 treaty with Spain by which we acquired Florida, 8 Stat. 252, 258, the 1867 treaty regarding acquisition of Alaska, 15 Stat. 539, 542, and other treaties. *See* AMAR, BILL OF RIGHTS 167-68 (1998) (similar provisions in treaties with the Stockbridge Tribe, with the Wyantotts, with the Ottawas and with the Sioux). So also President Andrew Johnson's proclamation of amnesty for former Confederates, which gave them "restoration of all rights, privileges and immunities under the Constitution and the laws...." 15 Stat. 711, 712.

This was the explanation advanced by John Bingham himself, in 1871:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.
>
> ....
>
> Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague [Mr. Shellabarger] has referred is only a construction of the second section, fourth article of the original Constitution, to wit, 'The citizens of each State shall be entitled to all the privileges and

> immunities of citizens in the several States.' In that case the court only held that in civil rights the State could not refuse to extend to citizens the same general rights secured to its own.... Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article....?

CONG. GLOBE, 42nd Cong., 2nd Sess., Appendix at 82 (Mar. 31, 1871).

C. Congressional References To The Violations Of The Right To Arms Relate To Disarmament Of Individuals, Not To Threats To Militiamen

A dissent in *District of Columbia v. Heller* suggests that Congressional references to blacks being denied the right to arms might not relate to disarmament of individual freedmen and Unionists, but to attacks upon members of the southern pro-Union "negro militia," 128 S. Ct. at 2841-42 (Stevens, J., dissenting).

This theory is factually unsupportable. When Congress debated the Fourteenth Amendment and related measures in 1866, these pro-Union militia units did not yet exist. As noted above, in early 1866 Congress was dealing, not with reconstruction governments, but with reconstituted Confederate State units. After Appomattox, these southern governments formed "provisional militias." These were composed solely of whites, mostly Confederate veterans, many of whom still wore their gray uniforms. OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 5 (1957). Their major activity was to disarm blacks and Unionists:

> Disarming the freedmen was apparently considered a primary duty and once that was fulfilled with relish, according to his excerpt from a letter: "The militia of this county have seized every gun and pistol found in the hands of the (so-called) freedmen of this section of the county."

Id. The early postwar southern governments were shaken by panics in 1865 and 1866, based on rumors that the freed slaves were going to mount belated slave revolts, seeking vengeance rather than freedom. ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION xxii (1971). Several States called out their militia "to patrol the roads and search negro cabins for arms. This it did, in some cases with great brutality." *Id.* Throughout this period, the "legally constituted militia of the Johnson governments commonly went about disarming Negroes and frequently committing violence in the process." *Id.* at xliii.

These were the southern militias known to the 39th Congress, one of whose members complained that rather than restore order the militia preferred to "hang some freedman' or search negro houses for arms." CONG. GLOBE, 39th Cong., 1st Sess., pt. 1, at 941 (Feb. 20, 1866).

This explains why, in March 1867, the 39th Congress voted to disband the militias of most Southern States and forbid their re-organization. Act of March 2, 1867, §6, 14 Stat. 487.[25] The act was not repealed until after the Fourteenth Amendment had been ratified.[26]

The legislative history of the measure is enlightening. Senator Wilson had moved for such a measure in March 1866. CONG. GLOBE, 39th Cong., 1st Sess. at 1100 (March 1, 1866). Nearly a year later, he managed to attach such a proposal to a vital appropriations bill: the provision would have caused militias in the listed States "to be forthwith disarmed and disbanded ... " CONG. GLOBE, 39th Cong., 2nd Sess. at 1848 (Feb. 26, 1867).

Senator Willey expressed a worry at the disarmament provision: "It strikes me also that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace." *Id.* Senator Wilson reiterated "These organizations, I say again, are completely rebel, not only in the men who compose them, but in the spirit which animates them, and I think they should not be permitted." To avoid the constitutional problem he was "willing, however, to modify the amendment by striking out the word 'disarmed.' Then it will provide simply for disbanding these organizations." *Id.* at 1849. Senator Willey found the amended form, which dissolved militia units but carefully preserved the individual right to arms for these former enemies, "much more acceptable to me than it was previously." *Id.*[27]

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[25] Tennessee was not named; it had already been re-admitted to the Union. Nor was Arkansas, presumably because it was not yet a problem.

[26] Act of January 14, 1869, 15 Stat. 266 (repeal as to five States); Act of July 15, 1870, §2, 16 Stat. 364 (repeal as to remaining four States).

The 39th Congress was, in short, not concerned about protecting State militias from Federal interference. The southern militias it knew were not composed of freedmen and Unionists, but of former Confederates and racists, and it disbanded rather than protected them. The battle over the "negro militias" occurred in the Reconstruction period, well after the Congressional references to deprivations of the right to arms.[28] The Congressional references to

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[27] President Johnson did not veto the bill, but did send Congress a protest that the bill deprived the States of their right to "protect themselves in any emergency by means of their own militia." 6 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908 at 472 (James Daniel Richardson, ed. 1909).

[28] The incident cited in the *Heller* dissent – the murder of militia officer Jim Williams – occurred in 1871. The conflict over the "negro militia" in Mississippi came in 1875. Frank Johnson, *Suffrage and Reconstruction in Mississippi*, 6 PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 198, 201-02 (1902); NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 125, 130-31 (2006). South Carolina's Hamburg Massacre, of a black militia unit, also came in 1875. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879, at 307 (1979). In late 1868 Klansmen intercepted arms for the Florida militia, and an impromptu Arkansas unit was disarmed. ALLEN W. TRELEASE,

(Continued on following page)

arms seizures relate to what was occurring in 1865-1866: white militias seizing arms from individual blacks and white Union veterans.

III. THE AMERICAN RIGHT TO ARMS HAS CONTINUED TO EVOLVE IN WAYS THAT MAKE IT EVER MORE INDIVIDUALISTIC AND PERSONAL

Like most other Bill of Rights freedoms, the right to arms has flourished in American minds over the past century. The great majority of Americans believe that their right to arms is an individual one;[29] it is hardly surprising that this belief is reflected in their making of laws and crafting of constitutions.

A. Americans Have Continued to Adopt, at the State Level, Increasingly Clear Guarantees of an Individual Right to Arms

Over the last century, the people of the United States have increasingly adopted individual rights guarantees, or made existing guarantees more clearly

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supra, at 119-20, 150-51. But legislators speaking in Spring 1866 can hardly be referring to events that occurred in 1868-1875.

[29] Harris Interactive, *Second Amendment Supreme Court Ruling Matches With Public Opinion From The Harris Poll*, http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 (70% of Americans believe the Second Amendment protects an individual right, or both an individual and a State right).

individualistic. In no State did the people vote to weaken their guarantee, or make it less individual and more militia-related.

The most concise formats guaranteed a citizen the right to arms "in defense of himself or the State" (Arizona's original 1912 constitution), or referred to the right "of the individual citizen" (Illinois' new 1970 provision) or "of each citizen" (Louisiana's 1974 amendment).[30] These measures expressed an individual right with minimum use of words.

From there, the formulations grew more detailed and even more specifically individual. Oklahoma (1907) and Missouri (1945) guaranteed a person's right to arms "in defense of his home, person, or property," while New Hampshire (1982) chose the plural form: "themselves, their families, their property, and the State...."

The 1978 Idaho provision is the longest, reflecting a decision to strengthen the right to arms by expressly allowing some restrictions while expressly foreclosing others:

> The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage

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[30] All State provisions are taken from Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POLICY 191 (2006).

> of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.[31]

The most popular 20th century model of the right to arms was even broader, coupling individual defense with recreational purposes. West Virginia (1986) added, to the listing of defensive uses, "and for lawful hunting and recreational use." North Dakota (1984) and Delaware (1987) added "and for lawful hunting, recreation, and other lawful purposes"; New Mexico (1971), Nevada (1982), Nebraska (1988) and Wisconsin (1998) used slight variations of this, while Utah (1984) simply appended "as well as for other lawful purposes." Passage was secured with large majorities. In 1998, for example, 74% of Wisconsin voters supported the right to arms amendment.[32]

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[31] Eugene Volokh, *supra*, at 196. The 1978 provision replaced an 1889 version that broadly provided "the Legislature shall regulate the exercise of this right by law." *Id.*

[32] Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK L. REV. 715, 727 (2005).

On the occasions when a militia-related model of the right appeared, the people often moved to reject it. Alaska began its statehood in 1959 with provisions tracking the Federal Second Amendment. In 1994, Alaska voters added "the individual right to keep and bear arms." Starting in 1879, Louisiana's provision tracked the Second Amendment, but in 1974 its voters replaced "the right of the people" in that guarantee with "the right of each citizen." Maine's provision originally contained "for the common defense"; its highest court read this as creating a militia-limited right. *State v. Friel*, 508 A.2d 123, 125 (Me. 1986). In the following year, its voters responded by deleting "for the common defense" from the guarantee.

B. Congress Has Repeatedly Recognized an Individual Right to Arms

Congressional action followed a similar pattern. In the 1866 Freedmen's Bureau Act, the 39th Congress recognized and protected against racial discrimination "the constitutional right to arms." 14 Stat. 176-77. It was the only Bill of Rights liberty singled out for specific mention in the statute.

In 1982 the Senate Judiciary Committee issued a lengthy report on the right to arms, concluding that it was an individual one. SUBCOMM. ON THE CONSTITUTION, SENATE JUDICIARY COMM., THE RIGHT TO KEEP AND BEAR ARMS (97th Cong., 2nd Sess. Feb. 1982). This may in turn explain why, when Congress reformed the Federal gun laws four years later, it cited the "rights of citizens" to keep and bear arms. Firearm Owners' Protection Act §1(b), 100 Stat. 449.

Most recently, in 2005 Congress made a detailed finding that:

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

Among the purposes of the 2005 legislation, Congress listed

> (3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

Protection of Lawful Commerce in Arms Act, 119 Stat. 2095-96. *See generally* Stephen P. Halbrook, *Congress interprets the Second Amendment: Declarations by a Co-equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

The individual right to arms is, in short, very much a living right. The people of the United States believed that they had such a right in 1789; they believed this even more clearly in 1866; in 2009 they *overwhelmingly* believe that they hold it. Over the last century, they have consistently voted to adopt individual-oriented State guarantees, or to make existing guarantees more clearly individual. Their representatives in Congress, have repeatedly evidenced an identical understanding of the right.

◆

CONCLUSION

In 1789 the American right to arms was individual, but it can be argued that much of the motivation for its adoption related to preserving the infrastructure for a mandatory, enrolled militia that could protect the States against the Federal government, and substitute for a dangerous standing army.

By 1866, all this had changed. The universal militia as the primary source of enrollees for mandatory military service had long been discarded, with no harm to our liberties. The regular army had saved, rather than overthrown, the Republic. In the North, even voluntary militias had vanished; in the South, the organized militias were oppressors rather than protectors. In 1789, "a well-regulated militia [is] necessary to a free state" was a truism; in 1866 it was a phrase of minor historic importance.

Between those dates, the individual aspect of the right to arms simply overwhelmed any other understanding of the right, prevailing among commentators, both political parties, this Court, the lower courts, and the Congress. The persecution of abolitionists and the refusal of the authorities to protect them made the individual right to arms for self-defense a tenet of that movement as it expanded from a small minority to a great majority of Americans. The actions of the postwar southern militias in disarming freedmen and Unionists brought this individualist understanding into sharp focus, and Congress showed its understanding of the right to arms by disbanding those militias but not disarming individual members in order to protect the right to arms.

The 1866 Framers of the Fourteenth Amendment, and the Americans who ratified their recommendation, implemented the right to arms as it was understood *in their day*, which involved a *purely* personal right – the right to shoot a violent, unlawful intruder as he came through the door – a right to do so even if the intruder in question served the State. The Fourteenth Amendment was intended to, and does, enforce *that* Second Amendment right against the states and also against the Federal government.[33]

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[33] By definition, the United States must respect privileges or immunities of federal citizenship.

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CITIES, COOK COUNTY, ILLINOIS AND POLICE CHIEFS IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae comprise ten major American cities (Baltimore, Maryland; Columbus and Cleveland, Ohio; Oakland, Richmond, Sacramento and San Francisco, California; Portland, Oregon; Philadelphia, Pennsylvania; and Seattle, Washington); Cook County, Illinois; the Commissioner of the Philadelphia Police Department, and the Chief of Police for the City of Seattle.[1] Each *amicus* is actively engaged in efforts to reduce the costs, both social and economic, inflicted by gun-related violence upon local, and especially urban, communities, to the full extent authorized by their State Constitution and/or statute(s):

(1) *Amici* Oakland, Richmond, Sacramento, and San Francisco, California have plenary authority to pass local regulations in furtherance of their police powers, as long as they do not conflict with the Constitution and laws of the State or the United States. CAL. CONST. art. XI, § 7; CAL. GOV'T CODE § 37100 (2009). Such ordinances include the regulation of firearms except in the

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[1] In compliance with Rule 37.6 of this Court, *amici curiae* represent that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 7 days prior to the due date of *amici curiae's* intention to file this brief.

limited fields excluded by statute. CAL. GOV'T CODE §§ 53071, 53071.5 (2009); CAL. PENAL CODE § 12026 (2009).

(2) *Amicus* Baltimore, Maryland has plenary authority to enact local laws in furtherance of its police powers, subject to the Constitution and public general laws of the State. MD. CONST., art. XI-A, § 3; BALT. CITY CHARTER (1996 ed.), art. II, §§ 27, 47. Local governments in Maryland may regulate firearm purchase, ownership, possession, transportation and discharge as provided by statute. MD. CODE ANN., Criminal Law, § 4-209(a), (b) (2009); MD. CODE ANN., Criminal Law, § 4-209(d) (2009).

(3) *Amicus* Columbus and Cleveland, Ohio have plenary authority to adopt and enforce within their limits regulations in furtherance of their police powers, as long as they do not conflict with the general laws of the State. OHIO CONST. art. XVIII, § 3 (2009).

(4) *Amicus* Portland, Oregon has plenary authority to pass local laws in furtherance of its police powers, subject to the Constitution and the criminal laws of the State. OR. CONST. art. XI, § 2 (2007); *City of Portland v. Dollarhide*, 714 P.2d 220, 224-25 (Or. 1986). The State maintains exclusive authority over certain areas of firearms regulations,

however. OR. REV. STAT. §§ 166.170 to 166.176 (2007).

(5) *Amicus* Philadelphia, Pennsylvania, as a First Class City governed by a Home Rule Charter, has plenary authority to enact ordinances, rules and regulations in furtherance of its police powers, as long as they do not conflict with State law. PA. CONST. art. 9, § 2; 53 PA. CONS. STAT. Ann. § 13133 (2009). Thus, the City has been granted power coextensive with the General Assembly with respect to its municipal functions, limited only by the Charter, the Constitution or the acts of the General Assembly itself. *See County of Delaware v. Township of Middletown*, 511 A.2d 811, 813 (Pa. 1986). The Commissioner of the Police Department, Charles H. Ramsey, is an official of the City.

(6) *Amicus* Seattle, Washington has plenary authority to adopt and enforce within its limits regulations in furtherance of its police powers, as long as they do not conflict with the general laws of the State. WASH. CONST. art. XI, § 11 (2009). Regulations relating to firearms, however, have to be authorized by statute. WASH. REV. CODE ANN. §§ 9.41.290 & 9.41.300 (2009). The Chief of Police, Interim Chief John Diaz, is an official of the City's Police Department.

(7) *Amicus* Cook County, Illinois, as a Home Rule county, has plenary authority to pass local laws in furtherance of its police powers, subject to the Constitution and as long as the State legislature has not specifically declared its exercise of authority over the subject area to be exclusive. ILL. CONST. art. VII, § 6(a), (i) (2009).

Based on their plenary authority to pass laws in furtherance of their police powers, *amici* cities and Cook County stand in the shoes of their respective States, and must therefore comply with the Fourteenth Amendment and any of the Bill of Rights that it incorporates. *Avery v. Midland County,* 390 U.S. 474, 480 (1968). Accordingly, except as otherwise stated in this brief, all references to the "State" or "States" include *amici* as local governments within their respective States.

Like Respondent Chicago, *amici* have suffered extensive loss of life, threats to the safety and security of law enforcement personnel, disruption to their economies, and massive health care costs associated with gun-related violence. They have developed regulatory programs to address the particular risks and threats posed by gun-related violence in their own communities. *Amici* thus have a critical interest in ensuring that they and their States retain maximum flexibility to counter the risks of guns and to protect public safety through reasonable firearms regulations. Incorporation of the right to bear arms under the Second Amendment will handcuff the ability of *amici* and other local governments to respond to gun-related violence in their communities and impede their efforts to tailor laws to address their individual situations.

SUMMARY OF THE ARGUMENT

The Second Amendment recognizes an individual right to bear arms that preexisted the Constitution and the founding of the Republic. It has codified that right for the limited purpose of ensuring that the Federal Government does not interfere with the ability of the States to raise citizen militias. In other words, the Amendment's purpose makes clear that it is essentially a "federalism provision" designed to protect the States and their citizens from excessive federal power. In view of the Second Amendment's stated purpose, it makes no sense to incorporate the right to bear arms against the States.

The States, as independent sovereigns and through the exercise of their plenary police powers, have long regulated the right of their own citizens to bear arms. The right had existed in the common law, long before the Framers chose to codify it in the Second Amendment. Incorporation would disrupt the delicate federal-state balance struck by the Constitution by forcing the States to regulate in accordance with a uniform federal constitutional standard. It would hamper the States' exercise of their own judgment to tailor laws and regulations to the conditions and problems involving gun-related violence that they see as prevailing in their local communities. It would also handcuff the States in their experimentation in local communities with solutions for gun-related violence.

An inherent tension exists between an individual's exercise of his or her Second Amendment right to bear arms in self-defense and the States' police powers to ensure the health, safety and welfare of all of their citizens. As this Court has noted, the Second Amendment right is not unlimited and is subject to presumptively valid regulatory measures. But the States should retain the prerogative to define the limits of this right consistent with the exercise of their police powers and outside the shadow of any federal constitutional standard.

Incorporation would result in an unwarranted intrusion by the Federal Government into a field that falls exclusively within the States' police powers. The States have a paramount interest in protecting their citizens and property from loss of life, injury and damage occasioned by violence and breach of peace. Even if each individual enjoys the right to bear at least some sort of arms for self-defense, the exercise of that right carries with it the risk of violence and breach of peace, which the States naturally would want to minimize for the good of the community as a whole.

At bottom, the Second Amendment right cannot be considered implicit in the concept of ordered liberty, so as to justify its incorporation under the Due Process Clause of the Fourteenth Amendment. Instead of promoting social order, justice and peace, it functions in situations where the rule of law has broken down, and the States may have to call their citizens to militia duty under their emergency powers. While the notion of citizens using force of arms to protect themselves from harm is not unreasonable or unjustified in a vacuum, it must be tempered in a community setting in which each citizen must conduct himself so as not to cause unnecessary injury or death to fellow citizens.

ARGUMENT

I. INCORPORATION OF THE SECOND AMENDMENT RIGHT AGAINST THE STATES WOULD DISRUPT THE DELICATE FEDERAL-STATE BALANCE

In *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008), this Court construed the right protected by the Second Amendment as an individual right to keep and bear arms. *Id.* at 2799. This right, however, "'is not a right granted by the Constitution [and] [n]either is it in any manner dependent upon that instrument for its existence.'" *Id.* at 2797 (quoting *United States v. Cruikshank,* 92 U.S. 542, 553 (1876)). Rather, it is a right born of English common law, *id.* at 2805, and the Second Amendment merely protects it from infringement by Congress, *id.* at 2797-98.

In *Cruikshank,* this Court further observed that a State, through the exercise of its police powers, may have already provided to its citizens protection of this right that was subsequently recognized and guaranteed by the Second Amendment. 92 U.S. at 553 (quoting *New York v. Miln,* 36 U.S. (11 Pet.) 102, 139 (1837)). Accordingly, in cases of alleged infringement of the right by a fellow citizen, an aggrieved complainant should look not to the Second Amendment but to the State for relief. *Id. Accord Presser v. Illinois,* 116 U.S. 252, 267-68 (1886).

The preceding observations made in *Heller* and *Cruikshank* about the nature of the right recognized by the Second Amendment lead to the conclusion that incorporation of this right against the States would be inconsistent with constitutionally cherished principles of federalism. When the Second Amendment came into being, the States had already recognized the right in the common law and provided for its protection and regulation. *See, e.g.,* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America,* 25 LAW & HIST. REV. 139, 162-164 (2007) (summarizing various State and local laws in force during the Revolutionary period that limited the times and places where guns could be used); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control,* 73 FORDHAM L. REV. 487, 505-12 (2004) (discussing several categories of State laws regulating firearms in the 18th century). All that the Second Amendment did was to prevent the Federal Government from infringing the right and thereby interfering with the ability of the States to muster citizen militias. Incorporation therefore would be inconsistent with the Second Amendment's original intent and would infringe upon the States' sovereignty to regulate the right to bear arms in accordance with and in response to the circumstances and needs of their local communities, and to experiment with legislative and regulatory solutions to problems of gun-related violence.

A. The Second Amendment Plays a Structural Role in Preventing Federal Elimination of State Militias.

This Court has held that the First Amendment does more than just safeguard a right for its own sake; it plays a structural role "in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (observing that the First Amendment's structural role "entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication"). Similarly, in *Heller*, this Court reaffirmed that the Second Amendment has its own structural role in preserving what the Founders viewed to be a cornerstone of a free country—namely, the States' ability to raise citizen militias, given that standing armies were disfavored. 128 S. Ct. at 2800-01. Unlike the First Amendment, however, the Second Amendment does not also safeguard a right for its own sake; it does so only as a means to the end of preserving citizen militias. *Id.* at 2801.

The *Heller* Court observed that history had shown

> that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a

> select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

128 S. Ct. at 2801. No differently, and as its prefatory clause makes clear, the Second Amendment codified the right to bear arms in order "to prevent the elimination of the militia." *Id.* "[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution." *Id.* *See also United States v. Miller,* 307 U.S. 174, 179 (1939) ("The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.").

In *Presser,* it was this recognition of the Second Amendment's limited purpose that led this Court to conclude that the Amendment operates as "a limitation only upon the power of Congress and the National government, and not upon that of the States." 116 U.S. at 265. Because the right to bear arms preexisted the Constitution, its codification in the Second Amendment was merely a stipulation that the right shall not be infringed *by Congress*. *Id.* *Presser* thus upheld the constitutionality of sections of the State of Illinois' Military Code that forbade men from associating together as military organizations, or drilling or parading with arms in cities and towns unless authorized by law. *Id.* at 264-65.

As *Presser* implies, it makes no sense for the Second Amendment to constrain the States when it is the States' activities that the Framers sought to protect from federal interference, namely, raising militias from the ranks of their able-bodied citizens. *See Miller*, 307 U.S. at 178-79 (describing the Militia that the States were expected to maintain and train as comprising "all males physically capable of acting in concert for the common defense" and "bearing arms supplied by themselves and of the kind in common use at the time").

Given its structural role, the Second Amendment should be understood as a "federalism provision" that resists incorporation. Although the underlying right to bear arms is an individual right, the Second Amendment does not create the right. *Heller,* 128 S. Ct. at 2797; *Cruikshank,* 92 U.S. at 553. And while the Second Amendment admittedly does protect the right itself from infringement, it does so for the purpose stated in its prefatory clause—to prevent the Federal Government from eliminating State militias. *Heller*, 128 S. Ct. at 2801; *Presser*, 116 U.S. at 265. It therefore makes no sense to bind the States, via the Fourteenth Amendment, to the same restriction as the Federal Government when they are the indirect beneficiaries of the Second Amendment and when it was well understood that they could and did recognize a right to bear arms in their own fashion. *Heller*, 128 S. Ct. at 2802-03 (describing pre-Second Amendment provisions in the constitutions of

Massachusetts, North Carolina, Pennsylvania and Vermont codifying a right to bear arms).

B. The States Should Retain Their Independence and Autonomy with Respect to Regulation of the Second Amendment Right.

Under the Constitution's system of dual sovereignty, it is essential that the States "remain independent and autonomous within their proper sphere of authority." *Printz v. United States,* 521 U.S. 898, 928 (1997). In this case, the Second Amendment right to bear arms falls within the States' proper sphere of authority under at least two areas of substantive law, namely, criminal law and tort law, because as this Court has held, "the inherent right of self-defense has been central to the Second Amendment right." *Heller,* 128 S. Ct. at 2817; *see also id.* at 2801 (concluding that self-defense is the central component of the right).[2] Incorporation of the right would therefore interfere with the States' recognized independence and autonomy to regulate in the fields of criminal law and tort law.

First, self-defense can serve as a justification for the use of physical force in the context of criminal liability. *See, e.g.,* CONN. GEN. STAT. § 53a-19 (2008); DEL. CODE ANN. tit. 11, § 464 (2009); GA. CODE ANN.

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[2] More specifically, *Heller* described the right to bear arms as having to do with the "home, where the need for defense of self, family, and property is most acute." 128 S. Ct. at 2817. *See also id.* at 2821 & 2822.

§ 16-3-21 (2009); 720 ILL. COMP. STAT. 5/7-1 through 7-9 (2010); N.J. STAT. ANN. § 2C:3-4 (2009); N.Y. PENAL LAW § 35.15 (2009); 18 PA. CONS. STAT. § 505 (2009); TEX. PENAL CODE ANN. § 9.32 (2009). The States, of course, "possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac,* 456 U.S. 107, 128 (1982)). Consistent with that view, this Court has in the past dismissed, for want of jurisdiction, appeals challenging the trial court's definition of the right of self-defense to the jury because they fail to raise a substantial federal question. *Hart v. Virginia,* 298 U.S. 34, 35 (1936) (challenge brought under the Due Process and Equal Protection Clauses); *Kelley v. Oregon,* 273 U.S. 589, 590-91 (1927) (challenge made generally under the Constitution). *See also Hankerson v. North Carolina,* 432 U.S. 233, 244-45 (1977) (holding that a jury instruction on the burden of proof for self-defense is essentially a question of state law). This Court has also declined to find a due process violation in the State of Ohio's common-law practice of requiring self-defense to be proven by the defendant at trial. *Martin v. Ohio,* 480 U.S. 228, 236 (1987) (adding that the question of whether Ohio's holdover practice violates the Constitution "is not answered by cataloging the practices of other States").

Second, self-defense can serve as an affirmative defense to the tort of wrongful death. *See, e.g., Hargress v. Montgomery,* 479 So. 2d 1137 (Ala. 1985); *Ewurs v. Pakenham,* 290 N.E.2d 319 (Ill. App. Ct. 1972); *Sturgeon v. Baker,* 227 S.W.2d 202 (Ky. 1950); *Ross v. Glaser,* 559 N.W.2d 331 (Mich. Ct. App. 1996); *Young v. Warren,* 383 S.E.2d 381 (N.C. Ct.

App. 1989); *Fields v. Dailey,* 587 N.E.2d 400 (Ohio Ct. App. 1990); *Foster v. Emery,* 495 P.2d 390 (Okla. 1972). The development of tort law, including the rules of liability, also falls within the States' proper sphere of authority. This Court has repeatedly reminded litigants that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. 693, 701 (1976). *See also County of Sacramento v. Lewis,* 523 U.S. 833, 863-64 (1998) (declining "[t]o hold, as respondents urge, that all government conduct deliberately indifferent to life, liberty, or property, violates the Due Process Clause"); *Daniels v. Williams,* 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society").

One way that incorporation of the Second Amendment right could impact state criminal or tort law standards for self-defense is with respect to the amount of defensive force reasonably necessary under the circumstances to counter a threat. *See, e.g., Benjamin v. Bailey,* 662 A.2d 1226, 1232 (Conn. 1995) (observing that "[t]he common law principle permitting one to use deadly force in self-defense has long been restricted by the general rule of reason" and concluding that "the [State] constitution protects each citizen's right to possess a weapon of reasonably sufficient firepower to be effective for self-defense"); Paul H. Robinson, *Essay: A Right to Bear Firearms But Not to Use Them? Defensive Force Rules and the*

Increasing Effectiveness of Non-Lethal Weapons, 89 B.U. L. Rev. 251, 253 (2009) (describing current defensive force laws as setting a necessary force limitation and a proportionality limitation). This issue of defensive force would likely engender litigation over whether the Second Amendment right must yield to a reasonableness standard under State statutory or common law.

Incorporation of the Second Amendment right against the States would draw this Court, and indeed the entire federal judiciary, into the States' business of defining criminal and tort law standards of justification and liability with respect to self-defense. *Cf. Smith v. Robbins*, 528 U.S. 259, 274 (2000) (emphatically reaffirming that the Constitution "has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure" (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967))). Although the right to bear arms in self-defense is an important right from the perspective of the individual citizen, the implications and consequences of its exercise in a society in which the rights of fellow citizens have to be taken into account, are traditional matters for the States to address as sovereigns. The States' independence and autonomy in this regard should therefore be respected.

C. The States' Judgment in Regulating the Second Amendment Right Should Not Be Replaced with a Federal Constitutional Standard.

Under this Court's selective incorporation cases, provisions in other Bill of Rights have been incorporated against the States based on a legitimate concern that the fundamental liberties covered by those provisions cannot be adequately protected without a uniform national standard subject to this Court's constitutional review. For example, First Amendment rights of speech, press and assembly have been recognized as grounded in the concept of promoting the democratic form of government through open political discourse. *See, e.g., Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 227 (1997) (purpose of First Amendment is to promote public discussion and informed deliberation necessary for democratic government); *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."). This goal of open discourse cannot be achieved unless all citizens in the Nation have the same opportunity to express their views, regardless of the State or locality in which they reside. Consequently, State and local governments are reasonably subject to the same constitutional limitations as the federal government in terms of their ability to regulate the rights of free speech, press and assembly.

By contrast, there is no compelling need to impose upon State and local governments a single national standard with respect to the Second Amendment right to bear arms in self-defense. Even if the Court were to accept Petitioners' contention that the right to bear arms is inextricably intertwined with the principle of self-defense, the scope of an individual's self-defense right has always been subject to varying interpretations by the States. For example, some States adhere to the traditional common law rule that one who is attacked outside of the home has a duty to attempt to retreat before force can be used against an attacker in self-defense. *See, e.g.*, ARK. CODE ANN. § 5-2-607 (2009); NEB. REV. STAT. § 28-1409(4)(b) (2009). Other States, however, have enacted "stand your ground" laws that allow the use of force in self-defense at any location where the individual has a right to be, with no requirement of retreat. *See, e.g.,* ALA. CODE § 13A-3-23(b) (2009); FLA. STAT. ANN. § 776.013(3) (2009); TEX. PENAL CODE ANN. § 9.31(e) (2009). *See generally* P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground,* 35 S.U. L. REV. 1 (Fall 2007). Similarly, laws with respect to the carrying of firearms for self-defense purposes outside of the home vary widely among the States. *Compare* N.M. STAT. ANN. § 30-7-2 (2009) (permitting carrying of concealed, loaded firearm in a private automobile for personal • protection) *with* CAL. PENAL CODE § 12025(a) (2009) (prohibiting carrying of concealed firearm in any type of vehicle).

These differences in State laws regarding self-defense reflect not only varying policy choices that State governments have made in the interests of public safety, but also significant cultural differences among the States. For instance, *amici curiae* for Petitioners have highlighted the fact that, in certain regions of the American West, the notion of possessing firearms for self-defense is grounded in the traditions and practicalities of life on the frontier. *See* Amicus Curiae Brief of Rocky Mountain Gun Owners and National Association for Gun Rights in Support of Petitioners, at 8. Plausibly, in certain sparsely populated regions of the West, the individual's need to possess firearms for self-protection may be more compelling. *See id.* at 16-17. In more urban areas that have the benefit of a concentrated and highly trained police force, however, the need for individuals to arm themselves for self-defense is less compelling. In fact, statistics suggest that the availability of firearms in urban areas only increases the danger of violent crimes, rather than protects against their commission. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: TRENDS BY CITY SIZE, *available at* http://bjs.ojp.usdoj.gov/content/homicide/city.cfm (approximately 60% of gun homicides between 1976 to 2005 occurred in large cities).

Thus, there has never been agreement among the States as to the proper scope of an individual's self-defense rights, and States have remained free to develop their own self-defense standards under their criminal and tort laws. Given the relationship between firearms possession and self-defense, the incorporation of the Second Amendment right against the States could potentially subject to constitutional review numerous State and local laws that regulate not just the right to possess firearms, but also the propriety of their use in different self-defense situations. *See* Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1236-37 (2009).

In past cases, this Court has stressed the importance, in keeping with its status as a court in a federal system, "to avoid imposing a single solution on the States from the top down." *Smith,* 528 U.S. at 275. This case is no different; this Court should avoid imposing its own, counter-majoritarian formulation of the Second Amendment right on the States. With regard to regulations affecting the Second Amendment right, this Court should leave alone the "patchwork of rules representing the diverse policy judgments of lawmakers in 50 States" as it determined it should do in *BMW, Inc. v. Gore,* 517 U.S. 559, 570 (1996), because "reasonable people may disagree" about the scope and limitations of the right, *see id.*

Moreover, with respect to a right that has been codified in State constitutions (a handful even prior to codification in the Second Amendment), members of this Court have pointed out that "[s]tate courts interpreting state law remain particularly well situated to enforce individual rights against the States," given the fact that this Court's reluctance "to intrude too deeply into areas traditionally regulated by the States" may limit its ability to enforce the federal constitutional guarantees. *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting). This Court should regard state constitutions as having independent significance and continued importance, based on "their own unique origins, history, language, and structure," and state courts as remaining "primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound." *Delaware v. Van Arsdall*, 475 U.S. 673, 706-07 (1986) (Stevens, J., dissenting). Here, such concerns should give this Court pause regarding incorporation of the Second Amendment right against the States. There is arguably no need to enforce a federal constitutional guarantee when all but six of the States have codified in their own fashion a right to bear arms into their Constitutions and developed case law interpreting the nature and scope of the right.

D. The States Should Be Allowed to Continue Experimenting with Solutions for Gun-Related Violence in Their Local Communities.

This case also emphasizes the importance of another aspect of federalism—the States' ability to allow their local governments to act as "laboratories" for testing new solutions to legal and social problems such as gun-related violence. *Chandler v. Florida*, 449 U.S. 560, 579 (1981) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))); *Whalen v. Roe*, 429 U.S. 589, 597 (1977) ("[W]e have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."). Just as Justice O'Connor viewed *Gonzalez v. Raich*, 545 U.S. 1 (2005), a case involving the State of California's own conclusion regarding the palliative uses of marijuana, as exemplifying the role of States as laboratories, so too does this case because it implicates States' core police powers, which "have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens." *Id.* at 42-43. As discussed at length in Part II *infra*, the Second Amendment right to bear arms in self-defense carries with it the risk of violence and breach of peace, a risk which the States have a paramount interest in minimizing based on their obligation to protect their citizens.

Many local governments, including *amici*, have implemented a variety of recent initiatives aimed at combating gun-related violence, many of which may be called into question if the Second Amendment is incorporated against the States. In 2007, for example, Baltimore became the second city in the United States to enact a gun offender registry law requiring individuals convicted of gun offenses to make periodic reports to its police department. *See* City of Baltimore, *Press Release*, Oct. 1, 2007, *available at* http://www.baltimorecity.gov/LinkClick.aspx?fileticket=LniIUg7Sp04%3d&tabid=1177&mid=2108. That same year, Sacramento enacted an ammunitions ordinance (that has since been followed by similar California legislation) requiring vendors of firearms ammunition to maintain detailed records of their ammunitions sales. *See* Marcos Breton, *City Ammo Ordinance Is on Target*, SACRAMENTO BEE, Oct. 7, 2009, at B1. Seattle has taken yet a different approach towards gun control, recently adopting a rule prohibiting the possession or display of firearms at certain city parks and recreation facilities where children are likely to be present. *See* City of Seattle, *News Advisory*, Oct. 14, 2009, *available at* http://www.seattle.gov/news/detail.asp?ID=10197&Dept=40. Cook County has an ordinance banning the sale or ownership of certain types of firearms deemed to be assault weapons. *See Wilson v. Cook County*, 914 N.E.2d 595 (Ill. App. 2009).

In its continuing effort "to deal with the 'unfortunate and tragic proliferation of gun crimes in the city,'" Philadelphia recently persuaded a state appeals court to approve local gun control measures requiring the reporting of lost or stolen handguns, allowing the temporary seizure of guns by police after probable cause is demonstrated, and barring gun ownership by people subject to protection-from-abuse orders. Joseph A. Slobodzian, *Court Rejects 2 Phila. Gun Controls, Allows 3*, PHILA. INQUIRER, June 19, 2009, at A01. In Memphis, Tennessee, the City Council recently passed an ordinance banning guns in parks, playgrounds and other public recreational buildings, under a provision that allows city councils and county commissions to exempt local parks under their control from newly passed State handgun carry permit laws. Amos Maki, *City Council Votes to Ban Guns in Parks; Measure Follows Action by G'town, County,* COM. APPEAL, July 22, 2009, at B2. The article quoted a Council member expressing her view that "We do not live in the wild, wild West where everybody can just shoot it out[.]" *Id.*

As the preceding sampling of articles underscores, local governments around the country continue to devise new legislative and administrative solutions to problems of gun-related violence in their local communities. Given the importance of such innovation, incorporation of the Second Amendment right against the States would be manifestly unwise. This Court in the past has cautioned that it will not "cavalierly impede" the States' ability to experiment with new solutions. *Smith,* 528 U.S. at 275. "Principles of federalism should not so readily be compromised for the sake of a uniformity finding sustenance perhaps in considerations of convenience but certainly not in the Constitution." *Crist v. Bretz,* 437 U.S. 28, 39-40 (1978) (Blackmun, J., concurring). *See also District Attorney's Office v. Osborne,* 129 S. Ct. 2308, 2322 (2009) (declining to recognize a freestanding right under substantive due process to DNA evidence because "[t]o suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response" and because "judicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures.")

(quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989)).

In the case of the Second Amendment right, there is no compelling need for a uniform national standard. Principles of federalism therefore counsel against incorporation. The States should be left alone to exercise their own policy judgments about the scope of the right and the limits on its exercise, and to implement solutions for gun-related violence without fear of triggering a spate of litigation seeking federal constitutional review.

II. INCORPORATION OF THE SECOND AMENDMENT RIGHT AGAINST THE STATES WOULD INTRUDE UPON THE STATES' CORE POLICE POWERS

In *Heller*, this Court recognized that the individual right to bear arms in self-defense is "not unlimited" with respect to the manner in or the purpose for which the right may be exercised. 128 S. Ct. at 2799, 2816. Instead, the right is subject to "presumptively valid regulatory measures" such as laws prohibiting possession "by felons and the mentally ill," and carrying "in sensitive areas like schools and government buildings," and laws imposing "conditions and qualifications on the commercial sale of firearms." *Id.* at 2816-17 & n.26.

Another "important limitation on the right to keep and carry arms" is that the right applies only to weapons that were "in common use at the time." *Heller*, 128 S. Ct. at 2817 (quoting *United States v.*

Miller, 307 U.S. 174, 179 (1939)). In other words, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 2815-16. This interpretation accords with the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." *Id.* at 2817.

Both of these pronouncements—that the right to bear arms is subject to "presumptively valid regulatory measures" and that it applies only to weapons "in common use" and excludes "dangerous and unusual weapons"—underscore the importance of allowing the States to retain their plenary authority to regulate the right to the full extent of their police powers. The States are in the best position to determine what regulatory measures are necessary and proper to ensure the health, safety and welfare of their own citizens and communities. *See, e.g., United States v. Lopez,* 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (recognizing that States may properly lay claim to the area of guns on school premises "by right of history and expertise"). They are in the best position to determine what weapons should be considered dangerous or unusual, and therefore not fit for possession for lawful purposes. *See, e.g., Bell v. State,* 8 So. 133, 133-34 (Ala. 1889) (affirming a conviction under a statute that outlawed concealed brass knuckles as a "barbarous weapon" not recognized for self-defense and as to which "good reason to apprehend an attack" is not justification or mitigation); N.H. REV. STAT. ANN. § 159:20 (2009) (defining "self-defense weapons"). Incorporation of the Second Amendment against the States would intrude upon the traditional prerogative of the States to make such determinations on behalf of the citizens in their local communities.

A. The States Have a Paramount Interest in Protecting Their Citizens from Violence Arising from Armed Self-Defense.

In *Munn v. Illinois*, 94 U.S. 113 (1877), this Court explained that the source of the police powers reserved to the States comes from the inherent authority of a sovereignty to establish laws requiring each citizen to conduct himself or herself, and to use his or her property, so as not to injure others unnecessarily. *Id.* at 124-25. This inherent authority stems from the social compact between each citizen and the community to which he or she chooses to belong, agreeing to be governed by certain laws and regulations necessary for the common good. *Id.* at 124. In making this compact and becoming a member of society, each citizen "necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain." *Id.*

The right to bear arms protected by the Second Amendment is unquestionably one of those rights or privileges that must necessarily yield to some measure of regulation by the State for the common good. As the *Heller* Court makes clear, "the inherent right of self-defense has been central to the Second Amendment right." 128 S. Ct. at 2817. Self-defense, however, refers to an individual's particular relation to another person, often marked by violence, and carries with it the risk of injury or death, whether necessarily or unnecessarily caused, to the parties involved, as well as to others, including innocent bystanders.

Given the potentially negative societal consequences of armed self-defense, it is not surprising that this Court has made clear that the "individual right to keep and bear arms . . . was not unlimited." *Heller*, 128 S. Ct. at 2799. But simply announcing that the Second Amendment right to bear arms is not unlimited does not justify its incorporation. The States must retain their prerogative as independent sovereigns to set the *limits* of that right, consistent with the exercise of their police powers to ensure the health, safety and welfare of their citizens and outside the shadow of some federal constitutional standard. The very prospect of violence and breach of peace that is associated with any exercise of a right to bear arms implicates the State's core police powers.

In the context of a case upholding the State of Wisconsin's power to enjoin violent union conduct that may also be an unfair labor practice under the National Labor Relations Act, this Court recognized that "[t]he States are the natural guardians of the public against violence" and their "dominant interest . . . in preventing violence and property damage cannot be questioned." *United Auto., Aircraft & Agric. Implement Workers v. Wis. Employment Relations Bd.*, 351 U.S. 266, 274 (1956). "It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction," hence making violence a "matter of genuine local concern." *Id.* at 274-75.

In the context of a case upholding the constitutionality of the State of Illinois' mob and riot indemnity law under the Fourteenth Amendment, this Court recognized that the States have an obligation "to preserve social order and the property of the citizen against the violence of a riot or a mob." *Chicago v. Sturges,* 222 U.S. 313, 322 (1911). This obligation inheres in a government in which citizens entrust the protection of their lives, liberty and property:

> Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. . . .

Id.

Moreover, the States may create "subordinate municipal governments" and vest "in them the police powers essential to the preservation of law and order." *Sturges,* 222 U.S. at 323. Local governments—i.e., cities, counties, villages and towns—may thus be charged with the responsibility of protecting the lives and property of citizens living within their territorial limits from violence occasioned by public breaches of the peace, such as mobs and riots. *Id.* Not inconsistently with this responsibility, they may also be charged by the State with the liability and obligation to indemnify private property owners for damages and losses caused by such breaches of the peace. *Id.*

United Automobile Workers and *Sturges* thus confirm that the States—and their subordinate municipal governments (such as *amici* in this case)—have a paramount interest in protecting their citizens from the negative consequences of violence, which are primarily matters of local concern, and not national concern.[3] Armed self-defense carries with it the potential of inciting violence and breach of peace and hence falls within the ambit of the States' core police powers. Incorporation would impede the States' ability to regulate arms that may be used in self-defense and other interpersonal engagements.

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[3] Local governments must also deal with the economic burden that gun violence has on their communities. For example, Stroger Hospital of Cook County, a public hospital operated by Cook County and renowned for its trauma center, routinely treats victims of gun violence on an emergency basis.

B. Police Power Limitations on Free Speech Counsel Against Incorporation of the Second Amendment Right Through the Due Process Clause.

In *Heller,* this Court likened the limits on the Second Amendment right to bear arms to the limits placed on the First Amendment right of free speech:

> Of course the right was not unlimited, just as the First Amendment's right of free speech was not, *see, e.g., United States v. Williams,* 553 U.S. —, 128 S.Ct. 1830, — L.Ed.2d — (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

128 S. Ct. at 2799 (emphases in the original). Although both rights are subject to limits, the similarity ends then and there. Importantly, the limits recognized by this Court on the First Amendment right of free speech in its early cases further support the conclusion that the Second Amendment right should not be incorporated against the States.

In *Gitlow v. New York,* 268 U.S. 652 (1925), this Court first took the view that the freedoms of speech and press are among the "fundamental personal rights and liberties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States. *Id.* at 666. At the same time, however, the Court acknowledged the principle "[t]hat a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Id.* at 667 (citations omitted). Consistent with the preceding principle, the Court upheld the constitutionality of a New York statute criminalizing anarchy as being a proper exercise of the State's police power:

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power.

Id. at 668.

Two years later, in *Whitney v. California*, 274 U.S. 357 (1927), this Court, following *Gitlow*, similarly upheld the constitutionality of California's Syndicalism Act, which penalized membership in or assistance in the organization of "an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes." *Id.* at 371. The Court accorded due deference to the State legislature's determination that the proscribed conduct "involves such danger to the public peace and the security of the State, that [the conduct] should be penalized in the exercise of its police power." *Id.* California's criminal statute therefore did not offend the Due Process Clause of the Fourteenth Amendment. *Id.* at 372.

Subsequently, in *Stromberg v. California,* 283 U.S. 359 (1931), this Court again confirmed that the right of free speech falls within the conception of liberty under the Due Process Clause of the Fourteenth Amendment but held that the right is not absolute and is subject to punishment for "utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Id.* at 368-69. In this case, however, the Court concluded the challenged statute in question, which criminalized the display of a red flag in a public place as a sign or symbol of opposition to organized government, was unconstitutionally vague and therefore invalid. *Id.* at 369-70.

In incorporating the right of free speech against the States through the Due Process Clause of the Fourteenth Amendment, this Court has thus recognized that the freedom of speech, properly exercised, nourishes and strengthens this Nation's constitutional form of democratic government. *Stromberg,* 283 U.S. at 369 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."); *Gitlow,* 268 U.S. at 668 (characterizing the freedom of press as instrumental to "[t]he safeguarding and fructification of free and constitutional institutions"). *See also Richmond Newspapers,* 448 U.S. at 575 (observing that the freedoms of speech, press, assembly and petition safeguarded by the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

At the same time, however, this Court has upheld the exercise of police power to curb violence, breach of peace, and corruption of public morals that threaten the very order and stability of the State as a constitutional government, and speech that incites such conduct is not immune. *Stromberg*, 283 U.S. at 368-69; *Whitney*, 274 U.S. at 371; *Gitlow*, 268 U.S. at 667-68. Such are the limits that this Court's early incorporation cases placed on the First Amendment right of free speech.

Applying the same framework that this Court has used for the First Amendment right of free speech, it becomes clear that the Second Amendment right to bear arms is distinguishable from free speech considerations. For one thing, its existence is not central to the functioning of a free and democratic government; on the contrary, as the Amendment's prefatory clause makes clear, one of the reasons for its existence (and the only reason of constitutional significance to the Framers)[4] is to provide the States with the ability to raise a militia in the event of disaster, emergency, or breakdown in the constitutional order. *Heller,* 128 S. Ct. at 2801. *See, e.g.,* ALA. CODE § 31-2-46 (2009); CAL. MIL. & VET. CODE § 128 (2009); GA. CODE ANN. § 38-2-72 (2009); 20 ILL. COMP. STAT. ANN. 1815/2 (2009); MICH. COMP. LAWS SERV. § 32.555 (2009); N.C. GEN. STAT. § 127A-80 (2009); VA. CODE ANN. § 44-86 (2009). Thus, rather than furthering the preservation and improvement of the incumbent constitutional government, the Second Amendment right provides a failsafe in the event the constitutional government fails by reason of disaster, emergency or other cause.

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[4] Other reasons for exercising the Second Amendment right of course would be self-defense and hunting. *Heller*, 128 S. Ct. at 2801. Although these reasons are no less important than preserving the militia, it was "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms" that caused this right, unlike some other English rights, to be codified in a written Constitution. *Id.*

Furthermore, unlike speech, bearing arms for self-defense almost always gives rise to a risk of violence and breach of peace. Accordingly, while speech has enjoyed considerable room under this Court's precedent free from State regulation, the same cannot be said of the right to bear arms under the reasoning in *Gitlow, Whitney* and *Stromberg.* If anything, the Court's early incorporation cases regarding the right of free speech pay obeisance to the States' police powers in preventing and fighting violence, breach of peace and corruption of morals in their communities.

C. The Second Amendment Right to Bear Arms Should Not Be Viewed as Implicit in the Concept of "Ordered Liberty."

In view of the attributes described above, the Second Amendment right should not be considered "implicit in the concept of ordered liberty" in the way that the First Amendment rights, for example, have been considered under this Court's selective incorporation doctrine. *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937); *see, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment."). There are sound reasons for drawing this distinction.

In *Illinois v. Allen*, 397 U.S. 337 (1970), Justice Brennan equated "ordered liberty" with "social justice and peace," and contrasted it with "the breakdown of lawful penal authority—the feud, the vendetta, and the terror of penalties meted out by mobs or roving bands of vigilantes" and with the perversion of penal authority "through secret denunciation followed by summary punishment" or "the caprice of tyrants." *Id.* at 347-48 (Brennan, J., concurring). In other words, "ordered liberty" refers to those rights and procedures that one would expect a government of the sort created by the Constitution to provide to its citizens in the pursuit of justice and fairness. Its antithesis would be a society that has suffered a breakdown in the constitutional order, such that conditions of vigilantism, mob rule and tyranny can breed.

As discussed above, the First Amendment right of free speech unquestionably promotes the existing constitutional order by preserving the opportunity for political discussion in a participatory democracy. The Second Amendment right, however, does not promote the constitutional order. Rather, it functions in situations in which the constitutional order has broken down, and the States must therefore look to their able-bodied citizens for militia assistance in restoring order. The right to bear arms thus is not implicit in the concept of "ordered liberty," and it should not be incorporated against the States through the Due Process Clause of the Fourteenth Amendment under this Court's selective incorporation doctrine.

D. Under *Slaughter-House Cases*, the Second Amendment Right Should Not Be Incorporated Through the Privileges or Immunities Clause Either.

The Privileges or Immunities Clause of the Fourteenth Amendment does not provide for the incorporation of the Second Amendment right against the States either. In *Slaughter-House Cases*, 83 U.S. 36 (1873), this Court construed this Clause as protecting from State infringement only those privileges or immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. Importantly, the Court did not view this Clause as transferring from the States to the Federal Government the responsibility for the security and protection of an "entire domain of civil rights heretofore belonging exclusively to the States." *Id.* at 77. The Court held that this latter class of civil rights encompasses those rights that belong to an individual as a citizen of a State and that the State was created to establish and secure. *Id.* at 76.

A right to bear arms should be regarded as one of those civil rights that the States have long recognized and regulated. As already discussed, this right is not granted by the Constitution and does not depend upon that instrument for its existence. *Heller,* 128 S. Ct. at 2797; *Cruikshank,* 92 U.S. at 553. Instead, this is an ancient right emanating from English common law. *Heller,* 128 S. Ct. at 2805. In short, the right does not owe its existence to the Federal Government, its National character, the Constitution, or any federal law, and therefore cannot be considered a privilege or immunity of National citizenship.

Moreover, as this Court recognized in *Cruikshank,* the States had protected and regulated a right to bear arms under their plenary police powers long before the Fourteenth Amendment came into being. 92 U.S. at 553. The rationale in *Slaughter-House Cases* thus squarely applies here: surely the Reconstruction Congress did not intend, through the Privileges or Immunities Clause, to transfer the primary responsibility of protecting and regulating a civil right to bear arms recognized under State law from the States to the Federal Government. Such a result would turn the Second Amendment on its head—transforming the Amendment from its original conception as a limitation on Federal power with respect to the right to bear arms and the States' ability to muster citizen militias, into a broader Federal constitutional mandate on the States with respect to firearms possession.

That cannot have been the intent of a clause that was designed to combat discrimination against freedmen. *See, e.g.,* John Harrison, *Reconstructing* *the Privileges or Immunities Clause,* 101 YALE L.J. 1385, 1474 (1992) (concluding that the Privileges or Immunities Clause constitutionalizes the Civil Rights Act of 1866). A more plausible reading is that the States were commanded by the Fourteenth Amendment to treat freedmen no differently from whites with respect to the right to bear arms. It was never the intent of the Fourteenth Amendment to strip the States of their existing sovereignty to protect and regulate the right to bear arms and replace it with a Federal standard.

CONCLUSION

For the reasons stated above, *amici* join Respondents in asking that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OTIS MCDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC., AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

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INTEREST OF AMICUS*

Amicus, the American Center for Law and Justice (ACLJ), is a public interest legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued before the Supreme Court of the United States and other Federal and State courts in numerous cases involving constitutional issues, with a particular emphasis on the First Amendment, most recently ***Pleasant Grove City v. Summum***, 129 S. Ct. 1125 (2009).[1] The proper resolution of this case is a matter of substantial concern to the ACLJ because it concerns proper application of the Bill of Rights to the States.

SUMMARY OF THE ARGUMENT

While this Court's historically has used the Due Process Clause of the Fourteenth Amendment to incorporate against the States provisions of the Bill of Rights, a precise textual reading of the Fourteenth Amendment's Privileges or Immunities Clause and an understanding of the historical context surrounding the terms "privileges" and "immunities" demonstrates that the Privileges or Immunities Clause of the Fourteenth Amendment is better suited historically and textually to incorporate against the States the individual guarantees contained in the Bill of Rights, including the Second Amendment.

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* The parties in this case have consented to the filing of this brief upon receipt of the required seven (7) days' notice of ACLJ's intent to file and letters of consent are on file with the Clerk of this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[1] *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs. v. Jews for Jesus*, 482 U.S. 569 (1987).

Relying upon the Privileges or Immunities Clause of the Fourteenth Amendment for incorporation against the States of individual guarantees contained in the Bill of Rights, including the Second Amendment, is supported both by the expressed intent of the principal drafter of Section 1 of the Fourteenth Amendment, John Bingham, and by contemporary learned commentary on the amendment.

Incorporating the Second Amendment against the States through the Privileges or Immunities Clause would not require this Court to overrule its decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, (1873). To the extent that its decisions in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), hold that the Second Amendment is not incorporated against the States, however, those decisions should be overruled.

ARGUMENT

For over 100 years, this Court has used the Fourteenth Amendment's Due Process Clause to enforce provisions of the Bill of Rights against the States. But, the amendment's Privileges or Immunities Clause is better suited textually and historically, and thus a sounder basis, for incorporating the individual guarantees contained in the Bill of Rights.

I. The Privileges or Immunities Clause of the Fourteenth Amendment is Better Suited for Incorporating the Individual Protections of the Bill of Rights, Including the Second Amendment.

In interpreting the Constitution, this Court is "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (*quoting United States v. Sprague*, 282 U.S. 716, 731 (1931)). This reference to the phrase "normal and ordinary" should be read to include the way in which the terms were understood in contemporary legal discourse.

Section 1 of the Fourteenth Amendment states,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

> any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

A. A True Textual Interpretation of Section I of the Fourteenth Amendment Supports Incorporation Through the Privileges or Immunities Clause.

A full appreciation of the historical understanding of the terms "privileges" and "immunities" is necessary to properly understand incorporation of the Bill of Rights through the Privileges or Immunities Clause. *See* Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 781 (2008). William Blackstone recognized the true relationship between man's natural rights and the law of governments as their protectors. He wrote, "[T]he principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute . . . ." 1 William Blackstone, *Commentaries* *120–21. He explained that human laws should "take notice of these absolute rights, and provide for their lasting security." *Id.* at *121. Blackstone made clear that man naturally possesses liberty to do as he pleases, but, as a member of a civil political society, his absolute rights may be tempered in some respects. Still, the political society must provide positive protections in place of those tempered portions of absolute liberty. Claeys, 45 San Diego L. Rev. at 781. Blackstone characterized these positive law rights as "civil privileges" and "private immunities." Blackstone, *supra*, at *125.

Blackstone's undeniable influence over American legal thought imparted this understanding of privileges and immunities to the Founders. Claeys, 45 San Diego L. Rev. at 793. Alexander Hamilton wrote:

> "The principal aim of society, is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature; but which could not be preserved, in peace, without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these absolute rights of individuals."
>
> . . . .
>
> [N]atural liberty is a gift of the beneficent Creator . . . . *Civil liberty is only natural liberty modified and secured by the sanctions of civil society.*

Alexander Hamilton, *The Farmer Refuted*, *in* 2 The Works of Alexander Hamilton 37, 44, 61 (John C. Hamilton ed., New York, Charles C. Francis & Co. 1851) (*quoting* Blackstone, *supra*, at *120) (emphasis in the original). Hamilton quotes Blackstone's position that the terms "privileges" and "immunities" referred to the sacred and fundamental natural rights of all men as guarded by the sentinel of positive political enactments. In other words, particular rights referenced do not owe their existence to the political State, but they are granted enumerated protections by it.

This understanding of the terms "privileges" and "immunities" is not inconsistent with prevailing case law at the time of the Fourteenth Amendment. Excepting the Fourteenth Amendment, the other most noted appearance of the terms "privileges" and "immunities" in American law occurs in Article IV of the Constitution. U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Of the possible interpretations of the Privileges and Immunities Clause of Article IV, the interpretation that dominated antebellum case law and commentary was a reading that "require[ed] [S]tates to grant visiting citizens *some* of the same privileges and immunities which the [S]tate conferred upon its own citizens." Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, at 18 (Loyola Law Sch. Legal Studies Paper No. 2009-29, 2009), *available at* http://ssrn.com/abstract=1457360 (click on SSRN link for download) (emphasis in the original). In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), the leading Antebellum case on the interpretation of Article IV, the court rejected the notion that Article IV permitted Delaware citizens to access oyster beds claimed by the State of New Jersey. *Id.* at 552. Though the court did not provide a comprehensive list of the privileges and immunities covered by Article IV, it did recognize that they were limited, as they did not include oyster gathering. The court never explicitly defined the terms "privileges" and "immunities." The court did recognize, however, that those terms denoted rights "which are, in their nature, fundamental" as protected by the State. *Id.* at 551–52. Such a characterization is not inconsistent with Blackstone's understanding of the terms, as societal legal provisions protecting the natural, fundamental rights of men.

Applying this history of the origins of the terms "privileges" and "immunities" to the text of the amendment, the terms "privileges" and "immunities," when paired together, "did not refer to the natural rights belonging to all people or institutions, but referred instead to rights belonging to a certain group of people or a particular institution." Lash, *supra*, at 16; *see also Magill v. Brown*, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833) (No. 8952) (privileges and immunities are "the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places, whereby a particular man, . . . is exempted from the rigor of the common law . . . ."); *Campbell v. Morris*, 3 H & McH. 535, 553 (Md. 1797) (opinion of Chase, J.)

(the Privileges or Immunities Clause of Article IV contemplates "peculiar advantages and exemptions"); The Declaration of Rights and Grievances (U.S. 1774) ("That these His Majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."). *See generally* Lash, *supra*.

As this Court has noted, the Privileges or Immunities Clause also explicitly recognized national citizenship by prohibiting States from abridging "'the privileges or immunities of citizens of the United States.'" *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873) (*quoting* U.S. Const., amend. XIV, § 1). This text reads as both a limitation on the States and a substantive guarantee of certain "privileges or immunities" as part of national citizenship. Thus, the Clause cannot be given its natural textual effect without discussing the phrase "citizens of the United States." In a purely textual sense, it is abundantly clear what definition the phrase should be given, as the preceding clause provides it. The first clause of Section 1—the Citizenship Clause—overturned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and made "all persons born within the United States and subject to its jurisdiction citizens of the United States," and citizens of the State in which they reside. *Slaughter-House*, 83 U.S. (16 Wall.) at 73. The Citizenship Clause recognizes that national citizenship and State citizenship are "distinct from each other." *Id.* at 74.

This reading of the Fourteenth Amendment does not leave non-citizens unprotected, because unlike the Privileges or Immunities Clause, the Due Process Clause applies to "any person." This was a necessary inclusion, since incorporating the Fifth Amendment Due Process guarantee through the Privileges or Immunities Clause would secure that guarantee only for citizens. *See* Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1224-26 (1992). At the time of the Fourteenth Amendment's framing, the meaning of the words "due process of law" were likely thought to have a similar meaning to the Fifth Amendment protection. *Id.* at 1225. Representative John Bingham (R-OH), Section 1's principal drafter, when asked by Representative Andrew Rogers (D-NJ) what he meant "by 'due process of law,'" replied, "the courts have settled that long ago, and the gentleman can go and read their decisions." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). Under a plain reading of the clause, its purpose was to require States to provide all persons due judicial process before deprivation of life, liberty, or property. Christopher Wolfe, *The Rise of Modern Judicial Review* 131 (rev. ed. 1994).

In addition, the Equal Protection Clause complements the judicial process protected by the Due Process Clause. It seeks to ensure that if a State has laws providing due process before deprivation of life, liberty, and property, those laws apply equally to all persons. This was a particularly important part of the Fourteenth Amendment because the Drafters were concerned about violations of the Bill of Rights, manifested in attempts to subjugate the freedmen to a slave-like status. *See* Rep. of the J. Comm. on Reconstruction, H.R. Rep. No. 30, pt. 2, at 142 (1st Sess. 1866).

Only with these relevant terms properly defined may a textual reading of the Amendment be accomplished. Indeed, in its truly textual sense, the Privileges or Immunities Clause of the Fourteenth Amendment should be read to prohibit any State from "mak[ing] or enforc[ing] any law which shall abridge" the positive law protections afforded by the United States to any person "born or naturalized in the United States" as a safeguard for certain fundamental rights. U.S. Const. amend. XIV, § 1. Thus, to ensure proper application of the amendment, a single question remains to be answered: To which privileges and immunities does the Fourteenth Amendment refer?

It is this question that has long perplexed jurists and legal scholars. While the amendment does not specifically refer to any particular complete set of "privileges or immunities," this does not render it impossible to discern whether certain rights are included within the amendment's scope. On more than one occasion, this Court has defined privileges of citizenship by looking at constitutionally enumerated rights. In *Dred Scott*, Chief Justice Taney stated that the "rights and privileges of the citizen are regulated and plainly defined by the Constitution itself." 60 U.S. (19 How.) at 449. He then listed many of the rights guaranteed in the Bill of Rights, including the right to keep and bear arms. *Id*. at 450. In *The Prize Cases*, 67 U.S. (2 Black) 635

(1863), Justice Grier stated that during the Civil War, besides the rebels, all "others were peaceful citizens, entitled to all the privileges of citizens under the Constitution." *Id.* at 695. Finally, in *Slaughter-House*, Justice Bradley in dissent said, "we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." *Slaughter-House*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).

Taking this Court's direction, in light of the precise definitions of the terms "privileges" and "immunities," the Fourteenth Amendment's reference to "privileges or immunities of citizens of the United States" should be read to include those enumerated protections of fundamental rights contained within the Constitution. As such, the fundamental rights referred to by the Privileges or Immunities Clause of the Fourteenth Amendment necessarily include those individual guarantees secured by enumeration in the Bill of Rights.

B. The Second Amendment Reinforces this Textual Understanding of the Privileges or Immunities Clause.

The Second Amendment provides the consummate example of support for the textual interpretation of the Privileges or Immunities Clause. In fact, this Court has recognized that the Second Amendment comprises the enumerated civil protection of the historical natural right to self-preservation, as provided by the United States Government. *Heller*, 128 S. Ct. at 2798-99. This understanding is supported by the historical inclusion of the right to self-defense or preservation within the bundle of natural and absolute rights referred to by Blackstone. For instance, in his *Commentaries*, Blackstone identified three basic rights of all mankind that were protected by the privileges and immunities of English citizens: the rights of private property, personal liberty, and personal security. Blackstone, *supra*, at *125. He characterized this right to personal security as the absolute protection of life and limb so fundamental that even homicide must be pardoned in its just defense. According to Blackstone, the right to security is so inviolable that it "cannot be wantonly destroyed or disabled without a manifest breach of civil liberty." *Id.* at *126.

English history bears out the natural right to self-preservation by characterizing attempted denials of arms possession as impermissible infringements upon the right of personal security. For example, King James II actively sought to disarm his opposition even though from medieval times Englishmen were expected to keep arms to assist in the common defense. This caused English citizens to fear consolidated government forces, which ultimately led to the positive civil protection for the right to keep arms as assurance for individual security and liberty to be included within the English Bill of Rights. *Heller*, 128 S. Ct. at 2798.

The Second Amendment is a direct result of the ideals expressed by Blackstone and events of English history. "It is undeniable that the Founding Fathers drew upon their English heritage in defining our legal rights and customs . . . ." Cliff Stearns, *The Heritage of our Right to Bear Arms*, 18 St. Louis U. Pub. L. Rev. 13, 18 (1999). Indeed, before the American Revolution, the colonists asserted, and many of the colonial charters guaranteed, that they were entitled to all the privileges and immunities enjoyed by all Englishmen, *Saenz v. Roe*, 526 U.S. 489, 523-24 (1999) (Thomas, J. dissenting). Those privileges included the right to bear arms. *Heller*, 128 S.Ct. at 2798. Moreover, this Court has explicitly characterized the English positive protection of the right to keep and bear arms as "the predecessor to our Second Amendment," *id.*, and stated that the individual right to keep and bear arms "is not a right granted by the Constitution. Neither is it *in any manner dependent upon that instrument for its existence.*" *Id.* at 2797 (emphasis added) (citation omitted). Thus, the Founders, as former Englishmen, held the natural right to self-preservation in such high regard that they thought it necessary to enumerate it in the Bill of Rights to guarantee its protection to the fullest extent possible for all citizens.

II. The Understanding of Rep. Bingham and of Learned Commentators During or Shortly After Ratification Also Supports Incorporation by the Privileges or Immunities Clause.

A. Bingham Understood Both Incorporation and the Notion of Distinct State and National Citizenships and Adjusted Section 1 Accordingly.

The ultimate understanding expressed by the principal drafter of Section 1 of the Fourteenth Amendment, Representative John Bingham, was consistent with this textual reading and provides insight into Section 1's meaning at the time. To understand Bingham, it is important to look at his two different drafts of the Fourteenth Amendment, and his reason for altering the first.

Bingham's first draft of the amendment read,

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). This language was modeled after Article IV, evidencing

Bingham's belief that "the Privileges and Immunities Clause of Article IV, Section 2 protect[ed] rights of national rather than state citizenship." Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 69 (1993). Bingham further believed that Congress lacked enforcement authority, *id.* at 71, and "that, properly interpreted, the Clause would read: 'The citizens of each State shall be entitled to all privileges and immunities of citizens [of the United States] in the several States.'" *Id.* at 69–70 (alteration in the original) (citation omitted).

During House debate on the first draft, Bingham stated that the goal of his amendment was "not to transfer the laws of one State to another State" but "to secure to the citizens of each State all the privileges and immunities of citizens of the United States in the several States." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). Bingham considered the Bill of Rights to be among the privileges and immunities of citizens of the United States. In a speech on the first draft, he said, "Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States . . . . Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?" *Id.* at 1089. He explained that the amendment's only purpose was to "arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution . . . ." *Id.* at 1088; *see also* 1908 Horace Edgar Flack, *Adoption of* *the Fourteenth Amendment* 59 (John Hopkins Press 1908).

The text of Bingham's first draft was insufficient to accomplish his goals. In criticizing the first draft, Representative Giles Hotchkiss (R-NY) stated that "Constitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them," and suggested that he and Bingham take time to compare views and "agree upon an amendment that shall secure beyond question what the gentleman desires to secure." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).

Bingham's second draft of the Fourteenth Amendment was much clearer:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871).

In 1871, Bingham explained that he changed the language of what would become Section 1 after re-reading this Court's decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and understanding, as he "never did before," the need for express language limiting the States. Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871). Bingham focused on Chief

Justice Marshall's words, "'[h]ad the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.'" *Id.* at 84 (quoting *Barron*, 32 U.S. (7 Pet.) at 250)). Not wanting his amendment to suffer the same defect, Bingham added express language limiting the States. In his speech he listed the first eight amendments in the Bill of Rights and explained that, "until made so by the [F]ourteenth [A]mendment," these provisions did not limit the States. *Id.* He explained that Justice Washington's opinion in *Corfield* construed Article IV and "only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own." *Id.* Thus,

> [i]s it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the [F]ourteenth [A]mendment made them limitations.

Id.; *see also* Lash, *supra*, at 54-56.

Senator Jacob Howard (R-MI), who introduced the final draft of the amendment in the Senate, also included the textual provisions of the Bill of Rights in his speech on the amendment, in which he defined privileges and immunities as including

> the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; . . . the right to keep and bear arms . . . . [H]ere is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). He explained, however, that the courts had held that "all these immunities, privileges, rights, thus guarantied [sic] by the Constitution or recognized by it," were secured only to United States citizens and did not restrain State legislation. *Id.* Consequently, these privileges and immunities simply stood, "as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating" them. *Id.* at 2766. Clarifying the purpose of the proposed Fourteenth Amendment, however, he stated, "[t]he great object of the first section of this amendment is, . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*

In summarizing the Senate debates over the Fourteenth Amendment, Flack noted that no one questioned Howard's interpretation of Section 1. Flack, *supra*, at 94. Michael Kent Curtis, in his extensive research on the debates, has found no one who contradicted Bingham and Howard's statements that "the amendment would require the [S]tates to obey the Bill of Rights," and "[n]o one complained that the amendment would allow the [S]tates to continue to deprive citizens of the rights secured by the Bill of Rights." Michael Kent Curtis, *No State Shall Abridge* 91 (Duke University Press 1986); *see also* Kevin Newsom, *Setting Incorporation Straight: A Reinterpretation of* The Slaughter-House Cases, 109 Yale L.J. 643, 699 (2000).

B. Early Learned Commentary on the Fourteenth Amendment Supports Incorporation Through the Privileges or Immunities Clause of the Bill of Rights Against the States.

Bingham's understanding that the Fourteenth Amendment incorporated the Bill of Rights was confirmed in contemporary legal treatises. In his 1868 treatise, *An Introduction to the Constitutional Law of the United States*, the University of New York Law School Dean John Norton Pomeroy explained that under constitutional structure and court precedent, only the United States was forbidden "to deprive a person of any of the immunities and privileges guarded by the Bill of Rights." John Norton Pomeroy, *An Introduction to the*

Constitutional Law of the United States: Especially Designed for Students, General and Professional 147 (1868); *see also* Aynes, 103 Yale L.J. at 89-90. Pomeroy believed this to be "unfortunate," because "[t]he United States, as sovereign, as supreme over all [S]tate governments, should be able to afford complete protection to its citizens." Pomeroy, *supra*, at 149. The Fourteenth Amendment's Section 1, however, provided a remedy. *Id.* at 151. He called the amendment "by far the most important than any which had been adopted since the organization of the government, except alone the one abolishing the institution of slavery," and explained the amendment "would give the nation complete power to protect its citizens against local injustice and oppression" without "interfer[ing] with any of the rights, privileges, and functions which properly belong to the individual [S]tates." *Id.* Dean Pomeroy's interpretation of the Fourteenth Amendment and its importance in applying the Bill of Rights to the States was cited with approval in a review of his treatise by *The Nation*. *Pomeroy's Constitutional Law*, The Nation, July 16, 1868, at 54.

In the 1872 edition of his treatise, *Manual of the Constitution of the United States*, Judge Timothy Farrar "noted judicial precedents that had held the Bill of Rights inapplicable against the States, but, under the title 'Settled Questions' concluded, 'All these decisions . . . are entirely swept away by the 14th [A]mendment.'" Aynes, 103 Yale L.J. at 84–85 (quoting Timothy Farrar, *Manual of the Constitution of the United States of America* 546 (3d ed. 1872)).

Several cases decided shortly after the Fourteenth Amendment's ratification also demonstrate an understanding that the Amendment was intended to incorporate the individual guarantees of the Bill of Rights against the States.

In *United States v. Hall*, then-Circuit Judge Woods said that the "rights enumerated in the first eight amendments to the [C]onstitution of the United States, are the privileges and immunities of citizens of the United States . . . ." 26 F. Cas. 79, 82 (S.D. Ala. 1871) (No. 15,282). In *Ohio ex rel Garnes v. McCann*, 21 Ohio St. 198 (1871), Judge Day wrote that

> [t]he language of the [Fourteenth Amendment's Privileges or Immunities Clause] . . . taken in connection with other provisions of the amendment, and of the [C]onstitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the [C]onstitution of the United States.

Id. at 209-10. Judge Day warned that a broader construction could open "into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment." *Id.* at 210. In *In re Hobbs*, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6550), District Judge Erskine explained that the purposes of the

Fourteenth Amendment and the Civil Rights Bill were not just to guarantee "equality before the law throughout the whole land; but also, to protect from invasion and abridgement all the privileges and immunities—essential rights—that belong to the citizen and which flow from the [C]onstitution." *Id.* at 264.

III. This Court's Decisions in *Slaughter-House*, *Cruikshank*, *Presser*, and *Miller* Should Not Bar This Court From Incorporating the Second Amendment Through the Privileges or Immunities Clause.

A. Slaughter-House Can be Read to Support the Incorporation of the Second Amendment and the Rest of the Bill of Rights Through the Fourteenth Amendment Privileges or Immunities Clause.

The Seventh Circuit stated below that this Court's decision in *Slaughter-House* "holds that the privileges and [sic] immunities clause does not apply the Bill of Rights, en bloc, to the [S]tates." *Nat'l Rifle Ass'n of America v. Chicago*, 567 F.3d 856, (7th Cir. 2009). But *Slaughter-House* makes no such definitive statement. As argued in Section I, *supra*, the Privileges or Immunities Clause provides a textually and historically sound basis for incorporating the Bill of Rights against the States. As we will explain, this Court need not overrule *Slaughter-House* to reach that result.

In raising their Privileges or Immunities Clause claim, the butchers in *Slaughter-House* did not rely on the rights set forth in the Bill of Rights.[2] Kevin Newsom, *Setting Incorporation Straight: A Reinterpretation of* The Slaughter-House Cases, 109 Yale L.J. 643, 658 (2000). Rather, they claimed that the challenged act created a monopoly, conferred "odious and exclusive privileges" on a small group of people at the expense of others, and deprived butchers in the city of "the right to exercise their trade." *Slaughter-House*, 83 U.S. (16 Wall.) at 60. Their counsel, John Campbell, put forward an expansive definition of privileges and immunities, stating, "[t]hey are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country." *Id.* at 55 (syllabus) (argument of John Campbell). As Newsom notes, although Campbell "made passing reference to the freedoms of speech and of the press, the rights to trial by jury and to counsel, and the privilege of habeas corpus as freedoms 'incorporated in the bill of rights,'" he "did not rely on explicit textual guarantees in making the butchers' argument" and even "candidly conceded to the Court at oral argument that there was no specific textual basis in the Constitution for the right he claimed on behalf of his clients. 'There is not,' he admitted, 'a grant of this right nor a prohibition of its violation in direct terms.'" Newsom, 109 Yale L.J. at 658–59 (footnotes omitted) (*quoting* Brief for Plaintiffs, *Slaughter-House* (Nos. 475–480), *reprinted in* 6 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 535, 537–38, 559 (Philip B. Kurland & Gerhard Casper eds., 1975); Plaintiffs' Oral Argument, Slaughter-House (Nos. 475–480) (Feb. 3–4, 1873), *in* 6 Landmark Briefs, *supra*, at 733, 757)).

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[2] The butchers did unsuccessfully challenge the Act under the Due Process Clause of the Fourteenth Amendment, although Justice Miller noted that the argument had "not been much pressed." *Slaughter-House*, 83 U.S. (16 Wall.) at 80.

In rejecting the butchers' claim, Justice Miller took a narrow approach to interpreting the Privileges or Immunities Clause of the Fourteenth Amendment that focused on rights that were Federal in character—those that were enumerated and guaranteed in the Constitution, such as the Bill of Rights, or implied from the structure of the Federal government. He first set out the distinction between national and State citizenship, and the privileges and immunities associated with those citizenships, since Section 1 of the Fourteenth Amendment addressed the privileges and immunities of citizens of the United States. *Slaughter-House*, 83 U.S. (16 Wall.) at 72–73. The butchers' claims fell under the privileges and immunities of State citizenship, *id.* at 78, which included "nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* at 76. The privileges and immunities of citizens of the United States, however, were narrowly defined as those that, "owe[d] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. The term "existence" did not mean that the

Constitution created the right. Rather, the rights were "guaranteed by the Federal Constitution." *Id.* Included in Justice Miller's list were textual provisions of the Constitution and Bill of Rights, such as "[t]he right to peaceably assemble and petition for redress of grievances" and the "privilege of the writ of habeas corpus," along with "the rights secured by the thirteenth and fifteenth articles of amendment," and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 79–80. Because the butchers' claim was not a privilege or immunity of citizens of the United States, Justice Miller found it "useless to pursue this branch of the inquiry." *Id.* at 80.

The wisdom of Justice Miller's approach is seen in the possible consequences of the butchers' broad definition of privileges or immunities. Justice Miller noted that if the Court accepted the butchers' argument, Congress would have the power to "pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects." *Id.* at 78. The Supreme Court would become "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment." *Id.* Calling the consequences of the butchers' argument "serious," "far-reaching," "pervading," and "so great a departure from the structure and spirit of our institutions," Justice Miller noted that the effect of the argument would be to "fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character" and "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." *Id.* Given "the absence of language which expresses such a purpose too clearly to admit of doubt," Justice Miller stated that "no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." *Id.* In other words, the radical definition proposed by the butchers was entirely lacking in textual support.

Justice Miller's narrow and carefully drawn interpretation of the Privileges or Immunities Clause was clearly an attempt to avoid the broad construction and sweeping consequences of the butchers' claim. Miller looked carefully at Section 1's grammar and wording to ascertain the amendment's purpose, Robert Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment,* 1984 U. Ill. L. Rev. 739, 741, which was largely, "the freedom of the slave race, . . . and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." ***Slaughter-House,*** 83 U.S. (16 Wall.) at 71. It was not, as Justice Miller asked hypothetically "to transfer the security and protection of all the civil rights . . . from the States to the Federal government?" *Id.* at 77. While today we view civil rights as synonymous with the Bill of Rights, as Newsom points out, during the Reconstruction era, the term "civil rights" were largely defined as economic rights, such as those mentioned in the Civil Rights Bill. Newsom, 109 Yale L.J. at 670–73. Bingham opposed the Civil Rights Bill in part because he believed that it would "strip the [S]tates of power to govern, centralizing all power in the Federal [g]overnment." *Adamson v. California*, 332 U.S. 46, app. 100 (1947) (Black, J., dissenting). In a March 9, 1866, speech he explained that "the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government" and that his amendment "sought to effect no change in that respect in the Constitution of the country." Cong. Globe, 39th Cong., 1st Sess. 1292 (1866).

Justice Miller's narrow opinion was also a counter to the dissenting justices, who broadly defined the scope of Section 1 of the Fourteenth Amendment. Justice Field believed that "the recent amendments to the Federal Constitution protect[ed] the citizens of the United States against the deprivation of their common rights by State legislation," and that this result "was so intended by the Congress which framed and the States which adopted it." *Slaughter-House*, 83 U.S. (16 Wall.) at 89 (Field, J., dissenting). He further stated that "grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any *bill of rights* to render them void." *Id.* at 111 (Field, J., dissenting) (emphasis added).

While Justice Bradley recognized that the Constitution provided "an authoritative declaration of some of the most important privileges and immunities of citizens of the United States," *id.* at 118 (Bradley, J., dissenting), and listed some of the provisions of the Bill of Rights in his opinion, he was unwilling to limit his list to enumerated textual provisions, stating that "even if the Constitution were silent, the fundamental privileges and immunities of citizens . . . would be no less real and no less inviolable than they now are." *Id.* at 119 (Bradley, J., dissenting).

A close reading of Justice Miller's illustrative list of privileges and immunities of citizens of the United States supports incorporation of the Bill of Rights. His limited discussion of the Bill of Rights could be attributed to the nature of the butchers' claim, which, under his definition, clearly fell outside the scope of privileges and immunities of citizens of the United States. He explicitly referred to several constitutional provisions, including, significantly, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the First Amendment right to peaceably assemble and petition the government. *Id.* at 79–81. His failure to list all of the enumerated provisions in the Bill of Rights does not evidence a desire to exclude the rights not listed. He specifically noted that his list was not exhaustive. *See Slaughter-House*, 83 U.S. (16 Wall.) at 79–80. Newsom has postulated that the provisions he listed were in response to the enumerated constitutional rights that Bradley listed in dissent. Newsom, 109 Yale L.J. at 679–80. Whatever Justice Miller's reasoning, it would be "hard to imagine" that he intended to exclude the other Bill of Rights provisions from his understanding of privileges and immunities of citizens of the United States. *Id.* at 680. Finally, Justice Field's reference to "requir[ing] no aid from any *bill of rights* to render" a "grant[] of exclusive privileges" void, *Slaughter-House*, 83 U.S. (16 Wall.) at 111 (Field, J., dissenting) (emphasis added), likely was a response to an incorporation reading of Miller's opinion. Field criticized the majority for giving the amendment no meaning by limiting its definition of privileges and immunities to those that are "specially designated in the Constitution [before the adoption of the Fourteenth Amendment] or necessarily implied as belonging to citizens of the United States . . . ." *Id.* at 96 (Field, J., dissenting); *see also* Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 1094 (2000).

B. The Court's Opinions in Cruikshank, Presser, and Miller Should be Overruled to the Extent They Hold that the Second Amendment is not Applicable to the States.

The Seventh Circuit below stated that this Court "has rebuffed requests to apply the [S]econd [A]mendment to the states," citing *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S.

535 (1894). *Nat'l Rifle Ass'n of America v. Chicago*, 567 F.3d 856, (7th Cir. 2009). Similarly, this Court in *Heller* cited those three cases as "reaffirm[ing] that the Second Amendment applies only to the Federal Government." *Heller*, 128 S. Ct. at 2813 n.23. But in *Heller* this Court questioned *Cruikshank's* "continuing validity on incorporation," and noted that this Court in *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Id.*

Cruikshank, *Presser*, and *Miller* all cited to *Barron* for the proposition that the Bill of Rights "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone." *Cruikshank*, 92 U.S. at 552; *see also Presser*, 116 U.S. at 265; *Miller*, 153 U.S. at 538. These cases, however, did not directly discuss the impact of the Fourteenth Amendment's Privileges or Immunities Clause on the Second Amendment's applicability to the States. Therefore, to the extent that these cases hold that the Second Amendment is not applicable to the States, such a holding is unsupported by the text and historical understanding of the Privileges or Immunities Clause, and this Court should overrule this line of cases.

CONCLUSION

We respectfully ask that the judgment of the court of appeals be reversed.

Respectfully submitted,

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Petitioners,
v.
CITY OF CHICAGO, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF THE AMERICAN CIVIL RIGHTS UNION, LET FREEDOM RING, COMMITTEE FOR JUSTICE, AND THE FAMILY RESEARCH COUNCIL, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTEREST OF *AMICI CURIAE* [1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those conforming to a particular ideology. Founded in 1998 by longtime Reagan policy advisor Robert B. Carlson, the ACRU files briefs as *amicus curiae* on constitutional law issues in cases across the nation.

Those individuals setting the ACRU's policy as members of its Policy Board are: former U.S. Attorney General Edwin Meese, former Judge for the U.S. Court of Appeals for the D.C. Circuit Kenneth W. Starr, former Assistant Attorney General William Bradford Reynolds, John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams, former Harvard University Professor Dr. James Q. Wilson, Ambassador Curtin Windsor, Jr., and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that all constitutional rights are fully protected. This includes the right to keep and bear arms and a proper application of the Privileges or Immunities Clause.

Let Freedom Ring (LFR) is a non-profit organization, formed for the express purpose of mobilizing American citizens to engage on issues regarding the protection of fundamental American values. LFR promotes constitutional government, economic freedom, and traditional values. LFR is interested in this case because the right to keep and bear arms is central to the American constitutional system. The right to bear arms is also a core American tradition, with a history stemming from the founding of America. Accordingly, LFR desires to see this right extended against the states in a fashion consistent with a traditional understanding of both the Second and Fourteenth Amendments.

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[1] Peter J. Ferrara and Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any other party authored this brief in whole or in part and no one apart from *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Founded in 2002, the Committee for Justice (CFJ) is a non-profit organization incorporated in the District of Columbia that advocates against judicial activism, educates about the proper role of judges, and promotes judicial nominees who respect the rule of law. At the core of CFJ's mission is the need for objective judicial interpretation of the United States Constitution, based on the document's text and original meaning rather than on the political ideology, feelings, and life experiences of the judges. Accordingly, CFJ believes that the Second Amendment right to keep and bear arms must be afforded the same protection, at all levels of government, as the other fundamental rights in the Bill of Rights.

The Family Research Council (FRC) is a non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies that affect the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal. Accordingly, FRC has an interest in presenting a theory of the Fourteenth Amendment that allows for the extension of the right to bear arms to the states, but does not reinforce doctrines whereby courts recognize and enforce rights lacking a foundation in the Constitution's text or the history and traditions of the American people, doctrines often resulting in outcomes detrimental to the rights of parents and families in the United States.

SUMMARY OF ARGUMENT

This Court held in *District of Columbia v. Heller* that the Second Amendment secured an individual right to keep and bear arms. 128 S. Ct. 2783, 2799 (2008). In so holding, this Court invalidated various sections of the District of Columbia's statutes establishing a virtually-categorical ban on handguns and other readily-usable firearms within the home. *Id.* at 2821–22. Yet despite the landmark nature of this case, its extreme facts properly led this Court to an appropriately narrow holding that the Constitution would not tolerate a complete ban on handguns in this nation's capital.

Of the remaining questions regarding the Second Amendment, perhaps none is more consequential than whether the Fourteenth Amendment protects the right to bear arms from infringement by the states. This Court expressly disclaimed that question in *Heller*, 128 S. Ct. at 2813 n.23, and is now presented with this issue.

Although most of the individual rights in the Bill of Rights have been "incorporated" through substantive due process, the right to keep and bear arms should instead be recognized as one of the "privileges or immunities" protected by the Fourteenth Amendment. This right is significantly different from the other rights in the Bill of Rights, and there are several advantages to this approach. There are, moreover, no serious disadvantages.

Significantly, and contrary to the assertions of Petitioner, this Court can and should decide this case under the Fourteenth Amendment Privileges or Immunities Clause without overruling the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). This Court in *Slaughter-House* held that rights inhering in federal citizenship are applicable to the states through the Privileges or Immunities Clause.

This holding was designed to preserve the federal system of government. Had this Court struck down a public health law passed pursuant to a state's police power as violating a right without any textual support in the Constitution, this Court would have read Privileges or Immunities in an extraordinary-broad manner with profound implications for federal-state relations.

The commonly-held view that *Slaughter-House* eviscerated the Privileges or Immunities Clause and precludes its extending federal rights to the states has never been adopted by this Court. That common view is incorrect, and is a *post-hoc* gloss created and promulgated by the legal academy, which this Court has not had occasion to consider. This anti-incorporation view is also unusual in that *Slaughter-House* did not involve any provision of the Bill of Rights and therefore was not an incorporation case. To the contrary, *Slaughter-House* listed several rights as being among the "privileges or immunities" of U.S. citizenship that could thus be applied to the states through the Privileges or Immunities Clause.

It is also possible for a right to be both a fundamental right within the purview of the states while also a federal right enforceable against the states. This list of rights inhering in federal citizenship includes two provisions of the First Amendment, demonstrating that Privileges or Immunities can be used to apply federal rights to the states, so long as those rights are rooted in the constitutional text.

The political aspect of the Second Amendment confirms that the right to bear arms inheres in federal citizenship and thus can be applied to the states consistent with the *Slaughter-House Cases*. The Second Amendment entails two distinct, but related, interests. The first is a right to self-defense, recognized in *Heller*. The second is a political right to hold the government accountable by threat of arms as a deterrent against tyranny. Other courts have explored this right in detail, characterizing the Second Amendment as a "doomsday provision," assuring an armed citizenry that could quell "tyrannical leaders," and expressly acknowledging that this aspect of the Second Amendment is a "political component." This Court in *Heller* recognized the significance of this component, noting its role during the Framing.

This political distinction does not diminish the right to bear arms. The Constitution distinguishes citizens from noncitizens. Consequently certain fundamental rights, notably the right to vote, are restricted to only U.S. citizens because they are political rights. The right to vote is the means for expressing consent to be governed by certain leaders, and the Second Amendment is an intergenerational insurance policy to guarantee that such leaders cannot retain power in a tyrannical fashion after the American people have rescinded their consent. This concern regarding the federal government in 1791 when the Second Amendment was adopted became a prominent concern regarding state governments in 1868 when the Fourteenth Amendment was adopted, and thus the right to bear arms was extended to the states through the Privileges or Immunities Clause.

There are three precedents that this Court must, and should, overrule to extend the right to bear arms to the states through the Privileges or Immunities Clause. These cases are *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894). This Court has long since jettisoned the underlying rationales of *Cruikshank* and its progeny, all of which were decided before this Court began applying provisions of the Bill of Rights to the states. These cases must be overruled in that their clear language holds that the Second Amendment does not apply to the states through the Fourteenth Amendment, which would include both the Privileges or Immunities Clause and the Due Process Clause. These are prime examples of cases fit to be overruled, in that they meet this Court's criteria for overcoming *stare decisis*.

But the *Slaughter-House Cases* need not be overruled. By reaffirming that *Slaughter-House* stands for the proposition that rights applicable to the states through Privileges or Immunities are those inhering in federal citizenship, this Court could extend the right to bear arms—including a political component—through that clause with no adverse doctrinal consequences. Although there are several passages that appear problematic in *Slaughter-House*, all such passages are *dicta*, thus not protected by *stare decisis*, and the rejection of which therefore does not require overruling *Slaughter-House*.

Moreover, the *Slaughter-House Cases* should not be overruled. Doing so would render the Privileges or Immunities Clause a *tabula rasa*, which this Court in the future could interpret to mean anything this

Court chooses, making that clause a cornucopia of various rights devoid of any textual support in the Constitution, with profound implications for both social and economic policy issues in this country, as future Members of this Court could constitutionalize their personal preferences, foreclosing political solutions on these matters.

This is because the Privileges or Immunities Clause, unlike the Due Process and Equal Protection Clauses, has only one major precedent defining its meaning. Thus, removing that constraint renders Privileges or Immunities malleable, which, given that it provides for enforcing certain rights against the states, could profoundly alter the federalist system of governance if those rights were suddenly to be whatever this Court decides they should be, without condition or restraint. Such rights could be social matters or economic entitlements, and empower this Court to override every state and local government or any policy matter this Court chooses.

Stare decisis strongly counsels against overruling the *Slaughter-House Cases*. There is no special justification for overruling *Slaughter-House*. While *Cruikshank*, *Presser*, and *Miller* meet this Court's criteria for being overturned, none of those factors apply to *Slaughter-House*.

There are additional reasons to apply the right to bear arms through Privileges or Immunities instead of Due Process. Fourteenth Amendment jurisprudence has suffered from an overreliance on the Due Process Clause. The first two clauses of the Fourteenth Amendment's first section pertain to citizens, and the last two pertain to all persons. Redirecting rights properly considered under Privileges or Immunities to Due Process has resulted in judges narrowing procedural protections out of concern for the consequently sweeping scope of the Due Process Clause.

Moreover, both the political aspect of the right to bear arms, and the inherent dangerousness of firearms, counsel for Privileges or Immunities over Due Process. This Court's precedent demonstrates that "the people" referenced in the Constitution, such as in the Second Amendment, refer to the U.S. citizenry. While states should enact statutory entitlements to enable law-abiding aliens access to firearms for self-defense, it is not xenophobic to recognize that political rights, whether the right to vote or the right to hold the government in check by an armed citizenry, only extend to American citizens.

Applying the Second Amendment to the states through Privileges or Immunities does not require reworking other aspects of incorporation doctrine. Settled precedents regarding which other provisions of the Bill of Rights are—or are not—incorporated need not be revisited, and this Court may possibly never again face an incorporation question for a provision of the Bill of Rights. Therefore, by preserving the *Slaughter-House Cases*, this case presents a rare opportunity to give effect to the original meaning of the Privileges or Immunities Clause while strictly limiting its implications for any right other than the right to bear arms.

ARGUMENT

The Second Amendment secures an individual right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). Likely the most significant remaining question involving the right to bear arms is whether that right is applicable to the states through the Fourteenth Amendment. This Court is presented with the question of whether the right to bear arms applies to the states—or is "incorporated"[2]—through either the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment. This Court should hold that the right to bear arms applies to the states through the Privileges or Immunities Clause, and should do so without overruling the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

I. THE RIGHT TO KEEP AND BEAR ARMS IS A FUNDAMENTAL RIGHT APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

We note at the outset that this Court's precedents strongly support incorporation through substantive due process. *See, e.g.*, Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 191–96 (2008). If the Court chooses not to rely on the Privileges or Immunities Clause, those precedents undoubtedly dictate incorporation because the right to arms is "fundamental" under any of the tests this Court has articulated. *Heller* itself thoroughly explored the historical evidence indicating that the right to arms is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325–36

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[2] The term "incorporated" originally referred to whether the substantive federal right in question was applicable to the states through being incorporated into the Due Process Clause as an aspect of the doctrine of substantive due process. Klukowski, *Citizen Gun Rights*, *infra*, at 195 n.1. However, it has subsequently become the legal term of art for applying a federal right to the states through any provision of the Fourteenth Amendment, *id.*, and is used in that sense throughout this brief.

(1937), or "fundamental to the American scheme of justice," and "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968). The right to arms also meets the additional criterion of fundamentality under substantive due process later adopted by this Court, as it is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted).

The choice of incorporating the right to bear arms through Privileges or Immunities versus Due Process is partially a choice between first principles and past practice. Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195, 234 (forthcoming Dec. 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290584 [hereinafter "Klukowski, *Citizen Gun Rights*"]. This Court's extensive history with incorporating rights into the Due Process Clause, *see id.* at 203 n.79, in many ways presents the path of least resistance.

But for the reasons explained in this brief, this Court should instead apply the Second Amendment right to bear arms to the states through the Privileges or Immunities Clause.

II. THE RIGHT TO BEAR ARMS CAN BE INCORPORATED THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE WITHOUT OVERRULING THE *SLAUGHTER-HOUSE CASES*.

The right to keep and bear arms found in the Second Amendment can be applied to the states through the Privileges or Immunities Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1, cl. 2. Contrary to Petitioner's arguments, this right to keep and bear arms can be incorporated against the states consistent with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). It presents this Court with a false choice to assert that the Privileges or Immunities Clause must either be a cornucopia of boundless rights or a dead letter that extends no federal rights to the states. Klukowski, *Citizen Gun Rights*, *supra*, at 228. This Court can extend the right to bear arms to the states without overruling *Slaughter-House* by holding that it is a right inhering in federal citizenship.

A. The *Slaughter-House Cases* Holds that Rights Inhering in Federal Citizenship are Applicable to the States Through the Privileges or Immunities Clause.

In the *Slaughter-House Cases*, this Court differentiated between federal rights and state rights, declaring that the rights incorporated to the states through the Privileges or Immunities Clause are those inhering in federal citizenship. Klukowski, *Citizen Gun Rights*, *supra*, at 230; *accord* William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 162–63 (1988); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 746–49 (2003).[3] The foremost focus during the adoption of the Fourteenth Amendment was the rights that these newly-proclaimed U.S. citizens would be able to assert *as American citizens* against the states. *See* Klukowski, *Citizen Gun Rights*, *supra*, at 218 (citations omitted).

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[3] This was evidently also the position of the United States during the Reagan administration. *See* Off. Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, *Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause* 28–31 (1987).

In promulgating the rule that the Privileges or Immunities Clause only extends rights inherent in federal citizenship to the states, this Court was acting to preserve the federal system of government created by the Constitution. For this Court to have decided *Slaughter-House* to the contrary would have interpreted the Privileges or Immunities Clause in an extremely broad fashion that would have imbued federal courts with boundless power over the states. Klukowski, *Citizen Gun Rights*, *supra*, at 228. Had this Court held that the Privileges or Immunities Clause invalidated the Louisiana statute, such a reading could have opened Pandora's Box, arrogating to this Court the role of being "a perpetual censor upon all the legislation of the States . . . with the authority to nullify [any laws] it did not approve." *Slaughter-House*, 83 U.S. (16 Wall.) at 78.

This is especially true given the police-power nature of the challenged Louisiana statute. Public health laws are part of the police power. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (citation omitted). While states wield police power, *id.*, the federal government does not outside federal enclaves and possessions. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). This Court in *Slaughter-House* expressly noted that the challenged statute was a public health measure entailing the police power. 83 U.S. (16 Wall.) at 61, 82. To nullify a state's public health law as violating a right that is not expressly referenced in the constitutional text would have read the Privileges or Immunities Clause so broadly as to effectuate an enormous expansion of federal power. *See* Klukowski, *Citizen Gun Rights*, *supra*, at 226, 228, 229.

B. The Common View that *Slaughter-House* Precludes Incorporation Through the Privileges or Immunities Clause is Based On a Misunderstanding that Has Never Been Endorsed By This Court.

There is perhaps no precedent of this Court for which the gap between what this Court held versus how academic commentators later characterized the case is as great as for the *Slaughter-House Cases*. Many commentators assert that *Slaughter-House* eviscerated the Privileges or Immunities Clause, rendering it unable to incorporate rights against the states. *E.g.*, 1 Laurence H. Tribe, *American Constitutional Law* 1303 (3d ed. 2000). Such an argument claims that *Slaughter-House* "construed the Privileges or Immunities Clause so narrowly as to pave the way for its virtual elimination from the body of the Constitution." *Id.* While that may be what those seeking to advance an agenda of encouraging courts to create new unenumerated rights would like this Court to believe, it thoroughly misreads this Court's precedent. Fortunately, this Court is not bound by this *post-hoc* gloss imposed on *Slaughter-House* by various academics and advocates. Klukowski, *Citizen Gun Rights*, *supra*, at 230.

The anti-incorporation gloss imposed on the *Slaughter-House Cases* is especially odd given that *Slaughter-House* did not involve any enumerated right. *Slaughter-House* was not an incorporation case. *See, e.g.*, Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 1064

(2000); *see also* Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the* Slaughter-House Cases, 109 Yale L.J. 643, 685 (2000).

The *Slaughter-House* Court enumerated some, but not all, of the rights that inhere in federal citizenship, and thus constitute the relevant "privileges or immunities." Moreover, this Court's precedents help define the characteristics of rights that inhere in federal citizenship. After listing certain federal rights, this Court stated that "with the exceptions of these and a few other restrictions, [the rights] of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal Government." *Id.* at 77. *Slaughter-House* then adds that "the right to peaceably assemble and petition for the redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution." *Id.* at 79. This is critical in that these are both express rights in the First Amendment. Klukowski, *Citizen Gun Rights*, *supra*, at 229 n.322.

This in turn suggests that the "privileges or immunities" incorporated by the Fourteenth Amendment are those rooted in the constitutional text. Rights such as assembly and petition are expressly secured by the text. *Slaughter-House* then noted that it also recognized a right to travel across the nation to Washington, D.C., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 36, 44 (1868), and found such a right necessary to exercise the right to petition the government. 83 U.S. (16 Wall.) at 79. Thus rights such as the right to interstate travel that are not expressly granted in the Constitution are among "privileges or immunities" if they are essential to exercising the express rights. Either way, rights inhering in federal citizenship, applicable to the states through Privileges or

Immunities, must be derived from the constitutional text.

Whether a right inheres in federal citizenship is not dependent on whether the existence of the right antedates the Federal Constitution. The Ninth Circuit briefly held that rights of federal citizenship are those created by the Constitution, while fundamental rights that predated the Constitution are incorporated to the states through the Due Process Clause. *See Nordyke v. King*, 563 F.3d 439, 446–47, *vacated for reh'g en banc*, 575 F.3d 890 (9th Cir. 2009). But that is incompatible with this Court's precedent. Klukowski, *Citizen Gun Rights*, *supra*, at 229 n.322. First, this Court has found that the right of peaceable assembly preexisted the Constitution. *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). Second, Members of this Court have said the same regarding the right to seek redress. *See Adderly v. Florida*, 385 U.S. 39, 49 & n.2 (1966) (Douglas, J., joined by Warren, C.J., and Brennan and Fortas, JJ., dissenting). And third, the writ of habeas corpus—which although it is not a provision of the Bill of Rights is nonetheless an enumerated right in the Constitution—also anteceded the Constitution's creation. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2244–51 (2008) (Scalia, J., dissenting). All three of these rights—assembly, petition, and the Great Writ—are referenced by *Slaughter-House* as being among the rights of federal citizenship. *See* 83 U.S. (16 Wall.) at 79.

The two types of rights contemplated in *Slaughter-House*—fundamental rights to be protected by the states and federal rights secured by the U.S. Constitution—are not mutually exclusive. Klukowski, *Citizen Gun Rights*, *supra*, at 230 (citing Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739, 744). Indeed, quite the contrary. Richard L. Aynes, *Freedom: Constitutional Law: Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 648 (1994). For example, the writ of habeas corpus was referenced in the *Slaughter-House Cases* as a fundamental right. 83 U.S. (16 Wall.) at 117 (Bradley, J., dissenting) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (opinion of Washington, J.)). The section of *Corfield* cited therein was also referenced previously in *Slaughter-House* as describing those rights generally considered within the realm of state constitutions and legislation. *See* 83 U.S. (16 Wall.) at 75–77. Yet the *Slaughter-House* Court then expressly mentions habeas corpus as among the rights of federal citizenship, secured by the U.S. Constitution and thus entailed by the Privileges or Immunities Clause. *See id.* at 79. This establishes the principle that certain fundamental rights are also among the "privileges or immunities" of citizens of the United States, and therefore can be extended to the states through the Privileges or Immunities Clause consistent with *Slaughter-House*.

If a fundamental right within the purview of state governments is also manifestly a right against the federal government, then it could be a right of federal citizenship concurrently enforceable by both federal and state governments. Such a right would be one that the states are obligated to extend to out-of-staters under the Article IV Privileges and Immunities Clause, *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), but also independently would be federally enforceable against the states through the Fourteenth Amendment Privileges or Immunities Clause, Klukowski, *Citizen Gun Rights*, *supra*, at 222.

C. The Political Aspect of the Second Amendment Confirms that the Right Inheres in Federal Citizenship, and is Thus Applicable to the States Under *Slaughter-House*.

The Second Amendment entails two distinct, though closely related, interests. The first is a right of self-defense, which this Court recognized in *Heller*. 128 S. Ct. at 2817. This Court recognized that this right was found in the English Bill of Rights of 1689. *Id.* at 2798. A great deal of scholarship has been written on this issue. *See, e.g.*, Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 97–114 (1994). Late medieval, baroque, and colonial authorities are often cited to demonstrate the pre-constitutional lineage of this right. *E.g.*, Montesquieu, *De L'Esprit des Lois* [*The Spirit of the Laws*] bk. X, ch. 2 (1748); John Locke, *The Second Treatise on Government* § 16 (1690); Thomas Hobbes, *Leviathan* 146 (Marshall Missner ed., 2008) (1651). Although less often cited, this literature can be traced to even earlier sources. *See* James Warner, *Disarming the Disabled*, 18 Geo. Mason U. Civ. Rts. L.J. 267, 269–74 (2008) (citing Hugo Grotius, *De Jure Belli ac Pacis* [*The Law of War and Peace*] (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625); Plato, *The Laws*, *in The Collected Dialogues of Plato* 1429 (Edith Hamilton & Huntington Cairns eds., Bollingen Found. 1961) (360 B.C.)).

The second is a political right to hold government accountable by a latent deterrent of armed resistance. Two centuries of almost-unbroken domestic tranquility juxtaposed with America possessing the most powerful military in the world make the importance of this interest difficult to adequately appreciate. Klukowski, *Citizen Gun Rights*, *supra*, at 240. It was very much a concern for the Founding Fathers in 1791, however, *id.* (citing 1 Annals of Cong. 778 (Joseph Gales ed., 1789); *The Federalist* Nos. 24, 46), and also a concern during Reconstruction, when African-Americans were often the victims of violence perpetrated by local authorities in former slave states, *id.* at 249–52 (citations omitted).

Although this Court has not had occasion to thoroughly explore this right, other courts and authorities have done so. As now-Chief Judge Kozinski explained, "the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people." *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., *dissenting from denial of reh'g en banc*). Kozinski continues:

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Id. at 570. This design was articulated by Judge Janice Rogers Brown, who while serving on the California Supreme Court found that, "[e]xtant political writings of the [founding] period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders." *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring). Judge O'Scannlain's opinion for the Ninth Circuit restates this by explaining the Second Amendment "right contains both a political component—it is a means to protect the public from tyranny—and a personal component—it is a means to protect the individual from threats to life or limb." *Nordyke*, 563 F.3d at 451.

This Court recognized the significance of the Second Amendment's political aspect in *Heller*. Disarmament efforts by the British "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799. This Court noted that the Framers' concern was that government would disarm the citizenry to avoid being held accountable. *Id.* at 2801. This Court then concluded that the prefatory clause in the Second Amendment shows that the right was intended as a "safeguard against tyranny." *Id.* at 2802.

It in no way diminishes the right to bear arms to recognize that its *constitutional* status is tied to citizenship. Legitimate governments "derive[e] their just powers from the consent of the governed." The Declaration of Independence, para. 2 (U.S. 1776). Accordingly, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Yet the right to vote is restricted to citizens. *Cf. Burdick v. Takushi*, 504 U.S. 428, 433, 441 (1992) (citations omitted). Even the most important and productive noncitizens in this country cannot cast a ballot. The Constitution differentiates between citizens and aliens in no fewer than eleven instances. *Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting). As a political right possessed only by citizens, therefore, the Second Amendment should be extended to the states through the Privileges or Immunities Clause.

The political right entailed by the Second Amendment is an enforcement provision to preserve constitutional government. "The Second Amendment secured to the people the right to alter or to abolish their government, if necessary." Klukowski, *Citizen Gun Rights*, *supra*, at 248 (citing The Declaration of Independence, para. 2 (U.S. 1776)). The right to hold government accountable and remove tyrannical leaders if absolutely necessary is a "transcendent sovereign right" of the American people. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1133 (1991) [hereinafter Amar, *Constitution*]. So just as voting is a political right to install government officials, the Second Amendment secures a means to remove them if they seek to retain power after the people have affirmatively rescinded their consent via the democratic process.

This anti-tyranny concern against the federal government in 1791 became a concern against state governments in the South in 1868. Klukowski, *Citizen Gun Rights*, *supra*, at 249–52. State governments can be as grave a threat to freedom as the federal government, and thus the safeguard against the latter is also necessary against the former. *See* Eugene Volokh, *Necessary to the Security of a Free State*, 83 Notre Dame L. Rev. 1, 3–6 (2007). Some among the Founding Fathers considered state governments a greater potential threat to liberty than the federal government. *E.g.*, *The Federalist* No. 10 (Madison). Congressman John Bingham was the principal draftsman of the Fourteenth Amendment. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1233 (1992) [hereinafter Amar, *Fourteenth Amendment*]. During Reconstruction, Bingham stated that the amendment's purpose was to protect the former slaves from their own states' tyranny. *See* Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham). Many slave states disallowed even free African-Americans from owning firearms, rendering them unable to withstand local oppression. Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 Harv. J.L. & Pub. Pol'y 443, 448 (1995). The Fourteenth Amendment was designed "to protect the citizens of a state against the state itself." 2 Andrew C. McLaughlin, *A Constitutional History of the United States* 656 (1935). This right to arms need not actually prevent tyranny, Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 3, 13-14 (1996); it need only provide a credible deterrent to tyranny. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 115 (1987). Thus, a citizen's right to check the federal government in the Second Amendment became applicable against states through the Fourteenth Amendment Privileges or Immunities Clause. *See* Klukowski, *Citizen Gun Rights*, *supra*, at 241, 244.

D. Although Three Precedents Must be Overruled to Incorporate the Second Amendment, and Should Be Overruled, the *Slaughter-Houses Cases* Is Not Among Them.

There are three decisions of this Court that must be overruled to apply the Second Amendment right to bear arms to the states. This Court held that the Second Amendment right to bear arms does not apply to the states through the Fourteenth Amendment in *Cruikshank*, 92 U.S. at 551, and reaffirmed that holding in *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894).

This Court has held that "when governing decisions are unworkable or badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (internal quotation marks omitted). Specifically, "the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009). Additionally, *stare decisis* does not bar overruling precedent "where there has been a significant change in, or subsequent development of . . . constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (citations omitted). Beyond those factors, *stare decisis* affords less protection to a precedent involving a constitutional question. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2734 (2007) (citations omitted).

This Court has long since abandoned the assumptions underlying the *Cruikshank* line of cases. These cases were all decided before this Court began applying the Bill of Rights to the states, a concept that now has over a century of precedent supporting it. This Court noted that *Cruikshank* also stated the First Amendment does not apply to the states, *Heller*, 128 S. Ct. at 2813 n.23, reflecting a rationale and reasoning that has long since been jettisoned by this Court. The instant case provides an opportunity for this Court to reexamine the *Cruikshank* line, an opportunity this Court suggested it welcomed. *See Heller*, 128 S. Ct. at 2809–11.

The alternative argument that *Cruikshank* and its progeny leave open the possibility of incorporating the right to bear arms into the Due Process Clause is plausible, but problematic. The Ninth Circuit briefly adopted such an approach, *Nordyke*, 563 F.3d at 448, 457 n.16, and it is advocated by a premiere Second Amendment scholar, *see* Lund, *Anticipating Second Amendment Incorporation*, *supra*, at 195. But for the reasons explained in Part II.C, *supra*, and Part IV.B, *infra*, the Second Amendment also secures a political right that is properly applied only to citizens. Therefore due-process incorporation, while simpler, is less suitable.

The Court should instead formally repudiate the relevant portions of *Cruikshank*, *Presser*, and *Miller*. They meet the criteria this Court has set forth for overruling constitutional precedents, and moreover are prime examples of cases that should be overturned for the reasons explained above. The underlying rationale has long since been rejected by this Court, the reasoning is flawed, and it is inconsistent with subsequent changes in this Court's constitutional law. In so doing this Court would also remove a possible impediment to incorporating the Second Amendment through the Privileges or Immunities

Clause, as one scholar argues that *Slaughter-House* did not strip Privileges or Immunities of the Clause's incorporation potential, but *Cruikshank* did. Palmer, *supra*, at 740–41, 762.

But this Court need not overrule the *Slaughter-House Cases* to extend the right to bear arms to the states. There is no special justification calling for such a holding, if this Court construes *Slaughter-House* as standing for the proposition that Privileges or Immunities extends to the states those rights inherent in federal citizenship. Such an interpretation restricts the scope of this clause to civil rights of a political character, regarding which there have been no adverse doctrinal developments.

There are passages in *Slaughter-House* that, at first glance, seem problematic to the interpretation set forth in this brief. Some such statements lend limited credence to critics' comments that the majority in *Slaughter-House* was attempting in minimize the Fourteenth Amendment's impact. *See, e.g.*, *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). Admittedly, *Slaughter-House* did state that "rights which are fundamental . . . have always been held to be in the class of rights which the state governments were created to establish and secure." 83 U.S. (16 Wall.) at 76 (dictum). Such statements are potentially in tension with finding that a given right inhering in federal citizenship, such as the right to bear arms, is a fundamental right.

But these problematic statements share the common characteristic that they are all *dicta*. Klukowski, *Citizen Gun Rights*, *supra*, at 231–32. *Slaughter-House*'s holding was merely that, whatever the rights of federal citizenship are that apply to the states through Privileges or Immunities, an unenumerated economic right to be free of monopolies is not among them. *Id.* at 229–30. These problematic statements were not essential reasoning to reach this Court's holding. Indeed, most of the *Slaughter-House* opinion is *dicta*. *Saenz*, 526 U.S. at 516 (Rehnquist, C.J., joined by Thomas, J., dissenting); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1072–75 (2000). A proposition asserted in *dicta* but never elevated to a holding as the basis for judgment is not entitled to *stare decisis* protection. *Gonzales v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J., concurring in judgment) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545-46 (2005)).

III. THE *SLAUGHTER-HOUSE CASES* SHOULD NOT BE OVERRULED.

Although, as explained above, this Court could apply the right to bear arms to the states through the Privileges or Immunities Clause while preserving the *Slaughter-House Cases*, it is also clear that this Court could extend the right to the states by overruling *Slaughter-House*. However, overturning the *Slaughter-House Cases* would essentially relegate the Privileges or Immunities Clause to the status of a *tabula rasa*, enabling this Court to redefine Privileges or Immunities in whatever fashion this Court chooses in the ensuing decades.

The consequences of such a tectonic shift in constitutional law are manifold. This Court should reject Petitioner's arguments to overrule the *Slaughter-House Cases*, and instead incorporate the right to bear arms through the Privileges or Immunities Clause while preserving *Slaughter-House*.

A. Without *Slaughter-House*'s Constraining Effect, Privileges or Immunities Could Fundamentally Change the Federal System of Government in the United States.

The Fourteenth Amendment profoundly altered the federal system of government in the United States. In its first section alone, it explicitly declared and conferred U.S. citizenship, extending citizens' rights to the states, and extending rights of due process and equal protection to all persons.

In the intervening years, the Due Process Clause and the Equal Protection Clause have been adjudicated in multitudinous lawsuits, creating voluminous case law governing those two provisions of the Fourteenth Amendment. These precedents limit the extent to which these provisions can be fundamentally reinterpreted.

The Privileges or Immunities Clause, by contrast, has barely been elucidated by this Court. Overruling its sole major precedent could allow a wholesale reordering of the constitutional system. Privileges or Immunities could become a cornucopia of myriad entitlements, such as a constitutional right to healthcare, higher education, a "living wage," "decent" housing, and a clean environment. Kenneth A. Klukowski, *Incorporating Gun Rights: A Second Round in the Chamber for the Second Amendment*, *Engage* Nov. 2009, at 14. This is not a commentary on whether such entitlements are desirable; it is instead an assertion that such policy questions are better decided by the people's elected representatives than the federal judiciary. By limiting the Privileges or Immunities Clause to rights that have a textual basis in the Constitution, either express rights such as petitioning government, or implicit rights such as interstate travel to facilitate the express right of petition, *Slaughter-House* constrains this scenario of judicial activism run amok. Many authorities, including a sitting Member of this Court, have expressed such misgivings about the potential harm that could be brought about through a reinvigorated Privileges or Immunities Clause. *See, e.g.*, *Saenz*, 526 U.S. at 521–28 (Thomas, J., joined by Rehnquist, C.J., dissenting); J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause,* 12 Harv. J.L. & Pub. Pol'y 43, 51 (1989).

This Court's precedent bears out the wisdom of such apprehensions. In earlier days, this Court suggested the possibility of such constitutional entitlements. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) ("[G]overnmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."). Although that case concerned welfare benefits provided by statute, the former Chief Justice of this Court expressed concern as to the constitutional principle that was emerging from that case and others of its era. *Id.* at 283–85 (Rehnquist, J., dissenting) (citing, *inter alia*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969)). Such entitlements bear a resemblance to the economic right asserted by the unsuccessful petitioners in *Slaughter-House*, in that state laws and actions governing the allocation of economic resources, burdens on commerce, and employment issues were being drawn into a Fourteenth Amendment analysis despite the lack of constitutional text specifically supporting the existence of such rights. The former Chief Justice warned that "the Court should observe its traditional respect for the State's allocation of its limited financial resources, rather than justifiably imposing its own preferences." *Id.* at 286.

But such risk can be vitiated by retaining the *Slaughter-House Cases*. This Court has held that there is no constitutional entitlement to welfare. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973); *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970). However, these opinions were handed down under a Fourteenth Amendment jurisprudence wherein *Slaughter-House* limited the Privileges or Immunities Clause to rights of federal citizenship rooted in the constitutional text. Even then, Members of this Court argued for the existence of such constitutional entitlements. *E.g.*, *Rodriguez*, 411 U.S. at 99–101, 111–15 (Marshall, J., joined by Douglas, J., dissenting); *see also, e.g.*, *Dandridge*, 397 U.S. at 508–09, 518–30 (Marshall, J., joined by Brennan, J., dissenting). If recognizing and applying such rights to economic entitlements garners some level of support even under *Slaughter-House*'s limiting effect on federal rights, then it follows *a fortiori* that such rights are far more likely to emerge if the *Slaughter-House Cases* were overturned.

Some have argued, consistent with the theory advanced by Petitioner, that "[t]he abandonment of any meaningful judicial protection for economic liberty has yielded predictable, and tragic, results." Clark M. Neilly III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, *Engage* Nov. 2009, at 18, 22. However, it is not within the purview of this Court to address such matters beyond the enumerated provisions of the Constitution. For this Court to delve once again into questioning the wisdom of economic policies would be a form of "judicial supremacy" that this Court once resorted to in *Lochner v. New York*, 198 U.S. 45 (1905). *United Hauler's Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (plurality opinion of Roberts, C.J.). The fact that *Lochner* designated the locus of such judicial power to be the Due Process Clause instead of the Privileges or Immunities Clause is of no moment. The effects would be the same, as the judiciary would once again arrogate to itself the authority to override the economic policy judgments of public officials that are answerable to the electorate, to effectuate whatever five Members of this Court deem on any given day to be the best economic course of action for any given city, state, or the nation.

B. *Stare Decisis* Weighs Against Overruling the *Slaughter-House Cases*.

The doctrine of *stare decisis* also counsels against overruling the *Slaughter-House Cases*. *Stare decisis* is essential for stability in the rule of law in America's common-law system. *See John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 730, 757 (2008) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). This Court only overrules precedent where there is a special justification for doing so. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

This risk is only heightened in a case such as the instant case, in which this Court is being asked to overturn a longstanding precedent that shapes the entire scope of the extraordinarily-potent Fourteenth Amendment. Although this Court should regard extending the fundamental right to keep and bear arms to the states as a constitutional imperative, this compelling need does not warrant overruling the *Slaughter-House Cases* absent a special justification, especially when there are alternative routes for extending the right to bear arms.

IV. INCORPORATING THE SECOND AMENDMENT THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE WOULD IMPROVE THIS COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE.

There are additional reasons to apply the right to bear arms through the Privileges or Immunities Clause instead of the Due Process Clause. Privileges or Immunities can be considered "an empty and unused vessel which affords the Court the full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses." Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U. L.Q. 405, 420.

A. Fourteenth Amendment Jurisprudence is in Disarray, Partially Traceable to Overreliance on the Due Process Clause.

This Court's Fourteenth Amendment jurisprudence has suffered as a result of the underdevelopment of the Privileges or Immunities Clause.

The Fourteenth Amendment clearly distinguishes citizens from noncitizens. Section One of the Fourteenth Amendment includes four clauses: (1) the Citizenship Clause, defining U.S. citizenship, (2) the Privileges or Immunities Clause, extending the rights of federal citizenship to be actionable against the states, (3) the Due Process Clause, securing procedural rights where the deprivation of life, liberty or property is at issue, regardless of citizenship, and (4) the Equal Protection Clause, guaranteeing equal protection, also regardless of citizenship. Section One therefore neatly divides into two parts, with the first two clauses involving citizens, and the last two clauses involving all persons without respect to citizenship.

The Framers of the Fourteenth Amendment deliberated on the difference of citizens' rights versus the rights held by all persons, as reflected in various drafts of the Fourteenth Amendment. Amar, *Fourteenth Amendment, supra*, at 1225 & n.146 (citation omitted). The rights of citizens were consistently referenced in sharp contradistinction to the rights that all persons present in this country enjoy. Klukowski, *Citizen Gun Rights, supra*, at 218 (citations omitted). As Congress was debating the Fourteenth Amendment, Congressman Bingham reiterated this duality, stating:

> Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens? Is it not [also] essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?

Cong. Globe, 39th Cong., 1st Sess. 1090 (1959). This is consonant with the legal-rights distinction between citizens and noncitizens maintained throughout the nineteenth century. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1390 & n.15 (1992).

Rerouting substantive rights through the Due Process Clause has harmed that clause of the Fourteenth Amendment. Procedural protections in the Due Process Clause have been narrowed, as judges have found substantive due process "pretty scary" and sought to avoid giving too much effect to this one constitutional provision. John Hart Ely, *Democracy and Distrust* 20 (1980). This Court should consider the Framers' "deliberate choice of words" in the Constitution. *Wright v. United States*, 302 U.S. 583, 585 (1938). Those words extend procedural protections to persons regardless of citizenship through the Due Process Clause, and substantive rights to citizens through the Privileges or Immunities Clause. Privileges or Immunities was designed for that purpose, Klukowski, *Citizen Gun Rights*, *supra*, at 218–24, as briefs for Petitioner, Respondent NRA, and supporting *amici* demonstrate.

B. Both the Second Amendment's Political Aspect and the Inherent Dangerousness of Firearms Counsel in Favor of Incorporating Through Privileges or Immunities Rather Than Through Due Process.

In addition to general arguments for incorporating federal rights through the Privileges or Immunities Clause, there are distinctive reasons why the Second Amendment right to bear arms, in particular, should be extended through Privileges or Immunities rather than the Due Process Clause.

The Second Amendment entails a political right that is properly restricted to only citizens. In *Heller*, this Court acknowledged that the phrase "the right of the people" in the Second Amendment is often used to denote the U.S. citizenry. The First Amendment Petition Clause and Assembly Clause are both denoted as "the right of the people." 128 S. Ct. at 2790. This is significant in that this Court in *Slaughter-House* identified both the Petition and Assembly Clauses as rights of federal citizenship within the meaning of the Privileges or Immunities Clause. 83 U.S. (16 Wall.) at 79. This Court also noted that this term is also employed in "We the People" in the preamble of the Constitution, *Heller*, 128 S. Ct. at 2790, and that "the right of the people" carries a political connotation, *see id.* at 2791. None dispute that "We the People" referred to the citizenry of the United States in adopting the Constitution, not all persons present on American soil or even permanent resident aliens. Others have employed similar reasoning to conclude that the Second Amendment is a political right. *E.g.*, Amar, *Constitution*, *supra*, at 1163.

Second Amendment rights are unique in that they are inherently and unavoidably dangerous, with implications for extending such rights of "the people" to aliens coterminously with those of American citizens. "Among the enumerated rights in the Constitution, the right to bear arms is sui generis in that it carries the inherent power to take life; firearms are unavoidably dangerous; guns can kill." Klukowski, *Citizen Gun Rights*, *supra*, at 236–37; *but see United States v. Verdugo-Urquidez*, 494 U.S. 259, 263 (1990) (suggesting that "the people" should be read *in pari materia* throughout the Bill of Rights, including the Fourth Amendment, which has been applied to noncitizens).

This is not to suggest that aliens should be denied firearms. States should retain and enact statutes extending generous firearm rights to law-abiding aliens to enable them a means of self-defense. But these decisions should be made as a matter of state policy, with the resulting rights being statutory in origin, not constitutional. It is not xenophobic to recognize that just as it is patently ridiculous to allow noncitizens to vote, it is likewise inapposite to afford them a right to check by armed force a government of which they are not a part.

C. Applying the Second Amendment To the States Through the Privileges or Immunities Clause Would Not Necessitate Reworking Any Other Parts of Modern Incorporation Doctrine.

Incorporating the right to bear arms through the Privileges or Immunities Clause would work no mischief regarding the precedents of this Court concerning the incorporation of other provisions of the Bill of Rights.

This Court reviews judgments, not opinions. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). Although this principle typically applies to considerations governing the granting of *certiorari* to review the actions of inferior courts, the same reasoning applies here regarding prior incorporation precedent from this Court. This Court has already determined for most of the provisions in the Bill of Rights whether a particular right in is applicable to the states. Moreover, after the instant case is decided, this Court may never again be confronted with deciding whether a particular provision from the Bill of Rights is incorporated. Therefore a decision by this Court to apply the right to bear arms to the states through the Privileges or Immunities Clause will have few, if any, precedential consequences beyond the Second Amendment.

This case therefore presents a valuable opportunity for this Court. This Court can explicate a provision of the Fourteenth Amendment and give effect to its original meaning, while—by preserving the *Slaughter-House Cases*—strictly limiting the implications for rights outside the Second Amendment right to bear arms.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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BRIEF

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In The
Supreme Court of the United States

OTIS MCDONALD, ET AL.,
Petitioners,
v.
CITY OF CHICAGO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO FILE AND BRIEF OF *AMICUS CURIAE* AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONERS

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MOTION OF AMERICAN LEGISLATIVE EXCHANGE COUNCIL FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

The American Legislative Exchange Council ("ALEC") seeks leave under Supreme Court Rule 37.3(b) to file an *amicus curiae* brief in support of Petitioner and urging reversal of the opinion of the Court of Appeals for the Seventh Circuit. The Respondent City of Chicago, Illinois is the only party that has withheld its consent to filing this Brief.

ALEC has a keen interest in the outcome of this matter, just as it did in *District of Columbia v. Heller*, in which it also filed an *amicus curiae* brief. As more fully set out below in its Statement of Interest, ALEC is a non-partisan association of over 1,500 state legislators from across the United States and, as part of its duties, has frequently considered and implemented policy statements and resolutions concerning the individuals' right to keep and bear arms, as well as proposing model legislation concerning gun ownership, use and regulation. ALEC's fundamental focus in such activities is advancing and protecting the individual right to keep and bear arms against encroachment by state, local and federal lawmakers. Toward that end, ALEC seeks to support application of Second Amendment rights to the states and therefore requests leave to file the instant *amicus curiae* brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AMERICAN LEGISLATIVE EXCHANGE COUNSEL

The American Legislative Exchange Council ("ALEC") is the nation's largest non-partisan individual membership association of state legislators.[1] ALEC has more than 1,500 members in state legislatures across the United States. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. Although it may initially appear counter-intuitive for an association of state legislators to support a ruling that would limit state legislative authority by incorporating the Second Amendment to the states, ALEC's position is in keeping with the Jeffersonian vision of limited government and the spirit of the state legislatures during Reconstruction that ratified the Fourteenth Amendment's limit on state abuse of individual rights.[2] ALEC's interests are reflected in several of its official policies and publications.

ALEC has carefully considered myriad public policy issues concerning state and local firearms regulation, including the rights of citizens to keep guns in their homes. In particular, ALEC's *Castle Doctrine Act* codifies and bolsters the common-law right of a person violently assaulted in his or her own house to stand ground and use such force as may appear to a cautious and prudent person to be necessary to save his or her life or to prevent great bodily harm. ALEC has also adopted important model state legislation concerning personal protection on college campuses, concealed carry permit requirements and reciprocity, criminal history record checks for firearm sales, and the rights of firearms owners during public emergencies.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this Brief, in whole or in part, nor has any party or party's counsel made any monetary contribution intended to fund the preparation or submission of this Brief.

[2] Moreover, "to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual." *Pointer v. Texas*, 380 U.S. 400, 414, 85 S.Ct. 1065, 1073, 13 L.Ed.2d 923 (1965) (Goldbert, J., concurring).

ALEC's *Resolution on the Second Amendment to the U.S. Constitution* declares ALEC's overall views on the constitutionally-protected rights of individual citizens to keep and bear arms. The *Resolution* voices ALEC's concern that "several local, state, and federal lawmakers continue to propose measures aimed at restricting firearms including bans, taxation, waiting periods, registration, licensing, and confiscation." Declaring that "the Second Amendment to the Constitution of the United States guarantees each law-abiding citizen the right to keep and bar arms of his choice," the *Resolution* expresses ALEC's view that such problematic restrictions infringe upon the federal constitution protections of an individual's right to keep and bear arms from infringements by federal or state and local government. Instead, the *Resolution* "recommends the rejection of further restrictive firearms laws that only serve to limit law-abiding citizens in the exercise of their constitutionally guaranteed rights while having no effect on the activities of the criminal element in our society."

Consistent with ALEC's current Statement of Interest, and as further testament to it, ALEC also filed an *amicus curiae* brief with the Court in *District of Columbia v. Heller*.

SUMMARY OF THE ARGUMENT

Amicus curiae American Legislative Exchange Council ("ALEC") urges the Court to narrowly hold that the Second Amendment is selectively incorporated to the states under the Due Process clause of the Fourteenth Amendment. Such a holding (1) avoids the need to reconsider the vitality and validity of *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), (2) avoids the need to reconsider or overrule *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876), and *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886), which cases did not address selective incorporation under the Fourteenth Amendment Due Process clause,[3] and (3) is compelled by the Court's prevailing selective incorporation doctrine and its implicit recognition in *District of Columbia v. Heller*, -- U.S. --, 128 S.Ct. 2783, 171 L.Ed. 2d 637 (2008), that the individual right to keep and bear arms is a fundamental right, deeply rooted in our nation's history and traditions and necessary to a regime of ordered liberty.[4]

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[3] *See Nordyke v. King*, 563 F.3d 439, 448, rehearing *en banc* granted, 575 F.3d 890 (9th Cir. 2009) ("*Cruikshank* and *Presser* involved direct application and incorporation through the Privileges or Immunities Clause, but not incorporation through the Due Process Clause").

[4] *Heller* explicitly left open the question presented in this case, which is whether the Second Amendment applies to the states through the Fourteenth Amendment, although it also explicitly noted that *Cruikshank*, in holding that it does not, "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 127 S.Ct. at 2813. n. 23.

The Second Amendment can theoretically be applied to the states in one of three ways. One is by direct application, which is foreclosed by this Court's long-standing precedent that the Bill of Rights applies directly only to the federal government. *Barron v. Mayor of Baltimore*, 32 U.S (7 Pet.) 243, 247-51, 8 L.Ed. 672 (1833).

The second avenue is by incorporation through the Fourteenth Amendment's Privileges or Immunities clause. That avenue is arguably blocked by *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), which held that the Privileges or Immunities clause applies only to rights that are founded upon United States citizenship, but does not protect rights that pre-existed the United States' founding. *Id.* at 74-80. Given this Court's recognition in *Heller* that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," *Heller*, 128 S.Ct. 2797 (emphasis added), under the Court's existing precedent the Second Amendment cannot be incorporated through the Privileges or Immunities clause because the right to keep and bear arms that is protected by the Second Amendment is a right which existed before that amendment, and is therefore not a right that originates in or derives from United States citizenship. That was the holding of this Court in *Cruikshank* and *Presser*.

The third avenue - one which is not blocked by *Barron*, *The Slaughter-House Cases*, or *Cruikshank* and *Presser* – is incorporation under the Due Process clause of the Fourteenth Amendment. Selective incorporation of the Second Amendment through the Fourteenth Amendment Due Process clause is no foreclosed by any of this Court's previous cases, and holding that the Second Amendment is incorporated to the states under the Due Process clause would not require any reconsideration, or disruption of, this Court's existing precedent.

The pivotal question upon which incorporation of the Second Amendment through the Fourteenth Amendment's Due Process clause turns is whether the right to keep and bear arms is a fundamental right, deeply rooted in the Nation's history and traditions, and "necessary to an Anglo-American regime of ordered liberty." In analyzing the historical meaning of the Second Amendment phrases "well regulated Militia, being necessary to the security of a free State" and "keep and bear arms," this Court in *Heller* implicitly and convincingly acknowledged that it is. Therefore, *amicus curiae* ALEC urges that the Court narrowly hold that the Second Amendment right to keep and bear arms be incorporated to the states via the Due Process clause of the Fourteenth Amendment, and reverse the ruling of the Court of Appeals for the Seventh Circuit.[5]

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[5] ALEC does not *oppose* this Court overruling *The Slaughter House Cases*, *Cruikshank* or *Presser* upon a holding that incorporates the Second Amendment to the states through the Privileges or Immunities clause of the Fourteenth Amendment. Indeed, this Court has always recognized that the "doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law," *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94, 56 S.Ct. 720, 80 L.Ed. 1033 (1936) (Stone and Cardozo, JJ., concurring in result), and the Court has "held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235-236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). ALEC's position is simply that the Court can

ARGUMENT

The Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has held that the Due Process clause "guarantees more than fair process, and the 'liberty' it protects is more than the absence of physical restraint." *Washington v Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed. 2d 772 (1977). For over one hundred years this Court has acknowledged "some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law". *Twining v New Jersey*, 211 U.S. 78, 99, 29 S.Ct. 14, 43 L.Ed. 97 (1908).

Although many of the rights from the first eight amendments that this Court has incorporated to the states under the Fourteenth Amendment Due Process clause involve matters of criminal procedure,[6] this Court has never hesitated to hold that various substantive individual rights guaranteed by the Bill of Rights, but wholly unrelated to criminal procedure, are

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selectively incorporate the Second Amendment to the states through the Due Process clause without disrupting any of this Court's existing precedent or Constitutional doctrine.

[6] *See, e.g., Mapp v. State of Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1962) (incorporating to states Fourth Amendment right against unreasonable search and seizure, and exclusion of illegally seized evidence at trial), *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964) (incorporating to states Fifth Amendment right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (incorporating to states Sixth Amendment right to counsel).

incorporated against state action by the Due Process clause of the Fourteenth Amendment. Thus, the First Amendment's guarantee against infringement of the right to "freedom of speech and press . . . may be incorporated in the liberty protected from state action by the Due Process clause of the Fourteenth Amendment." *Roth v. State of California*, 354 U.S. 476, 480, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1959).

Similarly, the First Amendment right to free exercise of religion has been incorporated to the states under the Fourteenth Amendment Due Process clause. A state law establishing or prohibiting the free exercise of religion is a deprivation of "liberty without due process of law in contravention of the Fourteenth Amendment" because the "fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." *Cantwall v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). Therefore, the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* To be sure, the First Amendment's free exercise clause "clearly protects an *individual* right, [and] applies against the States through the Fourteenth Amendment." *Elk Grove Unified School District v. Newdew*, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (Thomas, J. concurring in the judgment) (emphasis added).

Indeed, virtually every right protected by the first eight amendments -- with the notable exception of the Second Amendment – has been incorporated to the states under the Due Process clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), explained that the

Fourteenth Amendment Due Process clause has incorporated to the states numerous rights, both those relating to matters of criminal procedure, as well as those unconnected to criminal procedures, guaranteed by the first eight Amendments:

> [M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures an to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

391 U.S. at 148 (footnotes and citations omitted). *See also id.* at 164 ("our Court has . . . held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government") (Black and Douglas, J.J., concurring).

The simple, straight-forward question presented in this Brief is whether the Second Amendment's prohibition of infringement of the right to keep and bear arms, held in *Heller* to be an individual right, should be incorporated to the states under the Fourteenth Amendment's Due Process clause.

A. Modern Incorporation Jurisprudence Under the Due Process Clause of the Fourteenth Amendment

Heller's reference to the "sort of Fourteenth Amendment inquiry required by us in later cases," which *Heller* noted that *Cruikshank* did not engage in, is a reference to *Duncan*. *Duncan* announced the modern and prevailing test for determining whether an Amendment guaranteeing a right in the Bill of Rights is selectively incorporated to the states under the Due Process clause of the Fourteenth Amendment.[7] That test requires the Court to ask whether the right at issue "is fundamental," meaning whether it is "[it] is necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149, n. 14. The test has also been restated as asking whether the right at issue is "deeply rooted in this Nation's history and traditions," *Nordyke, supra*, 563 F.3d at 449, which is a variation of this Court's test of whether a right is "fundamental" for purposes of substantive due process under the Fourteenth Amendment. *See, e.g., Glucksburg, supra*, 521 U.S. at 719. *See also Nordyke*, 563 F.3d at 449 ("Both selective incorporation and substantive due process require us to pose the same question: is a right so fundamental that the Due Process Clause guarantees it?

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[7] *Duncan* announced that "recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate," 391 U.S. at 149, n. 14, one which asks whether the right guaranteed in the first eight amendments and sought to be incorporated to the states is one that is essential to the English and American system of ordered liberty.

Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights."). If the Second Amendment's guarantee of the right to keep and bear arms is such a right, then it is selectively incorporated to the states; if it is not, it does not limit states from denying the right protected from infringement by the federal government.[8]

B. The Second Amendment Is Incorporated To The States Under The Fourteenth Amendment Due Process Clause Because The Right To Keep And Bear Arms is "Necessary To An Anglo-American Regime Of Ordered Liberty," And Is A Right "Deeply Rooted In Our Nation's History and Tradition."

In determining whether the right to keep and bear arms is "necessary to an Anglo-American regime of ordered liberty," *Duncan*, 391 U.S. at 149, n. 14, or has "any place in our Nation's traditions," *Glucksberg*, 521 U.S. at 723, this Court need look no further than the text of the Second Amendment and its own analysis in *Heller*. *Heller* determined whether the Second Amendment protects an individual or collective right. In holding that it protects an individual right, the Court examined the historical context of the right to keep and bear arms and the understanding of that right at critical points in the Nation's history. *Heller*,

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[8] As the Court of Appeals for the Ninth Circuit summarized in *Nordyke*, the "task is to determine whether the right to keep and bear arms ranks as fundamental, meaning 'necessary to an *Anglo-American* regime of ordered liberty,'" and "[i]f it does, then the Fourteenth Amendment incorporates it." 563 F.3d at 450 (quoting *Duncan*).

128 S.Ct. at 2805 – 2812. Although it was looking for an answer to a different question, *Heller's* historical analysis of the Second Amendment right to keep and bear arms also answered the question of whether the right is "necessary to an Anglo-American regime of ordered liberty" and is "deeply rooted in this Nation's history and tradition." Indeed, Court of Appeals for the Ninth Circuit held in *Nordyke*:

> Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the 'true palladium of liberty.' Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo American conception of ordered liberty that we have inherited.

Nordyke, supra, 563 F.3d at 450.

The right to keep and bear arms has been consistently recognized as a cornerstone of liberty from the time of ratification through Reconstruction. Accordingly, this Court should protect it from infringement by the State of Illinois under the Due Process Clause of the Fourteenth Amendment.

1. By Its Terms, The Second Amendment's Guarantee of the Individual's Right To Keep And Bear Arms Is Necessary To An Anglo-American Regime Of Ordered Liberty.

Before even reviewing its historical context, inherent in the very words of the Second Amendment is the notion that the right to keep and bear arms is necessary to an Anglo-American regime of ordered liberty, for the Amendment itself states that the right it protects is "necessary to the security of a free State." It is, therefore, perhaps the *most* necessary right to an American regime of ordered liberty, since it is the palladium[9] upon which all other rights of liberty in our free society depended for their origin, and upon which they depend for their continued existence.

The Second Amendment, in announcing its purpose in its prefatory clause, *Heller*, 128 S.Ct. at 2789, recognizes that a "well regulated Militia [is] necessary to the security of a free State." *Heller* held that phrase to mean "necessary to the security of a free polity." *Heller*, 128 S.Ct. at 2800. *Heller* also held that the "well regulated Militia" that is "necessary to the security of a free" polity is equivalent to "all able-bodied individuals capable of bearing arms," rather than a specific military institution, body or organization. *Heller* noted that "[i]n *United States v. Miller*, 307 U.S. 174, 179, 59 S.Ct. 816, 83 L.Ed. 1206 (1930), we explained that 'the militia comprised all males physically capable of acting in concert for the common defense.'" *Heller*, 128 S.Ct. at 2799. *Heller* further observed that "[t]he militia of the State . . . [is] every man in it able to bear arms" (quoting The Portable Thomas Jefferson 520, 524 (M. Peterson ed. 1975)), that "the ordinary definition of militia [is] all able-bodied men," and that "the militia consists of all able-bodied men." *Heller*, 128 S.Ct. at 2799-2800. *Heller* summarized the equivocation of "militia" with "all citizens capable of bearing arms" as follows:

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[9] St. George Tucker, who edited "the most important American selection of Blackstone's Commentaries," *Heller*, 128 S.Ct. at 2799, said that the right to bear arms is the "true palladium of liberty." St. George Tucker, *View of the Constitution of the United States*, 1 Blackstone's at 300 (1803). See also Justice Joseph Story, *Commentaries on the Constitution of the United States* § 1890 at 746 (1833) ("[t]he right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic").

> [A]s we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to military duty.

Heller, 128 S.Ct. at 2817.

Thus, *Heller* held that the Second Amendment means that a well regulated body of able-bodied individuals capable of bearing arms is "necessary to the security of a free" polity, and the right of individuals to so keep and bear them, even if untethered to a discrete militia organization, cannot be infringed. Under that interpretation of the Second Amendment, the right of individuals to keep and bear arms is a right that is "necessary to the security of a free State" or polity in which the American regime of ordered liberty exists. ALEC submits that it necessarily and unequivocally follows that the right of individuals to keep and bear arms is "necessary to an Anglo-American regime of ordered liberty."

One need go no further than the text of the Second Amendment and *Heller* to conclude that the right guaranteed by the Second Amendment is "necessary to an Anglo-American regime of ordered liberty," and is therefore incorporated to the states under the Fourteenth Amendment. However, the English and American historical antecedents of the right to keep and bear arms further confirm that it is a long-standing, fundamental right necessary to ordered liberty and deeply rooted in history and tradition.

Heller observed that the Second Amendments' "preface fits [perfectly] with an operative clause that creates an individual right to keep and bear arms" because "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." 128 S.Ct. at 2801. That the right to keep and bear arms is "necessary to an Anglo-American regime of ordered liberty" is clear from *Heller's* conclusion that "[i]t was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be *necessary* to oppose an aggressive military force *if the constitutional order broke down*." *Id*. (emphasis added).

2. English Antecedents[10] Of The Right To Keep And Bear Arms.

The 1689 English Bill of Rights described the right of arms for self-defense to be a "true, ancient, and indubitable" proposition. *Malcolm, To Keep and Bear Arms: The Origins of An Anglo-American Right,* 115 (1994). William Blackstone noted that the rights and "personal security, personal, liberty, and private property" were the three primary rights, or "to vindicate these rights, the subjects of England are entitled to the right of having or using arms for self-preservation and defense." *W. Blackstone, 1 Commentaries* 143-44. Indeed, the right to keep and bear arms was fundamental to the Anglo conception of ordered liberty, because the "Englishman's ultimate security depended not upon the Magna Carta or Parliament, but upon the powers of the sword," and represented "the security without which every other is insufficient." T. McCauley, *1 Critical and Historical Essays, Contributed to the Edinburgh Review* 154, 162 (1850).

3. The Post Ratification Understanding of the Right to Keep and Bear Arms

Heller examined the right to keep and bear arms at the time of the Constitution's ratification. The Court concluded that this right was woven into the fabric of the Nation even before the Nation's founding:

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[10] *Duncan's* reference to an "*Anglo*-American regime of ordered liberty" is significant, for it unambiguously calls for examination of both how the United States, and England before it, considered the right at issue. The Seventh Circuit expressly and erroneously rejected Petitioner's proper "reliance on William Blackstone, *1 Commentaries on the Laws of England* at 123-24, for the proposition that the right to keep and bear arms is 'deeply rooted' . . ." 567 F.2d at 859.

> [T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing right*. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'

Heller, 128 S. Ct at 2797.

Thus, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). In support of its conclusion, *Heller* noted that early commentators such as Tucker and Rawle recognized that an individual's right to keep and bear arms was necessary to the "first law of nature," the right of self defense, and akin to the rights contained in the First Amendment. *Heller,* 128 S.Ct. at 2805. As such, it existed as "one of the fundamental laws of Englishmen" enshrined in the English Bill of Rights long before the American colonies existed. *Id.* at 2797. Not only did the right to bear arms insure a nation able to resist tyranny, it provided the necessary means to self defense. William Blackstone, whom *Heller* called "the preeminent authority on English law for the founding generation," 128 S.Ct. at 2798 (quoting *Alden v. Maine*, 529 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)), considered the right to bear arms one of the "bulwarks of personal rights." *Id.*

The views expressed by legal commentators were reflective of the views of the colonists themselves. As

Heller pointed out, American colonists resisted the English Crown's attempts to limit their right to bear arms. *Heller* at 128 S.Ct. at 2799. As one colonist observed:

> It is a natural right which the people have reserved to themselves, confirmed by the English Bill of Rights to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when sanctions of society and law are found insufficient to restrain the violence of oppression.

Stephen Halbrook, A Right to Bear Arms 7 (1989) (quoted in *Nordyke*, 563 F.3d at 453).

Similarly, state constitutions ratified in the founding era reflected that the right to bear arms was an essential right. As of 1820, thirteen of the twenty three states admitted to the Union contained Second Amendment analogues. *Nordyke*, 563 F.3d at 454-455. The fact that so many states sought to guarantee the right to keep and bear arms constitutes potent historical evidence that the right to is necessary to an Anglo-American regime of ordered liberty and should be incorporated through the Due Process clause to the states. *See Duncan*, 391 U.S. 153 (analyzing state constitutions with respect to whether right to trial by jury is incorporated to states under Due Process clause.)

4. The Period Before and After the Civil War

Heller continued its analysis by looking to the periods before and after the Civil War, which gave birth to the Fourteenth Amendment. *Heller*, 128 S.Ct. 2808-2813. In the antebellum period, at least two state supreme courts – Georgia and Louisiana – recognized the right to bear arms as protecting the "natural right of self defence." *Heller*, 128 S.Ct. at 2809 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)). In fact, the portion of *Nunn* highlighted by the Court is equally applicable to the case at bar as it was to *Heller*:

> Our opinion is, that any law, state or Federal, is repugnant to the Constitution, and void, which contravenes this right originally belonging to our forefathers, trampled by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!

Heller, 128 S.Ct. at 2809.

The passionate defense of the right to bear arms continued after the Civil War when debate arose over the right of freed slaves to possess firearms. *Heller*, 128 S.Ct. at 2810. Many expressed the view that disarming freed men was a violation of their most basic rights. With respect to the freed slaves, Sen. Eliot stated: "Their arms are taken from them by the civil authorities .... Thus the right of the people to keep and bear arms as provided in the Constitution is infringed ...." This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders." *Heller* 128 S. Ct . at 2775. Similarly, *Heller* discussed the importance of the right to bear arms in debate on Reconstruction legislation:

> The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the [Freedman's Bureau] bill, with even an opponent of it saying that the founding generation "*were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.*" *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis)(emphasis added).

Later in the discussions surrounding the Fourteenth Amendment and the Civil Rights Act of 1871, the ability to keep arms was described as "indispensable" to the "safeguard of liberty." *Heller*, 128 S.Ct. at 2811 (quoting Sen. Pomeroy). There is little, if indeed there is any, difference between the right to keep and bear arms being indispensable to the safeguard of American liberty, and it being necessary to an American regime of ordered liberty.

Passage of the Fourteenth Amendment was explicitly linked to the right to bear arms by many involved in the process. For example, "Representative [John] Bingham ... explained that he had drafted §1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), [which held the Bill of Rights was not directly applicable to the states], especially in mind." *Monell v. Dep't of Social Services*, 436 U.S. 658, 686-87 (1978). Bingham himself characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States ... made so by the Fourteenth Amendment." CONG. GLOBE, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

Similarly, when the Fourteenth Amendment was introduced to Congress by Sen. Jacob Howard, the Senator referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution, such as ... the right to keep and bear arms .... The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these *great fundamental guarantees*." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866) (emphasis added). *See Duncan*, 391 U.S. at 166-67 (Black, J. concurring)(citing these comments). This sentiment continued as late as 1891:

> The right to bear arms has always been the distinctive privilege of freemen ... It was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.

Heller, 128 S.Ct. at 2812 (quoting J. Ordronaux, Constitutional Legislation of the United States, 241-42 (1891).) *See also Nordyke*, 563 F. 3d at 456 (concluding that framers of the Fourteenth Amendment considered right to bear arms a crucial freedom).

The historical record surveyed in *Heller* and *Nordyke* unmistakably reflects that Americans have always viewed their right to bear arms as a distinctive, fundamental and necessary instrument of their liberty. Indeed, as the Court of Appeals for the Ninth Circuit noted, "we have here both a right they [the colonists] fought for and the right that allowed them to fight." *Nordyke*, 563 F.3d at 454. This Court should therefore protect both the cause and effect of our liberty by incorporating the Second Amendment in the Fourteenth Amendment.

CONCLUSION

The Court should hold that the Second Amendment right to keep and bear arms is incorporated to the states under the Due Process clause of the Fourteenth Amendment and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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No. 08-1521

IN THE

Supreme Court of the United States

OTIS McDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*

The Anti-Defamation League ("ADL") submits this brief as *amicus curiae* in support of Respondents.[1]

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races. Its charter holds that it was founded "to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals, protects civil rights for all, and, most relevant to this case, has a long history of investigating, monitoring, exposing, and combating extremists.

ADL's efforts to monitor and expose extremists — and to educate the public about the threats posed by extremists — are reflected, in part, in its extensive online reporting on violent extremism and terrorism, including the encyclopedic *Extremism in America*.[2]

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[1] ADL gave at least ten days' notice of intention to file this brief to counsel of record for the parties. The parties themselves lodged letters of consent with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than ADL or its counsel made a monetary contribution intended to fund its preparation or submission.

[2] *See* ADL, *Extremism in America*, http://www.adl.Org/learn/ext_us/ (last visited December 22, 2009); http://www.adl.org/main_Extremism/ (extensive news and resources on extremism), www.adl.org/learn (extremist news and information for law enforcement), and http://www.adl.org/main_Terrorism/default.htm (information relating to domestic

(Continued . . .)

That report includes detailed descriptions of extremist individuals, leaders, groups, movements, and media. ADL has also made good use of its expertise in this area, regularly providing training on extremists and terrorists to law enforcement professionals, and has become the leading non-governmental organization training law enforcement on this critical subject. For example, in October of 2009 alone, ADL trained more than 2,000 law enforcement professionals nationwide on topics related to extremism and hate crimes.[3]

Since 1967, ADL has also advocated for strong, effective, and sensible gun control legislation. ADL has done so, in part, because of its recognition that a culture of guns and violence is pervasive among extremists. In order to address the real and imminent threats posed by extremists and by those who engage in hate crimes, ADL has long maintained that federal, state, and local units of government must have the latitude to adopt measures to regulate the sale, transfer, and possession of firearms.

ADL recognizes that numerous organizations and individuals have submitted helpful *amicus curiae* briefs to the Court focusing on the constitutional

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and international terrorism). *See also* http://www.adl.org/combating_hate/ (hate crimes).

[3] *See* ADL, *ADL Trains Over 2,000 Law Enforcement Officers in October*, November 19, 2009, http://www.adl.org/learn/adl_law_enforcement/le+training+october+2009.htm?LEARN_Cat=Training&LEARN_SubCat=Training_News.

issue presented in this case. Accordingly, while ADL supports Respondents' position that the right to bear arms protected by the Second Amendment is not incorporated against the states through the Fourteenth Amendment, this brief will touch only lightly on this well-trod issue. For the same reason, this brief only summarily addresses the point that, if the Court does hold that the Second Amendment is incorporated against the states, then it should do so through the Due Process Clause of the Fourteenth Amendment, and in a manner that avoids the serious risk of destabilizing long-standing constitutional jurisprudence.[4]

While these matters are important, they are thoroughly and competently briefed by others. Accordingly, this brief largely focuses on a different but no less important point: that this case, perhaps more than any other in the recent memory of the Court, calls for the keenest exercise of judicial restraint because of the nature of the governmental interest in gun control and regulation. Restraint is necessary to allow this Court the opportunity to develop a full and considered Second Amendment jurisprudence as time and occasion demand. And restraint is necessary to allow federal, state, and local units of government the latitude to continue to experiment with varying approaches to firearms regulation in the interest of preserving the safety both of the general public and of members of groups that may be targeted by the disciples of bigotry, extremism, and terror.[5]

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[4] Respondents and other *amici* have provided the Court with useful data regarding gun violence and firearms casualties generally. *See, e.g.*, Brief for Respondents City of Chicago and Village of Oak Park at 13-16, *McDonald v. City of Chicago*, No. 08-1521 (December 2009); Brief for *Amici Curiae* Brady Center to Prevent Gun Violence, The International Association of Chiefs of Police, The International Brotherhood of Police Officers, and The National Black Police Association in Support of Neither Party at 6-11, *McDonald v. City of Chicago*, No. 08-1521 (November 2009). This brief therefore does not address those issues, although ADL's position on gun control also stems from those concerns.

Heller (*District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008) (hereinafter "*Heller*")) devoted hundreds of pages to a *backward-looking* analysis of constitutional language and precedent. ADL respectfully urges the Court to remain mindful of the *forward-looking* implications of the language it uses, of the precedent it lays down, and of the unintended and potentially tragic consequences that might follow from deciding more than this case requires. Plainly put, it is imperative that nothing said in the decision of this case threaten the ability of federal, state, and local governments to address the daunting "on the ground" challenges posed by trying to keep guns out of the hands of extremists, terrorists, and hate criminals.

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[5] Restraint that leaves room for state and local experimentation is arguably more important here than in *Heller* since "[t]he federal government has not been the principal source of gun control." Philip J. Cook, Jens Ludwig, & Adam M. Samaha, *Gun Control After* Heller: *Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1069 (2009).

In an effort to assist the Court in this regard, this brief will provide information about the threat posed by extremism in America — a threat about which ADL has acquired unique expertise. Furthermore, in order to demonstrate the importance of deciding this case on the narrowest possible grounds, this brief will describe the scholarly debate that has emerged regarding possible future directions of Second Amendment jurisprudence — a debate that is lively but, in critical respects, still in its infancy. ADL hopes that these discussions will assist the Court in recognizing the signal significance of exercising judicial restraint in deciding this case.

SUMMARY OF ARGUMENT

Extremists and those who commit hate crimes pose a serious threat to the safety of the general public and, more specifically, to the members of discrete racial, ethnic, and religious groups who often become their targets. Extremist individuals and groups, in particular, tend to share several characteristics: an obsessive fascination with firearms; a paranoiac distrust of the government or a deep-seated hatred for particular minority groups — or both; and a willingness to engage in acts of shocking, often deadly, violence. *Armed* extremism leads to *violent* extremism with profoundly unsettling frequency and profoundly tragic effects.

ADL respectfully urges that the Court's decision in this case must take this threat into account. This holds true for several reasons. *First*, some of the arguments that have been raised against incorporating Second Amendment rights through the Fourteenth Amendment apply with even greater force when the extremist threat enters consideration. *Second,* a ruling that incorporates Second Amendment rights through the Privileges or Immunities Clause of the Fourteenth Amendment, and that destabilizes longstanding constitutional jurisprudence, would likely feed the current wave of extremist antagonism toward non-citizens. *And, finally,* lower courts and legal scholars have only recently begun to interpret *Heller* and to consider critical questions like the proper standard of review for firearms regulation. The extremist threat described below counsels that the Court should decide this case narrowly, so the dialogue below — and experimentation with effective gun control measures — can continue.

ARGUMENT

I.

VIOLENT EXTREMISTS AND EXTREMIST GROUPS POSE A SERIOUS THREAT IN THE UNITED STATES

Richard Baumhammers

Richard Baumhammers was a Pittsburgh attorney and white supremacist. He spent much of his time on the computer, visiting white supremacist Web sites, and tried to start an extremist group of his own. In April of 1999, Baumhammers purchased a .357 magnum revolver — a weapon that would become the instrument of one of the most horrific white supremacist rampages in recent history.

On April 28, 2000, Baumhammers went to the home of his elderly next door neighbor, a Jewish woman named Anita Gordon. He shot and killed Gordon and set her home on fire. He then drove to a nearby synagogue, where he fired shots into its windows and spray-painted swastikas on its walls.

Continuing his attack, Baumhammers fatally shot Anil Thakur, an Indian-American who was buying groceries, and shot Sandeep Patel, the store manager, also an Indian-American. Patel survived, but suffered permanent paralysis and died from complications related to his injuries in 2007.

Baumhammers next made his way to a second synagogue, firing shots into it as well. He drove to a shopping center, walked into a Chinese restaurant, and killed its manager, Ji-ye Sun, and a Vietnamese-American cook, Theo Pham. Finally, he drove to a martial arts school, where he murdered an African-American man, Garry Lee. The gruesome shooting spree, which left five dead and a sixth paralyzed, lasted over two hours.

Pittsburgh police arrested Baumhammers. He was convicted on multiple counts of murder, arson, and hate crimes, and sentenced to death.[6]

Wade and Christopher Lay

Wade and Christopher Lay were two anti-government extremists from Oklahoma who decided to seek revenge for the deadly FBI standoffs at Ruby Ridge, Idaho, in 1992, and Waco, Texas, in 1993. On May 24, 2004, they entered the Mid-First Bank in

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[6] *See* ADL, *Pittsburgh Man Sentenced to Five Death Sentences for Racist Killing Spree*, September 7, 2001, http://www.adl.org/learn/news/Pitt_man.asp.

Tulsa to commit an armed robbery to help fund their war against the government. When Wade Lay pulled out a gun and pointed it at a bank clerk, security guard Kenneth Anderson drew his weapon and opened fire, wounding both men. The Lays fired back, hitting Anderson multiple times and fatally injuring him. As he died in a pool of his own blood, the Lays took flight.

A police search of their residence turned up a trove of anti-government and conspiracy literature, as well as lists of "allies" and "enemies." Eventually apprehended, the Lays sought to conduct a "necessity defense" at trial, claiming that their actions were justified because of the conduct of the federal government. An unrepentant Wade Lay declared that he and his son had acted "for the good of the American people."

A jury convicted both men of murder. On September 28, 2005, Wade Lay was sentenced to death, and Christopher Lay was sentenced to life in prison without parole.[7]

James Von Brunn

James Von Brunn was born in 1920 and grew up in the Midwest, attending college at Washington University in St. Louis. He served in the Navy during World War II. After his military service, he worked in a variety of jobs in half a dozen states. He also began what would become a long and deep relationship with right-wing extremists and anti-Semites.

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[7] *See* ADL, *Father and Son Convicted on Bank Robbery, Murder Charges for Anti-Government Plot*, September 30, 2005, http://www.adl.org/learn/extremism_in_the_news/Anti_Government/lay_convicted_92705.htm?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_the_News.

Von Brunn gained prominence among white supremacists and neo-Nazis by "talking the talk." He published an anti-Semitic book, *Kill the Best Gentiles*. And he operated a notorious anti-Semitic website, which he called "The Holy Western Empire." But Von Brunn gained special stature among extremists because of his willingness to "walk the walk." He conspicuously demonstrated his capacity to do so in 1981, when he charged the Federal Reserve Building with a sawed-off shotgun and other weapons — while the Board was meeting — because of his view that Jewish bankers controlled the international monetary system. Police caught up with Von Brunn just outside the meeting room and arrested him; he was convicted of multiple felonies and sentenced to a lengthy prison term.

After emerging from prison, Von Brunn continued his extremist activities. On June 10, 2009, Von Brunn concluded that the time to "walk the walk" had come again. He made his way to the United States Holocaust Museum, where he opened fire on a security guard before being critically wounded himself.[8] White supremacists across the country celebrated him as a martyr and a hero to the cause.[9]

* * *

Richard Baumhammers, Wade and Christopher Lay, and James Von Brunn do not stand alone in their extremist views, their penchant for violence, and their attraction to firearms. They have company; and lots of it. Indeed, ADL could match the voluminous briefing filed in this case, page for page, with stories like these — even if it limited its attention to the events of recent years.

It is an ugly but inarguable fact that a deeply embedded subculture of extremism has developed in the United States of America. ADL's *Extremism in America* report identifies dozens of notorious extremist leaders, groups, and movements — but these numbers do not even scratch the surface.[10] Consider this: Stormfront — the most popular Internet meeting-place for anti-Semites, neo-Nazis, and other white supremacists — has exploded into a forum with over 6,000,000 posts, 490,000 discussion threads, and 170,000 members.[11] Following Barack Obama's election, so many white supremacists tried to post messages to Stormfront's server that they overloaded it and the site temporarily shut down.[12]

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[8] *See* ADL, *James Von Brunn: An ADL Backgrounder*, June 11, 2009, http://www.adl.org/main_Extremism/von_brunn_background.htm?Multi_page_sections=sHeading_1.

[9] *See* ADL, *White Supremacists Celebrate Holocaust Museum Shooter Suspect as a Martyr and Hero*, June 11, 2009, http://www.adl.org/main_Extremism/White-Supremacists-Celebrate-Shooter.htm.

[10] *See* ADL, *Extremism in America*, *supra*.

In its recent report *Rage Grows in America*, ADL concludes that "[s]ince the election of Barack Obama as president, a current of anti-government hostility has swept across the United States."[13] This development has many dimensions, but one of its most troubling aspects is a corresponding resurgence in the extremist militia movement, which has a long history of criminal violence. Within the past two years, the movement has almost quadrupled in size, growing to more than 200 groups across the United States.[14]

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[11] *See ADL, Extremism in America, Don Black/Stormfront*, http://www.adl.org/learn/ext us/Don-Black/Stormfront.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=5&item=DBlack (last visited December 22, 2009). The pace of activity on the site is profoundly unsettling. For example, on January 4, 2009 Stormfront reported that in the prior sixty days it had gained 10,153 new members, 15,198 new threads, and 227,432 new posts.

[12] *See* ADL, *Extremism in America*, *supra*. *Extremism in America* raises several important points about the number of extremists in our nation. It observes that the population of the United States passed 300,000,000 early in this century, "which means that the fringe of the fringe is still a large number." Furthermore, because extremists are willing to use violence in furtherance of their cause, they can cause harm in amounts disproportionate to their number. *See id.*

[13] *See* ADL, *Rage Grows in America: Anti-Government Conspiracies* at http://www.adl.org/special_reports/rage-grows-in-America/default.asp (last visited December 22, 2009).

Of course, extremists come in many shapes and sizes; not all raise concerns of equal magnitude. But even a cursory review of the profiles of the extremist individuals, groups, movements, and media contained in *Extremism in America* reveals that extremist subculture is permeated with an obsessive fixation on firearms and a perverse fascination with the possible need for a violent "final solution" to fantasized "threats" posed by racial minorities, Jews, non-citizens, the government itself, the Obama administration, and so on. It is therefore unsurprising that this grim potential so often hardens into tragic reality.

Tracking extremist violence and hate crime poses unique challenges; available statistics substantially understate the problem. Nevertheless, even the conservative numbers that can be cited with certainty paint a chilling portrait. According to ADL data, there have been more than 100 domestic extremist-related killings in the United States since 2005, more than half of which involved a firearm. In the last eight years alone, twenty-one police officers have been killed by domestic extremists; all without exception involved a firearm.[15] The FBI documented 7,783 hate crimes in 2008 — the highest national total since 2001.[16] And that was without receiving data from more than 4,000 law enforcement agencies.

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[14] *Id.*

[15] Unpublished data are on file with ADL.

[16] *See* ADL, *FBI Hate Crime Numbers Disturbing; Calls for*

(Continued)

A skeptic might respond that gun control legislation will not keep firearms out of the hands of determined extremists. But this argument proves too much. After all, a skeptic might say the same about determined felons and the mentally ill, yet the Court in *Heller* acknowledged the wisdom of longstanding prohibitions on the possession of firearms by such individuals.[17] In any event, the question before the Court is not whether the states will succeed in frustrating the efforts of extremists and hate criminals to take up arms and commit violent acts. Rather, the question is whether this Court will interpret the Constitution in a manner that prevents the states from trying.[18]

'Coordinated Campaign' To Confront Hate Violence, November 23, 2009, http://www.adl.org/PresRele/HatCr_51/5657_51.htm.

[17] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008).

[18] Some arguments against gun control laws have been raised, ironically, by extremists themselves. One such is that gun control laws act to facilitate the empowerment of extremists. For example, some suggest that gun control eased Hitler's rise to power. In fact, however, "[t]he history of gun control in Germany from the post-World War I period to the inception of World War II is a history of declining, rather than increasing, gun control." Bernard E. Harcourt, *On Gun Registration, the NRA, Adolph Hitler, and Nazi Gun Laws*, 73 Fordham L. Rev. 653, 671 (2004). It was the inability of the German *government* to remain sufficiently strong that allowed Hitler's "street gangs" to "seize[] control of the resources of a great modern State," causing "the gutter to come to power." Allan Bullock, *Hitler, A*

(Continued . . .)

II.

THE COURT'S DECISION SHOULD TAKE INTO ACCOUNT THE SPECIAL THREAT POSED BY EXTREMISTS AND EXTREMIST GROUPS

The foregoing discussion demonstrates the threat posed by violent extremists and extremist groups. Appropriate gun control laws play an important part in addressing that threat. What the Court does in this case could have a profound impact on those laws and, consequently, on the safety of the general public as well as of the discrete groups which find themselves the targets of extremist violence.

These considerations counsel the exercise of the highest degree of judicial restraint.[19] Exercising that

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Study in Tyranny 149 (Harper & Row) (abridged ed. 1991). While Germany had discriminatory laws that barred Jews from having firearms, that proves only the evils of discrimination - prohibited in our country by operation of the First and Fourteenth Amendments regardless of the meaning or even existence of the Second. Surely, historical fact does not support the myth that arming all might allow an oppressed minority, no matter how courageous, to restore democracy and liberty when confronted with a demagogue's larger (and better-armed) army.

[19] The Court has repeatedly expressed the importance of exercising such restraint. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) ("[I]f it is not necessary to decide more, it is necessary not to decide more."), quoting *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

restraint now will afford this Court the opportunity in the future to craft, gradually and incrementally, the sort of nuanced jurisprudence that the Second Amendment demands.[20] Furthermore, the exercise of such restraint will help ensure that federal, state, and local units of government retain as much flexibility as possible to experiment with measures designed to prevent tragedies like those recounted above. Fortunately, the law applicable to this case supports, indeed urges, the exercise of such restraint.

A. The Threats Posed by Extremists and Extremist Organizations Support a Decision that Second Amendment Rights are not Incorporated through the Fourteenth Amendment

As noted above, ADL does not intend to brief fully the question of whether the rights secured by the Second Amendment are incorporated against the states through the Fourteenth Amendment. Other *amicus* and party briefs provide an exhaustive analysis of this question. In this connection, however, ADL does wish to emphasize two points.

First, some of the arguments that have been raised against incorporation become even more compelling when one considers the threats posed by extremists. For example, Lawrence Rosenthal contends that incorporation of Second Amendment rights is not dictated by either the Privileges or Immunities Clause[21] or the Court's current Due Process jurisprudence.[22] With respect to the latter point, Rosenthal observes that "an incorporated Second Amendment would make it effectively impossible for police to raise the risks of carrying guns in public through stop-and-frisk tactics, since gang members would have a constitutional right to carry firearms, as long as they did so openly."[23] He cautions that, in an "urban landscape" where gangs can "act as virtual occupying armies," the "Second Amendment [would become] the enemy of ordered liberty, not its guarantor."[24]

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[20] In a recent law review article, Cass Sunstein predicts that as the jurisprudence of the Second Amendment unfolds the Court "will proceed cautiously, upholding most of the laws on the books and invalidating only the most draconian limitations. . . . We have entered a period of Second Amendment minimalism." Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 Harv. L. Rev. 246, 272, 274 (2008). This elegantly summarizes the approach advocated by ADL.

The prospect of law enforcement without authority to detain someone openly carrying a gun in public becomes even more chilling when we direct our concern toward violent extremists. As *Extremism in America* documents, in the last ten years there have been a number of incidents where violent extremists have walked or driven through a community, making little or no effort to conceal their weapons, destroying property and murdering people who had no reason to suspect they were about to become targets of violence. If Rosenthal is correct, and if Second Amendment incorporation creates the risk that individuals will have a constitutional right to carry firearms openly, then that would offer considerable aid and comfort to the next Richard Baumhammers.

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[21] Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 75 (2009).

[22] *Id.* at 84-90.

[23] *Id.* at 87.

[24] *Id.*

Rosenthal's observations about gangs invite other considerations as well. Gangs operate in specific urban areas; violent extremists can — and do — strike anywhere, including places with limited law enforcement resources. Gangs, by definition, involve groups of individuals whose movements and activities can be monitored; extremists are often isolated individuals who act alone (or with family members). Gangs, Rosenthal suggests, are unlikely to engage in violence in the presence of a law enforcement officer;[25] extremists often direct their violence *against* those law enforcement officers. Rosenthal's point applies *a fortiori* when we take the extremist threat into account. And, in light of that threat, the idea that "ordered liberty" is served by allowing an individual with an openly displayed weapon to walk down a sidewalk toward a synagogue, mosque, or church is not only constitutionally perverse; it is morally appalling.

The *second* point is that a decision against incorporation would preserve our nation's ability to adopt the most effective and appropriate measures to keep guns out of the hands of extremists and terrorists. This follows because most gun control legislation has come from the states, not from the federal government. A decision against incorporation would provide the states with the greatest leeway to innovate and experiment.[26]

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[25] *Id.*

Such an approach advances the principle of federalism that states and local units of government "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). In this spirit, Justice Kennedy has written:

> While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring opinion). The "best solution" for keeping deadly weapons out of the hands of violent extremists is similarly "far from clear." But it is exquisitely clear that no successful experiment has ever emerged from a laboratory that has been shuttered. Incorporation threatens precisely that effect.

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[26] *See* Cook, Ludwig, & Samaha, *supra*, at 1069 ("[A]ggressive gun control efforts tend to occur in a select set of states and cities; the absence of incorporation would leave those jurisdictions untouched by Second Amendment norms.").

B. A Ruling that Incorporates Second Amendment Rights Through the Privileges or Immunities Clause and that Destabilizes Longstanding Fourteenth Amendment Jurisprudence Could Feed Extremist Antagonism and Violence Toward Non-Citizens

As noted above, good reasons exist to doubt that an individual right to bear arms is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968), and is therefore incorporated as to the states through the Due Process Clause of the Fourteenth Amendment. Perhaps for just this reason, Petitioners primarily argue that this Court should incorporate that right through the Privileges or Immunities Clause. Indeed, Petitioners appear to invite the Court into a wholesale reexamination of the meaning of that clause and the predicates for incorporation.

Other *amici curiae* have thoroughly briefed the substantial risks inherent in venturing into this largely uncharted territory.[27] Furthermore, as those briefs explore in considerable detail, this case does not require the Court to reevaluate its existing Due Process Clause decisions, to rethink the bases on which other rights have already been incorporated, or to otherwise destabilize a settled jurisprudence that protects rights and liberties treasured by millions of Americans, including — of particular interest to ADL — freedom from discrimination and religious persecution.[28] ADL will not re-argue points persuasively argued by other amici.

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[27] *See, e.g.*, Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Neither Party at 15-26, *McDonald v. City of Chicago*, No. 08-1521 (November 23, 2009).

ADL does, however, wish to raise an issue not touched upon in the other briefs. Some briefs have expressed concern about a ruling that would broadly call into question the constitutional validity of state gun control laws; others have expressed concern about a ruling that would bring uncertainty to the textual foundation for rights that have already been incorporated and that protect discrete populations that have historically been the targets of discrimination and persecution. But it does not appear that any other *amicus* has pointed out the terrible, if wholly unintended, consequences that could follow from a decision that does both of these things simultaneously.

Consider, for example, a decision that rules precisely as Petitioners ask, *i.e.*, it incorporates the right to bear arms through the Privileges or Immunities Clause and it suggests that this provision, rather than the Due Process Clause, provides the constitutionally correct vehicle for incorporation. Among other things, such a decision would cast into doubt the civil rights of non-citizens[29] while at the same time granting broader rights to extremists to arm themselves against the fantasized non-citizen "threat."[30] In a nation with a rising tide of extremism, hate crime, and rage — and rising numbers of immigrants — this would be a perilous coincidence of precedents.

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[28] *Id.*

C. Judicial Restraint Is Appropriate Here Because Lower Courts and Legal Scholars Have Only Just Begun to Interpret *Heller*

Finally, ADL urges judicial restraint in this case because, in many important respects, interpretation by the lower federal courts and the scholarly community of the Second Amendment rights acknowledged in *Heller* has only just begun. *Heller* was decided less than two years ago and it intentionally and explicitly left a number of issues open for scholarly consideration and debate. And, as to at least one of the most significant of those issues — the proper standard of review for gun control legislation — the scholarship has only begun to emerge.[31]

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[29] While the Due Process and Equal Protection Clauses of the Fourteenth Amendment allude to "person[s]," the Privileges or Immunities Clause refers to "citizens." Existing precedent under the Due Process clause makes clear that the protections of the Bill of Rights apply to non-citizens. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982). In contrast, the reach of the Privileges or Immunities Clause is, at best, unclear. *See, e.g.*, Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 Nw. U. L. Rev. 923, 966 (2009).

[30] *See* ADL, *White Supremacists Ratchet up Anti-Hispanic Action as U.S. Immigration Debate Rages*, May 24, 2006, http://www.adl.org/PresRele/Extremism_72/4822_72.htm.

The scholarship to date raises a wide array of issues and possibilities with respect to potential approaches to the standard of review. One recent article assesses the state of affairs in these terms: the Court in *Heller* did not "prescrib[e] any particular model for judicial review of Second Amendment claims over the long term. And there is no consensus model that judges could import from other fields of constitutional adjudication."[32]

Another article that has proved influential actually appeared shortly before the Court decided *Heller*. In that article, Adam Winkler examined the arguments supporting application of the strict scrutiny standard and found them unpersuasive.[33]

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[31] Jason T. Anderson, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. Cal. L. Rev. 547, 548 (2009).

[32] Cook, Ludwig, & Samaha, *supra*, at 1066. ADL offers the following description of the existing scholarship in order to provide the Court with an overview of the variety and kinds of issues and arguments that have been raised. ADL does not do so in order to endorse or advance any of the positions reflected in that scholarship.

[33] Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007). Winkler notes that "the important question of what standard of review would apply to laws burdening the right to bear arms" has been "[m]ostly overlooked in the literature." *Id.* at 685. *See also* Stuart Banner, *The Second Amendment, So Far*, 117 Harv. L. Rev. 898, 907-08 (2004) (book review) ("A final area that could use more

(Continued . . .)

After *Heller*, others have concurred in Winkler's analysis.[34] Because that article has become foundational to the post-*Heller* debate, a brief summary of Winkler's thinking may be useful.

Winkler identifies and analyzes three arguments that might be raised in support of applying strict scrutiny in this context. The first "is that, as a textual provision in the original Bill of Rights, the individual right to bear arms necessarily warrants [such] heightened review."[35] Winkler points out that this argument errs in its premise that all rights based in the provisions of the Bill of Rights trigger strict scrutiny. In fact, Winkler observes, most of the Bill of Rights guarantees do not do so. As Winkler notes, the Court has applied strict scrutiny in cases involving the First and Fifth Amendments, but not in cases involving the Third, Fourth, Sixth, Seventh, Eighth, Ninth, or Tenth Amendments. "From this," he argues, "we might conclude that textual grounding in the Bill of Rights creates a presumption *against* strict scrutiny."[36]

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attention is the plumbing. What exactly will the doctrine look like? What kinds of regulation will be unconstitutional? Which guns? Which people? Which situations? This is lawyerly detail, well below the level of most of the debate thus far, but it is detail that may be important one day.").

[34] *See, e.g.*, Anderson, *supra*; Mark Tushnet, *Permissible Gun Regulations after* Heller: *Speculations about Method and Outcomes*, 56 UCLA L. Rev. 1425, 1428 (2009).

[35] Winkler, *supra*, at 693.

[36] *Id.* at 694 (emphasis added).

Furthermore, Winkler observes, "even the individual rights in the Bill that do trigger strict scrutiny only receive the protection of such review some of the time."[37] Strict scrutiny does not apply, for example, to content-neutral restrictions on speech, to regulations of public employee speech, to generally applicable laws that burden religious practices, or to limitations on a number of rights secured by the Fifth Amendment.[38] Winkler concludes that "one thing is clear: strict scrutiny is not automatically the applicable standard simply because the right is textually grounded in the Bill of Rights." Instead, the Court has often protected those rights through rational basis scrutiny, reasonableness review, and other tests.

Winkler next turns his attention to the related argument that strict scrutiny should apply because the rights protected by the Second Amendment are "fundamental."[39] Winkler responds by observing that, even among rights the Court has deemed fundamental or "preferred," strict scrutiny is not always applied. He notes, for example, that the Court has not applied strict scrutiny where the burden placed on a fundamental right is incidental, rather than substantial. Indeed, he concludes that "[t]his approach is common in speech, religion, and privacy cases."[40]

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[37] *Id.* at 695.

[38] *Id.* at 695-96.

[39] Winkler notes that the Court has never precisely explained what determines whether a right fits the definition of fundamental. He therefore identifies three potential bases for concluding that a right qualifies as such: (1) it appears in the Bill of Rights; (2) it has been incorporated against the states; or (3) it has been clothed with special judicial protection. *Id.* at 698. For purposes of argument, Winkler assumes that Second Amendment rights qualify as fundamental for one or more of these reasons. *Id.*

Finally, Winkler analyzes the rationales offered to support the application of strict scrutiny to laws burdening other rights and finds they have little or no application with respect to gun control laws. One such rationale is that strict scrutiny is essential to "smoke out" invidious and illegitimate motives that may underlie regulation. But, as Winkler observes, "[t]he motive behind most gun control laws is to enhance public safety[,] a perfectly legitimate goal for government."[41] Strict scrutiny, he contends, should be "reserved for areas of law, such as race discrimination and restriction on political speech, where we would expect most, if not all, regulation to be invidious."[42]

A scholarly consensus appears to be emerging in support of Winkler's conclusion and around the proposition that the traditional strict scrutiny standard is neither constitutionally required nor practically sensible with respect to the right to bear arms.[43] Beyond that, however, the literature goes in a number of different directions. Indeed, it has the hallmarks of a conversation that has only begun.

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[40] *Id.*

[41] *Id.* at 701

[42] *Id.* at 702. Winkler also discusses the rationale that strict scrutiny exists to provide breathing room to certain rights — such as those embodied in the free speech clause of the First Amendment -- that are central to the functioning of the democratic process. He questions whether an individual right to bear arms fits this description. *Id.* at 704.

Winkler himself argues for application of a "reasonable regulation" standard, based on the text of the Second Amendment;[44] the history of firearm regulation by the states both before and after the adoption of the Second Amendment;[45] considerations of federalism, separation of powers, and institutional competence;[46] and the interpretations state courts have offered of concomitant state constitutional provisions.[47] He acknowledges that this test is highly deferential to governmental decision making, even though not as forgiving as the "rational basis" standard found in Equal Protection cases.[48] All of this said, Winkler further concedes that the core of contemporary gun control legislation might survive an intermediate standard or even strict scrutiny itself.[49]

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[43] *See* note 33, *supra*. *See also* Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash. & Lee L. Rev. 1095, 1132 (2000).

[44] Winkler points out that the First Amendment states that "Congress shall make no law" abridging the rights it protects, but the Second Amendment explicitly incorporates the "necessity" of a "well regulated Militia": "One provision suggests the invalidity of any legislation; the other invites regulation." Winkler, *supra*, at 707.

[45] *Id.* at 708-712. *See also* Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford University Press 2006).

[46] Winkler, *supra*, at 712-15.

[47] *Id.* at 715-18.

But others have raised different possibilities. Some have advocated for rational basis "with bite."[50] Some have suggested the adoption of something like traditional intermediate scrutiny.[51] Some have proposed a kind of "semi-strict scrutiny," residing between strict and intermediate standards.[52] And some have even proposed eschewing existing standards of scrutiny altogether.[53] This dialogue is engaging, insightful, and informative, but also still in its formative stage.

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[48] Winkler points out, for example, that a state's decision to disarm its citizenry completely might survive rational basis review but would not pass the reasonable regulation test. *Id.* at 717. Interestingly, the examples Winkler offers of the types of regulations state courts have upheld under the reasonable regulation test, *see id.* at 720-22 (bans on particular kinds of weapons, bans on the possession of firearms by convicted felons, and licensing laws) are remarkably consistent with this Court's rulings in *Heller* that (1) various kinds of weapons can be banned, (2) "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons", and (3) Heller won only the right "to register his handgun" — assuming he was not otherwise disqualified from doing so. *Heller*, 128 S. Ct. at 2817, 2816-17, and 2822.

[49] *Id.* at 727-32.

[50] Tushnet, *supra*, at 1426.

[51] Anderson, *supra*, at 548.

[52] Massey, *supra*, at 1133

In a law review article written shortly after the Court decided *Heller*, Mark Tushnet presciently observed that "[a]fter *Heller*, the first important question the Supreme Court will have to decide is incorporation. And, in doing so, it need not address any substantive questions about the Second Amendment's scope."[54] Like *Heller* itself, this case does not present a necessary or even appropriate occasion for the Court to address the nettlesome issues of scope and scrutiny — issues where further lower court developments and scholarly analysis would inform and assist the Court's analysis in deep and important ways. But perhaps the point is best made by invoking an observation offered by the Chief Justice during the oral argument of *Heller* itself: "But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?"[55] Indeed, for the reasons explored above, such an effort would not only be jurisprudentially imprudent; it would be extraordinarily dangerous.

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[53] *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1446 (2009) (arguing that "the question should not be whether federal or state right-to-bear-arms claims ought to be subject to strict scrutiny, intermediate scrutiny, an undue burden standard, or any other unitary test. Rather, as with other constitutional rights, courts should recognize that there are [differing] categories of justifications for a restriction on the right to bear arms.").

[54] Tushnet, *supra*, at 1426.

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[55] Transcript of Oral Argument at 45, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf.

CONCLUSION

The principle of judicial restraint dictates that when it is not necessary to decide more, then it is necessary not to decide more. This principle applies with singular force to this case. After all, the exercise of judicial restraint reflects the kind of reasoned caution that is appropriate when the stakes are high. In this case, the stakes are, quite literally, a matter of life and death. The judgment of the court of appeals should be affirmed.

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OTIS MCDONALD, ET AL., *Petitioners,*

v.

CITY OF CHICAGO, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for The Seventh Circuit

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AMICUS CURIAE BRIEF OF THE APPELLANTS FROM THE NINTH CIRCUIT INCORPORATION CASE of *NORDYKE V. KING,* MADISON SOCIETY, and GOLDEN STATE SECOND AMENDMENT COUNCIL – IN SUPPORT OF REVERSAL

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I. INTERESTS OF AMICI[1]

Russell and Sallie Nordyke, along with the other named plaintiff/appellants in the case of *Nordyke v. King,* 563 F.3d 439 (9th Cir. 2009), have a special interest in the outcome of this case. They are gun show promoters, exhibitors and vendors who operate at county fairgrounds throughout Northern and Central California. The County of Alameda passed an ordinance forbidding the possession of guns on county property, which includes the County Fairgrounds. The ordinance was intended to, and has the effect of banning the Nordykes' gun shows at that venue.

A *sua sponte* order was issued by the Circuit for the case to be reheard *en banc. Nordyke v. King,* 575 F.3d 890 (9th Cir. 2009). *En banc* argument took place on September 24, 2009. The case was then withdrawn from submission pending the outcome of this case.

Amicus Virgil McVicker, in addition to being a named plaintiff in the *Nordyke* case, is president of the Madison Society. The society is a membership organization whose purpose is to sponsor public interest litigation to preserve and protect the constitutional right to keep and bear arms for its members and all responsible law-abiding citizens.

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[1] The parties were notified ten days prior to the due date of this brief and all consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel for party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus Golden State Second Amendment Council is an open membership association based in the San Francisco Bay Area of California. The purpose of the association is to educate the general public and influence public policy regarding the right to keep and bear arms; including but not limited to the right of self-defense, the rights of hunters, and the hobbies of collecting and sport shooting of firearms.

II. ARGUMENT SUMMARY

Even though incorporation is the question presented by the grant of *certiorari* in this case; the historical analysis of the fundamental nature of the "right to keep and bear arms" and its significance to American jurisprudence, has already been fully examined by this Court in *District of Columbia v. Heller*, 554 U.S. ___ , 128 S. Ct. 2783, (2008).

That historical/legal analysis already makes a sufficiently strong case for Fourteenth Amendment *due process* incorporation of the Second Amendment under the test in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), a three-judge panel of the Ninth Circuit performed the required analysis suggested by this Court in *Heller*, 128 S. Ct. at 2813 n.23. That opinion, found the Second Amendment incorporated against state and local governments.

The Seventh Circuit demurred on the incorporation question. *McDonald v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009). However, even if *stare decisis* trumps the plain language and contemporary understanding of the Fourteenth Amendment, the Seventh Circuit still had a duty to articulate constitutional reasons for denying the *McDonald* plaintiffs the protections of the Second Amendment. The three-judge panel in that Circuit did not even perform the *Duncan v. Louisiana* "required analysis." This is sufficient justification for reversal.

The clear implication of the question presented by *certiorari* in the *McDonald* case is that the mechanism of incorporation for the Second Amendment will be through the Fourteenth Amendment's Privileges or Immunities Clause and/or its Due Process Clause.[2] This would suggest that the Supreme Court may be open to a reexamination of its holding in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

Purging the legacy of *Slaughterhouse* is reason enough to reconsider the post-civil war insurgency against the Fourteenth Amendment manifested by that case and its progeny.[3] However, overruling *The Slaughterhouse Cases* is only useful to Second Amendment litigants and the lower courts if this Court provides a standard of review for the underlying fundamental right.

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[2] Silberman, L., *The Law and More with Judge Laurance Silberman*. Stan. U. (Aug. 5, 2009), suggests the Second Amendment may not require incorporation because it is broadly written and does not address Congressional authority like the First Amendment's "Congress shall make no law [...]." Video and transcript: http://www.hoover.org/multimedia/uk/63317727.html

[3] *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Ill.*, 116 U.S. 252 (1886); *Miller v. Tex.*, 153 U.S. 535 (1894); and *The Civil Rights Cases*, 109 U.S. 3 (1883).

A second plain error made by the Seventh Circuit was its suggestion (almost an implied finding) that the right of self-defense itself can be abrogated by state and local governments. That implied finding not only contradicted *Heller* itself – it ran afoul of dozens of Supreme Court cases holding that the right of self-defense is recognized by our constitutional case law in ways that should make it enforceable against the states by any method of incorporation. *See Logan v. United States*, 144 U.S. 263 (1892); *Gourko v. United States*, 153 U.S. 183 (1894); *Starr v. United States*, 153 U.S. 614 (1894); *Thompson v. United States*, 155 U.S. 271 (1894); *Beard v. United States*, 158 U.S. 550 (1895); *Allison v. United States*, 160 U.S. 203 (1895); *Brown v. Walker*, 161 U.S. 591 (1896); *Wallace v. United States*, 162 U.S. 466 (1896); *Alberty v. United States*, 162 U.S. 499 (1896); *Acers v. United States*, 164 U.S. 388 (1896); *Allen v. United States*, 164 U.S. 492 (1896); *Rowe v. United States*, 164 U.S. 546 (1896); *Andersen v. United States*, 170 U.S. 481 (1898); and *Brown v. United States*, 256 U.S. 335 (1921).[4]

The modern talisman of the three-tiered method of judicial scrutiny was not explicitly used in these turn-of-the-century cases. Perhaps that is why these cases were overlooked by the Seventh Circuit.

In those states that do not have a state constitutional right to keep and bear arms (California, Iowa, Maryland, Minnesota, New Jersey and New York) this newly incorporated right will be the only substantive protection of this enumerated right.

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[4] Collected from: David Kopel, *The Supreme Court's Thirty-Five Other Second Amendment Cases*. 18 St. Louis University Public Law Review 99 (1999).

In those states with a Second Amendment analog in their constitutions, incorporation will guarantee a baseline right, in much the same way that the criminal procedure protections of the Fourth, Fifth, and Sixth Amendments have standardized the minimum rights afforded the accused throughout the United States.

Incorporation of the Bill of Rights is a form of constitutional preemption that insures a baseline uniformity of the rights, privileges and immunities of all persons entitled to the protections of our Constitution, in every jurisdiction subject to its reach. This is the very essence of the Fourteenth Amendment.

Of course enforcement of constitutional rights against the states, does not prevent those states from affording greater protection of those rights. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), for operation of this principle in a First Amendment context.

The incorporation issue was foreshadowed, but not compelled, by the facts of *Heller*. It may be argued that the scrutiny question is similarly not yet ripe for resolution in the *McDonald* case. However when the court below spent as much ink on how the Second Amendment might be applied in the states (i.e., a state might have the power to nullify the right of self-defense), as it did about whether it applies to the states, it was addressing scrutiny.

When a lower court passes on an issue *sua sponte*, the issue may properly be presented to the Supreme Court. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). (raising such an issue before the Court is particularly appropriate where the question (1) is in a "state of evolving definition and uncertainly," and (2) is "one of importance to the administration of federal law"). See also *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), ("even if this were a claim not raised by the petitioner below, we would ordinarily feel free to address it since it was addressed by the court below").

Since judicial scrutiny and the incorporation issues are inextricably intertwined in *McDonald*, this Court should resist the minimalist approach of *Heller* now that the Second Amendment will apply in 50 more jurisdictions. The sheer number of potential cases and controversies that may arise after incorporation of this Amendment suggests that this Court may want to address the scrutiny issue now, even if only in the name of judicial economy.

III. WHY SCRUTINY MATTERS

The rules for judicial scrutiny of the Second Amendment are critical for at least two reasons: (1) to define the substantive "right to keep and bear arms" in a way that insures uniform justice throughout the United States, and (2) to keep judicial scrutiny of fundamental rights in general – as a device for insuring liberty – from turning into a unprincipled empty gesture with no application to future cases.

The *Heller* opinion made it clear that certain long standing regulations of the right to keep and bear arms were presumptively valid under the Second Amendment. *Heller*, at 128 S. Ct. 2816-17. However the Court provided no abstract rules for determining that validity beyond the concrete examples cited.

Several cases involving felons in possession of firearms have attempted to exploit *Heller*. *See e.g.*, *United States v. Gilbert*, 286 Fed. Appx. 383, 2008 U.S.

App. LEXIS 15209 at 4-5 (9th Cir. 2008) (noting that the possession of machine guns and short-barreled rifles and possession of firearms by felons are all still prohibited post-*Heller*); *United States v. Harden*, 2008 U.S. Dist. LEXIS 54717, at *1-2 (D. Or. 2008) (upholding prohibition on possession by felons). *United States v. White*, 2008 U.S. Dist. LEXIS 60115, 2008 WL 3211298 (S.D. Ala.)(citing *United States v. Walters*, 2008 U.S. Dist. LEXIS 53455, 2008 WL 2740398 (D.V.I.))("no court has, ever under an individual rights interpretation of the Second Amendment, found 18 U.S.C. § 922(g) constitutionally suspect."). With justification, these cases were summarily adjudicated in accordance with the *Heller* decision, i.e., the Second Amendment does not protect violent criminals.

But most guns in the United States are possessed by law-abiding citizens. A rule for scrutinizing state action that touches on Second Amendment rights is particularly critical when the government is interfering with the rights of the law-abiding when they are engaged in activities that are already well-regulated and that present no danger to the public.

The *Nordyke* three-judge panel ultimately found for the County in that case and the ordinance withstood challenges under the First, Second, and Fourteenth Amendments. Whether the *Nordyke* three-judge panel's scrutiny analysis on those claims was correct is still an open question. An analysis of that opinion, as it relates to scrutiny (on the First, Second, and Fourteenth Amendment claims) is presented here in the hope that this information will aid the Court in resolving the incorporation and scrutiny issues raised in the *McDonald* case.

A. The *Nordyke* Panel's Scrutiny Analysis Was Just Plain Wrong.

The Supreme Court did not announce a formal standard of review in *Heller*. This omission was criticized in *Nordyke*, at 563 F.3d 458. However, **rational basis** is clearly off the table. *See Heller*, at 128 S. Ct. 2818, n.27.

Even though the *Nordyke* panel suggested that Second Amendment rights should trigger the same strict scrutiny standard of review as First Amendment rights *Nordyke*, at 563 F.3d 458, n.19; they appeared to abandon that test when they proceeded to engage in the kind of balancing test rejected by *Heller*, at 128 S. Ct. 2821. *See Nordyke*, at 563 F.3d. 457-60.

The *Nordyke* three-judge panel also invoked a "sensitive places" doctrine/definition that was introduced, but not explained, in *Heller*, at 128 S. Ct. 2816-17. See *Nordyke*, at 563 F.3d. 459-60.

What is unique about the *Nordyke* fact pattern is that it is particularly well suited to a discussion of "judicial scrutiny" as a legal doctrine, because it forces us to compare and contrast a new application (Second Amendment) of tiered scrutiny with those areas of constitutional law that have historically analyzed rights in this way. (e.g., First Amendment and Equal Protection). Even if the *Nordyke* panel got the result right, Second Amendment litigants in the *McDonald* case (and throughout the country) would benefit from an authoritative explanation from this Court as to why they got it right.

The Nordykes held their gun shows at the County Fairgrounds, without incident, for more than 10 years before the case was filed in 1999. They have continued to hold gun shows at other fairground venues for more than 20 years. The California Department of Justice and local law enforcement testified that the gun shows promoted by the Nordykes, locally and throughout the state, are safe and well regulated.

The government in the *Nordyke* case admits that the gun shows at the fairgrounds are neither a primary nor a secondary source of crime. Alameda County cites no discreet public safety reasons for its ordinance. Its sole justification is generalized statistics about violent crime rates, which have nothing to do with the Nordykes' gun show activities.

Nordyke's First Amendment component rests on the Defendants' concession that possession of guns at gun shows can convey particularized messages, likely to be understood by their intended audience. The author of the ordinance (King) even announced in a press release that the purpose of the law was to ban gun shows and eliminate the fairgrounds as "*a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism*."

The Equal Protection aspect of the case arises because the County permits the Caledonian Scottish Games to possess firearms at the fairgrounds for their expressive purposes, but still prohibits gun shows that operate under substantially identical regulations.

The right to possess a gun at a gun show arises out of an ancillary "right to keep" which implies a right to acquire or purchase. The Second Amendment protects two distinct rights – "the right to keep" and "the right to bear" arms. *Heller*, at 128 S. Ct. 2830-31. It also arises out of the "right to bear" or carry arms for lawful purposes. *Heller*, at 128 S. Ct. 2793 *passim*.

The County of Alameda has even maintained the absurd position that gun shows and gun sales can take place on county property (e.g., the Fairgrounds) as long as no guns are present.

There is no so called "gun show loop-hole" in California as state law requires that all firearm sales (including those at gun shows) be processed through a federal and state licensed firearm dealer. The County conceded that the Nordykes' gun shows complied with all federal and state laws, and all safety regulations relating to gun shows and firearm transactions.

A recitation of the sheer volume of federal and state laws regulating sales, possession and gun show activities would exceed the limited space permitted in this brief. It is an undisputed fact that the promoters, exhibitors, vendors and patrons comply with all these laws. Brief examples include: (1) guns at gun shows must be unloaded and **secured in a manner that prevents operation**, except for brief periods of mechanical demonstration for a prospective buyer; (2) no person (except security and sworn peace officers) may possess a firearm and the ammunition for that firearm at the same time; (3) no person under 18 years is permitted to attend a gun show unless accompanied by an adult; and (4) no person may bring a gun to a gun show unless they have a government issued photo identification, and the firearm must be tagged and identified with the information from that I.D.

These state/federal laws are substantially identical to the exceptions for gun possession contained in the Alameda ordinance. Yet the *Nordyke* panel found no violation of equal protection (in the exercise of a fundamental right) when it differentiated the gun shows from the Caledonian Scottish Games.

The *Nordyke* panel cited *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992), and *Harris v. McRae*, 448 U.S. 297, 315-16 (1980), for the proposition: "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." But these cases dealt with a demand that government maintain medical facilities, personnel, funding and equipment to perform abortions for women (indigent or not) who sought to exercise their right to an abortion. Furthermore, the laws forbidding abortions that were challenged in these cases all had lifesaving exceptions for the life of the mother. See *Casey*, at 505 U.S. 877-95. Self-defense (preservation of innocent life) is the primary right recognized in *Heller* for which keeping, bearing, and acquiring arms is the means.

The *Nordyke* plaintiffs were not asking the Court to force the County to maintain the fairgrounds so that they could conduct gun shows. They were asking to compete on a level playing field with other organizations (e.g., Scottish Games, County Fair, Auto Shows, Dog Shows, Antique Shows, Sportsman Shows, Art Shows, etc...) that leased the fairgrounds for their events.

The County had not offered a scintilla of evidence that the Nordykes' gun shows imposed a greater burden on the County than any other event. In fact, the Nordykes contribute to the County by paying to lease the venue, they maintained insurance like any other promoter, and they comply with all special laws directed at their particular endeavor; all while generating indirect revenue for the County through rent, food sales, parking fees and sales taxes.

Nor were the Nordykes complaining about a mere burdening of any of their rights. They would welcome any appropriate regulation designed to address issues of gun safety and crime prevention.[5] But the ordinance is not an appropriate regulation aimed at a community evil. It seeks to ban gun shows and the "gun culture" from county property through the pretext of public safety.

Furthermore, the citation to *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), in *Nordyke*, at 563 F.3d 459, n.21, is confusing. If the panel means that the county is free to express its own anti-gun viewpoint under a Second Amendment analysis, why does its later First Amendment analysis proceed as if the ordinance is a neutral regulation instead of the county's pretextual vehicle for a partisan anti-gun message? First Amendment scrutiny can not be that different from Second Amendment scrutiny.

The sponsor of the ordinance, Mary King (County Supervisor) sent a memorandum to County Counsel prior to introducing the ordinance. It was copied to all board members. It requested that County Counsel research a way to prohibit gun shows on county property. The memorandum clearly set forth a purposeful intent, based on political philosophy, to deny gun shows access to county property.

The County, speaking through Supervisor King, issued a press release in connection with the ordinance. That press release reiterated that the purpose of the pending legislation was to deny gun shows access to the fairgrounds because the County did not agree with the political values of the people attending gun shows. (i.e., The County should not provide "*[...] a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.*")

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[5] E.g., The County could supplement the State law that prohibits a person from simultaneously possessing a firearm and the ammunition for the firearm, by requiring ammunition vendors to be physically segregated from the firearm vendors.

The Nordykes are entitled to the factual inference that their gun shows were targeted for extinction because of the political values expressed at gun shows and the County's disagreement with those values. This targeting of a disfavored group is relevant to the scrutiny discussion of the First Amendment (under a *Texas v. Johnson* analysis), the Second Amendment (overbreadth), and the Fourteenth Amendment (Equal Protection). See also: *Romer v. Evans*, 517 U.S. 620 (1996).

Nordyke is wholly different from *Pleasant Grove City v. Summum* because the Nordykes are not asking to place a **permanent monument** on county property. But the panel's strong inference that the County is engaged in anti-gun propaganda as a property owner, is certainly probative as to whether the County is engaged in the regulation of expressive conduct by banning gun shows in order to "send a message" that guns are bad. And because the County is engaged in its own expression and the regulation of expression by others, the panel should have applied the more rigorous scrutiny analysis under *Texas v. Johnson*, 491 U.S. 397 (1989).

Another inconsistency arises with a finding that the County's ban on gun shows does not violate Equal Protection (of a fundamental right) *vis-á-vis* guns possessed at gun shows vs. guns possessed at the Scottish Games. The guns at gun shows are secured pursuant to state law. While the guns at the Scottish

Games are secured pursuant to a county ordinance. This is a distinction without a difference and cannot survive strict scrutiny of a fundamental right under an Equal Protection claim.

Under the First and/or Second Amendment and under an Equal Protection (for fundamental rights) analysis, the government is required to: (1) produce evidence, (2) that demonstrates a compelling interest, (3) and prove that the government's regulation is not more restrictive of the right(s) than is necessary to address the compelling interest. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972).

The County failed on all three counts because it has conceded that gun shows are not a source of **any** community evil. So if the County's exclusion of gun shows from the Fairgrounds is based on a desire to engage in a hoplophobic message for Second Amendment purposes, then its ordinance is invalid under *Heller*, as it is not designed to address public safety or crime prevention. And if the County is expressing its hoplophobia by banning the expressive conduct of possessing guns at gun shows, then it is violating the First Amendment's commandment against censorship; and/or it is violating Equal Protection by permitting expression with guns by the Scottish Games, but forbidding expression with guns at gun shows.

B. The *Nordyke* Panel's "Sensitive Place" Analysis was Wrong.

The *Nordyke* three-judge panel also indulged the County's argument that the fairgrounds is a "sensitive place."

But the County presented no evidence – none – that the Fairgrounds (or indeed any county property) is a "sensitive place." How could it? Discovery was closed and this case was already on appeal out of the district court when the *Heller* opinion was filed on June 26, 2008. *Heller's* "sensitive places" concept was set forth in *dicta* at 128 S. Ct. at 2816-17:

> [W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on *longstanding prohibitions* on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (*Emphasis added)*

The adjective "longstanding" modifies the noun "prohibition" regarding felons and the mentally ill; and it might be stretched to cover sensitive places.

There was no factual record in the *Nordyke* case that the county fairgrounds had a longstanding history as a sensitive place. The facts construed in the light most favorable to the Nordykes are: (1) Mary King had been trying for "years" to get rid of gun shows, (2) the Nordykes had conducted gun shows at the Alameda Fairgrounds for almost 10 years before the ordinance was passed, and (3) the Nordykes continued to hold gun shows at other fairgrounds throughout California while this case has been pending. When and how did "fairgrounds" as a class of property undergo a transformation to a sensitive place?

The *Nordyke* panel tried to describe a distinction without a difference for the ways guns are handled at gun shows (**secured** unless the gun is being mechanically demonstrated to the buyer) and the way guns are handled during the Scottish Games (**secured** until the re-enactors are actually staging their mock battles). This has nothing to do with defining a sensitive place. A sensitive place, like a courthouse, would neither permit mock battles nor gun shows.

How can the fairgrounds be a sensitive place if secured guns are possessed at gun shows, but "not-a-sensitive" place when guns are possessed by "*authorized participants in a motion picture, television, video, dance or theatrical production or event, [...]* " ? [Alameda Ordinance § 9.12.120(f)(4).] Neither the County nor the *Nordyke* opinion provides any compelling explanation for this inconsistency. Why aren't gun show patrons and exhibitors, who pay their admission and follow all federal and state laws regulating gun shows, "*authorized participants*" at an event? Furthermore, why is the County's property **not sensitive** to functional movie prop guns, but **is sensitive** to gun show guns which are secured unless being mechanically demonstrated?

How can the fairgrounds be a "sensitive place" when the ordinance exempts imitation firearms or BB guns and air rifles? [Alameda Ordinance § 9.12.120(d).] An airport "sterile area" or airliner does not tolerate the presence of imitation firearms. See Cal. Pen. Code § 171.5.

Persons with valid licenses to carry loaded and concealed firearms under Cal. Penal Code § 12050, are also exempt from the ordinance. [Alameda Ordinance § 9.12.120(f)(3).] A jail or prison does not permit such licensees to retain their weapons when interviewing or visiting inmates.

The County's ordinance is not delineating "sensitive places." At best, the County is describing permissible and impermissible "uses" of guns, which negates any argument that county property is *per se* sensitive to the presence of guns.

The only place where the ordinance attempts to define "places" is where it exempts from the ordinance "local public buildings" as defined in Cal. Pen. Code § 171b. [Alameda Ordinance § 9.12.120(c).] This state law in California bans guns in government buildings, but this code section cited by the ordinance specifically includes an exception for the **purpose of conducting a law-abiding gun show**. See Cal. Pen. Code § 171b(b)(7)(A) and § 171b(b)(7)(B).

Consider these easily verified general facts regarding places where guns show up in parks and fairgrounds:

- The publication: Gun Shows: Brady Checks and Crime Gun Traces was jointly published in January 1999, by the United States Department of Justice and the Department of the Treasury See http://www.atf.gov/pub/treas_pub/gun_show.pdf. Gun shows are described on page 4. Nationally there were 4,442 gun shows advertised in a trade publication for calendar year 1998. California was among the top 10 states where gun shows took place. "*Ordinarily, gun shows are held in public arenas, civic centers, fairgrounds, and armories,...*"

- On May 22, 2009, President Obama signed into law a bill that was passed with bipartisan support that permits law-abiding citizens to possess firearms in National Parks – consistent with the law of the state in which the park is located. [The Credit CARD Act of 2009, Pub. L. No. 111-24, 123 Stat, 1734 (2009).]

These facts can be judicially noticed for the proposition that public places, where many people gather, like: parks, fairgrounds, public arenas, civic centers, and government buildings where gun shows take place, are **not** longstanding examples of historically "sensitive places."

The *Nordyke* three-judge panel made a prejudicial unwarranted finding regarding sensitive places. The County did not even request that the case be returned to the trial court so that it could attempt to prove that its fairgrounds (or indeed all of Alameda County's properties) are particularly sensitive places.

Neither is there is any legal basis for the panel's creation of a definition of "sensitive place" out of the *dicta* in *Heller*. The panel did note that "Second Amendment law remains in its infancy" and that *Heller* itself "does not provide much guidance." *Nordyke*, at 563 F.3d 460.

This state of affairs should have triggered a default fundamental rights analysis. It should be the County's burden to demonstrate a compelling justification for classifying its fairgrounds as a sensitive place, and the County must be required to demonstrate that there is no less burdensome regulation that addresses the compelling interest that they assert.[6] The County did not meet that burden, and the *Nordyke* three-judge panel was wrong to give it a pass on this issue.

An expansive interpretation of "sensitive places" is not unique to the *Nordyke* facts. In its post-*Heller* opposition to a motion for summary judgment in *Palmer v. District of Columbia*, Civil Action No.: 09-01482 (HHK), an ongoing challenge to D.C.'s complete ban on carrying firearms, the defendants argued that the entire federal enclave is a sensitive place:

> Defendants aver that the whole of the District of Columbia should be considered a "sensitive" place, given its dense concentration of iconic structures, government facilities, embassies, and regular meetings of diplomats and leaders from around the world. *See Hearing on the Impact of Proposed Legislation on the District of Columbia's Gun Laws Before the House Comm. on Oversight & Government Reform* (Sept. 9, 2008). (Testimony of Cathy L. Lanier, Chief of Police) at 5 ("[T]he District of Columbia, as the seat of the Federal government with its multitude of critical official and symbolic buildings, monuments, and events and high-profile public officials traversing its streets every

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[6] For example, the County took steps to control the unlawful possession of deadly weapons at the fairgrounds by the simple expedient of installing metal detectors at the entrance to the fairgrounds during the county fair.

> day, is a city filled with "sensitive" places. Our laws should reflect that reality.")[7]

Without guidance from this Court, judicial scrutiny of infringements of the Second Amendment will proceed in a chaotic and, perhaps, regionally-biased manner among the Circuits. Certainly the *en banc* panel of the Ninth Circuit would benefit from a word or two about judicial scrutiny when they revive their deliberations of the *Nordyke* case after the opinion in *McDonald* is published.

IV. JUDICIAL SCRUTINY: SECOND AMENDMENT

Judicial scrutiny requires identification of the role of the constitutional right at issue.

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.
>
> *N.Y. Times. Co. v. United States,*
> 403 U.S. 713, 717 (1971).
> Justice Hugo Black, Concurring.

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[7] http://www.archive.org/download/gov.uscourts.dcd.137887/gov.uscourts.dcd.137887.6.0.pdf page 27-28.

Heller examined the Second Amendment in a context of the right of self-defense in the home, because those were the facts of that case. Without an articulation of the contours of the right, the *Nordyke* panel felt constrained to recognize the right solely in that context. *Nordyke*, at 563 F.3d 458. And because the county ordinance challenged in that case merely burdened the right outside the home it was upheld.

How is it possible that an un-enumerated fundamental right (abortion) is important enough to warrant an "undue burden" test[8] – but an enumerated right may be so circumscribed? Will judicial scrutiny of the Second Amendment enhance or further erode the device of three-tiered scrutiny?[9] What will be the replacement doctrine?

The Second Amendment plays a vital role in our republic. As *Heller* points out, at the very least it recognizes a Blackstone-like fundamental "law of nature" in the use of force by individuals for self-defense. *Heller*, at 128 S. Ct. 2798. Only recently in the dissent on Second Amendment issues, Chief Judge Kozinski and Judge Gould of the Ninth Circuit have offered defense of the community and resistance against tyranny to the catalogue of Second Amendment values important to the republic. See, respectively: *Silveira v. Lockyer*, (*reh'g denied*) 328 F.3d 567, 569-70 (9th Cir. 2003); *Nordyke v. King*, 563 F.3d 439, 464 (9th Cir. 2009).

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[8] *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[9] For a discussion about the way recent Supreme Court decisions (*e.g.*, *Lawrence v. Tex.*, 539 U.S. 558 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).) may be undermining a principled approach to tiered scrutiny. See Professor Calvin R. Massey's article: *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. Pa. J. Const. L. 945 (2004).

The First and Second Amendment complement each other. They share a common purpose by recognizing that liberty of thought is useless without the right to defend ideas. Our constitutional form of government also recognizes that liberty of action leads to anarchy without a civic *virtu* of understanding that is brought about by a "marketplace" of ideas. These amendments taken together remind us that that marketplace is best protected by the governed and the government.

The *Nordyke* three-judge panel suggested that a fundamental rights analysis (i.e., strict scrutiny) should be applied to the Second Amendment in much the same way as the First Amendment. *Nordyke,* at 563 F.3d 458, n.19. Instances of government action surviving strict scrutiny are rare and have historically been confined to equal protection and racial classification schemes. *See Korematsu v. United States*, 323 U.S. 214 (1944), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

With the *Heller* presumption that long standing regulations will survive strict scrutiny, *Heller*, at 128 S. Ct. 2816-17, it becomes imperative to define the compelling government interest at stake in Second Amendment cases. Future judges who take up the "loaded weapon" described in Justice Jackson's dissent in *Korematsu*, at 323 U.S. 246, need to know how to use strict scrutiny in a safe and responsible manner.

Prevention, and if that fails, prosecution of criminal violence should be the only compelling justification for infringing the individual's right to keep and bear arms. Background checks to prevent violent and mentally unstable persons from acquiring firearms are the quintessential means for achieving this government interest.

Rules that make sensitive places like courthouses, jails, and prisons off limits to private firearms, where the government must exercise a monopoly of force – because that is the function of the building – probably pass constitutional muster. This might be a Second Amendment analogue to the First Amendment's anecdote about shouting fire in a crowded theater. *Schenck v. United States*, 249 U.S. 39 (1919).

Rules regulating, but not prohibiting, the carrying of firearms in non-sensitive places, should probably take the form of non-discretionary, ministerial duties, not unlike issuing a driver's license or parade permit. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). Though for a contrary view, see the state Constitutions of Vermont (Vt. Const. ch. 1, art. 16) and Alaska (Alaska Const. art. 1, § 19).

Maintaining uniformity in the application, operation, and interpretation of laws that touch on fundamental rights, especially in the context of criminal law, is another important constitutional value that should apply equally to all fundamental rights. See generally, *Bush v. Gore*, 531 U.S. 98 (2000). Of course this must be done in a way that recognizes that states have legitimate interests in addressing their own policy considerations. *Danforth v. Minn.*, 552 U.S. 264 (2007).

The *Nordyke* case initially had a preemption claim. *Nordyke*, at 563 F.3d 444. In 2000, the Ninth Circuit certified to the California Supreme Court the question whether state laws regulating gun shows and the possession of firearms preempted the Ordinance. *See Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000). The California Supreme Court answered that the Ordinance was not preempted. *See Nordyke v. King*, 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761.

That all occurred before *Heller*. When she was sitting on that Court, Associate Justice Janice Rogers Brown (currently of the D.C. Circuit Court of Appeals) dissented from the finding of "no preemption" – in part – because her colleagues on the California Supreme Court refused to analogize the rights of the gun show promoters to core First Amendment rights. At the time of that decision, the law in the Ninth Circuit was that individuals had no standing to assert Second Amendment rights. *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996). Furthermore, the State of California does not recognized a right to keep and bear arms in its own State Constitution. *See Kasler v. Lockyer*, 23 Cal. 4th 472, 480 (2000).[10]

Justice Brown went on to warn that even small intrusions on liberty can erode personal freedom just as surely as the malignant acts of dictators. *See Nordyke v. King*, at 118 Cal. Rptr. 2d 768-69. Her point was that uniformity of law was as much a component of liberty as the underlying substantive constitutional right. At a minimum state laws that trench on the right to keep and bear arms should be uniform within their respective jurisdictions.

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[10] This was another case addressing *equal protection* and the right to keep and bear arms, in which Justice Brown also wrote a dissent. *Kasler v. Lockyer*, 23 Cal.4th 472, 503-10 (2000).

An opinion in the *McDonald* case that incorporates the Second Amendment against the states, but which also includes a holding that all laws regulating the "right to keep and bear arms" must be uniform within each state serves the following functions: (1) Since firearms are ubiquitous, exercising the right to possess firearms should not conflict with the right of intrastate travel[11]; (2) law-abiding firearm owners need only acquaint themselves with federal and state laws, instead of being held criminally accountable in every town, city, county, and parish they travel through within their state while exercising a fundamental right; and (3) instead of the municipal codes of tens of thousands of cities and counties being subjected to challenges under the Second Amendment, a constitutionally recognized, baseline preemption of "the right to keep and bear arms" that funnels down those challenges to the bodies of law of 50 states plus one federal body of law, strangles the majority of potential lawsuits in their crib.[12]

Turning to a conventional analysis, based on case law, of the Chicago Municipal Code challenged in the *Mc Donald* case: (1) The handgun ban is D.O.A. via *Heller* upon a finding that the Second Amendment applies to state and local governments under either theory of incorporation; (2) The re-registration scheme, with its forfeiture consequences and arbitrary deadlines, would not even pass rational basis review under *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See also: *Lawrence v. Tex.*, 539 U.S. 558 (2003), which applied a kind-of rational basis test by refusing to apply intermediate or strict scrutiny to laws infringing on sexual intimacy; (3) The fee requirements are fatally tied to the re-registration scheme, but probably still fail as a special tax that burdens a constitutional right. See generally: *Minneapolis Star & Tribune Co. v. Minn. Commissioner of Revenue*, 460 U.S. 575 (1983).

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[11] Interstate travel with firearms is already protected by the *Firearm Owner's Protection Act,* Pub. L. No. 99-308, 100 Stat. 449 (1986).

[12] This would be the corollary application of the principle at work in the *Protection of Lawful Commerce in Arms Act,* Public Law 109-92; 15 U.S.C. § 7901-7903.

Scrutiny of Chicago's gun laws in the abstract should start with a presumption of invalidity to the extent that Illinois State law already regulates "the right to keep and bear arms." That would assume Illinois state law meets a compelling government interest test and that those laws are necessary to address that interest.[13] The Second Amendment, as an equally dignified part of the Bill of Rights, deserves at least this level of judicial scrutiny.

V. CONCLUSION

This renaissance of the Second Amendment must be vigorous, principled and complete. The Bill of Rights will only work if virtuous citizens are exercising all of their rights as actual limitations on government. The Court can, and should, take this opportunity to provide all of the jurisdictions in this country with rules for judicial scrutiny of the Second Amendment, at the same time it takes up the issue of incorporation.

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[13] See *Nonsubstance Reorganization of Deadly Weapon Statutes*, Calif. Law Revision Commission (June 2009). In response to a veto message on SB 1140 (Scott)(2004) by California Gov. Schwarzenegger, citing byzantine complexities in his state's firearms laws, the legislature commissioned this study to revise and simplify California's Deadly Weapons Control Act. http://www.clrc.ca.gov/pub/Printed-Reports/RECpp-M300.pdf

Associate Justice Hugo L. Black liked to say that written constitutions are indigenous to the United States, and that the consequences of the freedoms guaranteed by the Bill of Rights were already taken into account by those who wrote and ratified that document. He went on to warn against the danger of granting any branch of government the power to balance its interests against the rights of the people.

In his iconic speech[14] on the Bill of Rights, Justice Black quoted one of his heroes, Thomas Jefferson, to remind us that, "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

In that same speech, Justice Black gave us a (reverse) countdown of the "absolute" constitutional values set forth in the Bill of Rights. He did not patronize the Second Amendment as less than absolute, so long as the arms that are regulated (not banned) are necessary to a well-regulated militia.[15]

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[14] James Madison Lecture at New York University School of Law on February 17, 1960. Black, Hugo L., *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

[15] Having served in the Senate when the 1934 National Firearms Act (NFA) was passed and on the Supreme Court when *United States v. Miller*, 307 U.S. 174 (1939), was decided, Justice Black was in a unique

Justice Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947), is emerging as the inevitable standard for application of at least the Bill of Rights to state action, even though Privileges or Immunities incorporation may subsume more than those Ten Constitutional Commandments. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

The contest on the Court between the "balancers" and the "absolutists" evolved into the present day three-tiered approach to constitutional rights. In order to keep one-tenth of the Bill of Rights from becoming a "blank paper by construction" this Court should define the contours of judicial scrutiny for the Second Amendment along side the incorporation question.

Respectfully Submitted,

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position to expound on the relationship between mere regulatory legislation (i.e., the taxing of machine guns and short-barreled shotguns) and the absolute protections afforded individuals by all of the Bill of Rights as against government action infringing any one of those rights.

AMICUS
CURIAE
BRIEF

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Otis McDonald, *et al.*
Petitioners
v.
CITY OF CHICAGO, Illinois, *et al.*
Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Brief of Arms Keepers as *Amicus Curiae* in Support of Petitioners

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INTEREST OF *AMICUS CURIAE*

Amicus filed a brief supporting certiorari in this case. Arms Keepers is a volunteer organization that supports reasonable regulation of handguns and rifles, instead of prohibition.[1] Formed in 2009, *Amicus* is an unincorporated association headquartered in Monroe, Connecticut and registered there with the town government. *Amicus* communicates with its members and the general public primarily via electronic means including the web site www.ArmsKeepers.org. Arms Keepers is nonpartisan, and its business is conducted and transacted solely within the United States.

Amicus is filing this merits brief in support of reversal with respect to citizens who wish to keep and bear arms, because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

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[1] Pursuant to Supreme Court Rule 37, *amicus* provided timely notice of intent to file this brief to counsel of record for both petitioners and respondents, whose blanket consents are on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This amicus brief explains why the Court should rule against Petitioners' substantive due process argument, but in favor of Petitioners under the Privileges or Immunities Clause, regarding incorporation of the right to keep and bear arms as against the states. The Court should do so without overturning the *Slaughter-House Cases*, 83 U.S. 36 (1873), which did not involve incorporation of any enumerated right.

Amicus urges the Court not to overturn its wise and venerable holding in *Miller v. Texas*, 153 U.S. 535 (1894), which correctly said: "as the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law." *Id.* at 539. The *Miller* Court thus rejected substantive due process.

The holding in *Miller v. Texas* did not reject incorporation of the right to keep and bear arms via the Privileges or Immunities Clause, nor did the holdings in *United States v. Cruikshank*, 92 U.S. 542 (1876), or *Presser v. Illinois*, 116 U.S. 252 (1886) do so. See Brief For Respondents the National Rifle Association at 40-42.

The Due Process Clause would be a very inappropriate clause for incorporating the substantive right to keep and bear arms, especially in a case like this where there are competing interests in life and liberty on both sides. After all, accidental shooting victims are "persons" within the meaning of the Due Process Clause no less than unarmed crime victims are "persons."

The Court could hypothetically tell the city and people of Chicago how to balance the competing life and liberty interests in this case, given that the doctrine of substantive due process does not have "any limit but the sky." *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting, joined by Brandeis & Stone, JJ.). However, judicial restraint counsels against doing so, and indeed the Court should reconsider the entire doctrine of substantive due process, at least with respect to substantive rights that have not yet been applied against the states.

Justice Thomas, joined by the late Chief Justice Rehnquist, wrote that, "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence...." *Saenz v. Roe*, 526 U.S. 489, 527 (1999). The present case offers an opportunity to begin moving legitimate elements of the Court's individual rights jurisprudence from the Due Process Clause to the Privileges or Immunities Clause.

The right to keep and bear arms preceded the Constitution and was not created by it, but the privilege of vindicating that right in federal court was certainly created by the Constitution. See generally *District of Columbia v. Heller*, 128 S.Ct.

2783 (2008). That is why the right can now very plausibly be incorporated (selectively rather than en bloc) against the states via the Privileges or Immunities Clause, without overturning *Slaughter-House.*

The phrase "privileges and immunities of citizens" in Article IV, Section 2 does not include natural rights that cannot actually be vindicated. See Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause,* 43 GEORGIA LAW REVIEW 1117, 1161, 1188 (2009). The same principle applies to the same words in the Fourteenth Amendment.

The framers of the Fourteenth Amendment intended their new Due Process Clause to mean substantially what the same clause means in the Fifth Amendment, which in turn is equivalent to the Law of the Land Clause in the Northwest Ordinance of 1787: "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land." Northwest Ordinance of 1787, Art. VI, 1 stat. 50, 52 (1789).

The primary author of the Northwest Ordinance was Nathan Dane of Massachusetts, and Dane later wrote a treatise concisely explaining the clause: "an arrest according to the law of the land means any arrest authorized by the common law, or by statute...." NATHAN DANE, 9 GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 631 (Hilliard & Co. 1829). This interpretation by Dane is incompatible with using the Due Process Clause to strike down statutes that authorize arrest, including the Chicago ordinance at issue here. The Due Process Clause acts as a practical restraint on executive branch officials by forbidding unauthorized arrests, and likewise restrains legislators from repealing this vital limitation on the executive branch. Dane's treatise accurately captures how the courts of England interpreted the similar clause in their own laws, and that same interpretation was merged into American law by the reception statutes adopted by the newly independent states.

This Court has unanimously acknowledged that, "the substantive content of the [due process] clause is suggested neither by its language nor by preconstitutional history." *University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985)(citations omitted). Consequently, overturning the anti-substantive-due-process holding of *Miller v. Texas* would countenance an ascendancy of the *U.S. Reports* over the Constitution itself.

The Constitution does not allow the government to disarm the American people. However, that great principle has absolutely nothing to do with the Due Process Clause.

ARGUMENT

I. Incorporating Second Amendment Rights Via Substantive Due Process Would Violate Both Original Meaning As Well As Precedent That Bound The Court Below

The right in question should be incorporated against the states via the Privileges or Immunities Clause without overturning *Slaughter-House*. In contrast, incorporation via the Due Process Clause, and concomitantly overturning *Miller v. Texas*, would contradict precedent as well as original meaning. Even laying aside those considerations, this case is unsuitable for substantive due process, because there are liberty interests on both sides.

A. Judicial Restraint Counsels Against Substantive Due Process In Cases Like This Where There Are Life Or Liberty Interests On Both Sides

As Justice Scalia has observed, it is generally a mistake to assume, "one disposition can expand a 'liberty'...without contracting an equivalent 'liberty' on the other side." *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). Indeed, the courts should be very wary of taking liberties in such cases.

In the present case, accidental shooting victims are "persons" no less than unarmed crime victims are "persons," and so this is a very unsuitable case for application of the doctrine of substantive due process. This Court has in the past indicated that substantive due process would not be used to take sides where life or liberty interests exist on both sides of the case. See *Roe v. Wade,* 410 U.S. 113, 156 (1973)("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment").

The issue in this case is very different from things like assisted suicide or contraceptives, where the interests in life and liberty are basically on only one side of the case. See generally *Griswold v. Connecticut,* 381 U.S. 479, 499 (1965)(Justice Harlan's concurring opinion arguing for a substantive due process right to contraceptives); *Washington v. Glucksberg,* 521 U.S. 702 (1997)(no substantive due process right to suicide). See also *Lawrence v. Texas*, 539 U.S. 558 (2003)(substantive due process right to sex).

The Court has not always been true to the principle that it will refrain from using substantive due process to balance competing interests in life and liberty. For example, in *Planned Parenthood v. Casey*, 505 U.S. 833, 897-898 (1992), the Court ordered that fathers must no longer be at liberty to know that their unborn offspring will be aborted. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court limited the ability of children and their grandparents to see each other. And in *Roe*, a direct consequence of the Court's decision was that states had to criminalize a woman's family members who intercede between her and the abortion provider. Nevertheless, if the Court is to persist with the doctrine of substantive due process, it should do so only when the interests in life and liberty are not competing, lest the Court completely usurp the political process and the right of self-government.

B. The Doctrine Of Substantive Due Process Is Invalid With Respect To Substantive Rights That Have Not Yet Been Applied Against the States

The Due Process Clause in the Fourteenth Amendment has the same meaning as the Due Process Clause in the Fifth Amendment,[2] and in neither instance does it include a citizen's right to keep and bear arms. See generally *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995)(same words have same meaning). This substantive right has not yet been incorporated against the states via the Fourteenth Amendment's Due Process Clause, and, in view of *Miller v. Texas*, stare decisis disfavors such a result. Additionally, the original public meaning of the Due Process Clause is completely inconsistent with incorporation of this substantive right.

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[2] *Hurtado v. California*, 110 U.S. 516, 535 (1884) ("when the same phrase was employed... it was used in the same sense and with no greater extent"). *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905) (same); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329 (1901) (assuming "that the legal import of the phrase 'due process of law' is the same in both Amendments" although different constructions may be proper); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("the same constitutional standards apply against both the State and Federal Governments"). The primary author of the Fourteenth Amendment's Due Process Clause was John Bingham, and he only wanted to enforce pre-existing federal rights against the states. *See* Cong. Globe, 39th Cong., 1st Sess. 1088-1089 (1866). *See also* William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in

Nathan Dane was the primary author of the Northwest Ordinance including its Law of the Land Clause: "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land." Northwest Ordinance of 1787, Art. VI, 1 stat. 50, 52 (1789). The meaning of this Law of the Land Clause is a window onto the meaning of the Due Process Clause, especially because American colonists equated the phrases "due process of law" and "law of the land." *See Pacific Mutual v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855).

In his legal treatise, Dane explained that, "an arrest according to the law of the land means any arrest authorized by the common law, or by

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state and federal proceedings. To this day that remains the position of the Court").

statute...." NATHAN DANE, 9 GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 631 (Hilliard & Co. 1829). Dane also explained that when, "a statute makes an offence, and is silent as to the mode of trial, it shall be by jury, according to the course of the common law." NATHAN DANE, 6 GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 230 (HILLIARD & CO. 1829). Thus, Dane understood the Law of the Land Clause as setting up neither a general substantive common law nor a general procedural common law, to reign supreme over statute law. Dane's understanding is evident in the very structure of the Bill of Rights.

James Madison originally introduced the right to keep and bear arms together with the right to due process, in a single proposed amendment. 1 Annals of Cong. 451-452 (1789). Congress then split those rights into what became the Second and Fifth Amendments respectively. JOHN VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 202 (ABC-CLIO 2003). The separateness of these simultaneous amendments is a structural feature of the Constitution signifying that the two amendments are "distinct" as Roger Sherman put it,[3] and "unconnected" as Madison put it.[4] The states were invited to simultaneously ratify the due process right and reject the right to keep and bear arms, at their pleasure, which unequivocally shows that Congress did not regard the latter right as being part of "due process." The Court should not now join together what the framers split apart, even if the Court has made that kind of erroneous decision before, especially because doing so now would require the Court to overturn *Miller v. Texas*.

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[3] *Letter from Roger Sherman to Simeon Baldwin* (Aug. 22, 1789) reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1375 (Charlene Bickford et al., eds., 2004)("each may be passed upon distinctly by the states").

The Due Process Clauses are our heritage from the Magna Carta. The meaning in the American colonies was clear under English law, and that meaning was received by the newly independent states via reception statutes adopting English law:

> [L]ex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority.

Regina v. Paty, 92 Eng. Rep. 232, 234 (K. B. 1704).

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[4] *Letter from James Madison to Alexander White* (Aug. 24, 1789) reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287-288 (Helen E. Veit, et al., eds., 1991)("The several propositions will...go forth as so many amendments, unconnected with one another").

Holdsworth confirms the meaning described in *Regina v. Paty*: "as Coke phrases it, 'by due process of law'....is in substance a demand that no violence be offered to person or property without legal warrant." WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 61 (Sixth Edition Revised 1938).

Neither the American colonists nor the highest legal authorities in England attributed any sort of technical meaning to the critical phrase "law of the land."[5] That phrase simply referred to the rules of the country or region. *See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (e.g., defining the word law as a "rule of action," defining the word land as a "country; a region," defining the word due as "exact; without deviation," defining the word process as "course," and defining the word course as "consequences"). The ordinary meaning of the phrase "law of the land" was confirmed by legal luminaries such as Sir Edward Coke. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING

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[5] *Cf.* Alexander Hamilton, *Remarks on an Act for Regulating Elections* (1787), *reprinted in* 4 PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett ed., Columbia Univ. Press 1962). Hamilton saw technical meanings but his view was disputed. *See generally* James Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process* 16 CONST. COMMENTARY 315, 326 (1999)("it is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations").

THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 45 (Brooke 1797). Coke wrote that, "no man be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custom of England" – notice the conjunction "or" used here by Coke, which is consistent with the choice by the framers of our Fifth Amendment to use the phrase "due process of law" rather than "due process of the common law." *Id.*

Lord Coke also wrote that the due process clause in a particular statute was "declaratory of the old law of England." *Id.* at 50. It is important to attend carefully to what Coke meant. He was saying that the statute reiterated what had already been included in a clause of the Magna Carta, rather than saying that the statute incorporated various other old rules aside from that particular clause in the Magna Carta. As Coke put it, "the prudent reader may discern...whether the statute be introductory of a new law, or declaratory of the old...." *Id.* at Proeme (seventh page). *See also* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 86 (First Edition 1765)("Statutes also are either declaratory of the common law, or remedial of some defects therein").

The Court correctly explained in *Hurtado v. California,* 110 U.S. 516, 531 (1884), that "bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land."[6] When Coke referred to a particular aspect of due process, he was not referring to an intrinsic aspect, but rather was merely giving "an example and illustration of due process of law as it actually existed in cases in which it was customarily used." *Hurtado*, 110 U.S. at 523.

It would be inconsistent with the constitutional text if the courts were to now say that state statutes infringing upon gun ownership are not sufficiently rooted in history or fairness to be "laws" within the meaning of the Due Process Clause.[7] The Constitution prescribes what "shall be a law." U.S. Const. art. I, § 7, cl. 2. The Constitution also prescribes what "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The judiciary does not generally have carte blanche to counteract those prescriptions, whether the statute be federal or local.

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[6] *Cf. Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)(Law of the Land Clause was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"). This quote from *Okely* is a classic instance of accurately stating original intent rather than original meaning; by analogy, the original intent was also to make people happy, but that is no basis for using this clause of the Magna Carta to overturn laws to make people happier.

[7] *See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768)("LAW...1. A rule of action. *Dryden* 2. A decree, edict, statute, or custom, publicly established. *Davies*").

Even if the judiciary enlarges its role by ensuring that laws are uniform, permanent, and universal instead of being mere transient decrees or edicts, such a judicial role would not say anything about *what* the law does uniformly, permanently, and universally. See generally WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 44 (First Edition 1765).

Blackstone defined municipal law in the following way: "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.* Blackstone elaborated that the declaratory part of the law, which declares "the rights to be observed, and the wrongs to be eschewed....depends not so much upon the law of revelation or of nature as upon the wisdom and will of the legislator." *Id.* at 53-54. To the extent that our Constitution does not declare which laws are right and wrong, that is a job for legislators as Blackstone said; otherwise, there is no separation of powers except temporarily, or in matters that the Court believes are not important enough to decide itself. The present case is one of the relatively rare instances where the matter has been resolved by specific applicable constitutional provisions, and those provisions do not include the Due Process Clause.

Petitioners argue that statutes must be consistent with natural law. Petitioners' Brief at 66. That may be true, but we elect legislators to ensure consistency with natural law, not judges. As Justice Souter once observed: "the idea that legislation may be struck down based on principles of common law or natural justice not located within the constitutional text has been squarely rejected in this country." *Seminole Tribe v. Florida*, 517 U.S. 44, 163 n. 56 (1996)(Souter, J., dissenting). Use of the word "law" in the Fourteenth Amendment does not let the judiciary strike down acts that are supposedly not good enough to be "law," any more than use of the word "law" in the original unamended Constitution did so. George Mason spoke about this during the constitutional convention, saying that judges, "could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course." MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 73 (1911). Mason therefore supported giving judges a qualified veto over new laws, but that proposal lost.

The Court's due process decisions in the years leading up to 1868 are relevant here, but they ought not to be completely controlling as to the meaning of the Due Process Clause adopted that year, without regard to earlier history, for several reasons. First, that would allow the two different Due Process

Clauses to currently be interpreted very differently from each other, which was not what the people who adopted the later clause meant. Second, the Court's due process cases leading up to 1868 were inconsistent. For example, Justice Curtis wrote for the Court in *Murray's Lessee v. Hoboken Land*, 59 U.S. 272, 277 (1855), that whether a process is "due process" must be determined by looking at "common and statue [sic] law of England" prior to adoption of the Constitution. But Justice Curtis's subsequent dissent in *Dred Scott v. Sandford*, 60 U.S. 393, 626-627 (1856), jettisoned that intercontinental requirement without bothering to cite *Murray*, and the majority opinion in *Dred Scott* invoked the Due Process Clause without providing any rationale at all. *Id.* at 450. The *Dred Scott* case was then overturned by the Fourteenth Amendment itself on other grounds (i.e. birth confers citizenship). A third problem with taking the Court's decisions of the 1850s to be completely controlling here is that none of them clearly indicate whether the right to keep and bear arms is incorporated into the Due Process Clause; the issue in *Murray* was procedural, and the Court in *Dred Scott* provided no rationale.

On its face, the phrase "law of the land" does not suggest any distinction between procedural law and substantive law. Indeed, no one has ever suggested that this part of the Magna Carta allowed the King to inflict whatever violence he wanted on whoever he wanted, so long as he followed certain procedures along the way.[8]

There are two primary alternative interpretations of the Due Process Clause that could conceivably displace the unfortunate substantive due process interpretation of recent years. First, there is a completely objective due process jurisprudence that simply requires compliance with all other laws that are in force. In the twentieth century, the leading advocate on the Court for this objective interpretation was Justice Black. *See In Re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) quoted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting). The purely objective interpretation is also typified by *Walker v. Sauvinet*, 92 U.S. 90 (1875). The second alternative interpretation is a purely procedural due process jurisprudence having subjective recourse to "fundamental fairness." *See generally Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring). The Court in *Miller v. Texas* rejected the substantive interpretation, and said the statute at issue was consistent with a procedural interpretation, but the Court did not choose between the procedural and objective interpretations.

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[8] Some scholars say that the phrase "per legem terrae" in the Magna Carta originally meant trial procedures such as battle, ordeal, or compurgation. See WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 59-63 (Sixth Edition Revised 1938). However, that interpretation requires the word "vel" to mean "and," so that "lawful judgment of his peers" was also required, the word "lawful" embracing both substantive and procedural law.

The objective interpretation is most consistent with original meaning, and would still constrain legislators. For example, it would bar Congress and state legislatures from repealing the Due Process Clause as a limitation on the executive. It would also arguably allow the courts to apply the following remedy for deprivation of procedural rights enumerated in the Constitution: the government could not take life, liberty, or property.[9]

Additionally, the objective interpretation would not necessarily slow the courts from making procedural rules. See generally *Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("the Eighth Amendment requires increased reliability of the process..."). Still, it may be worthwhile to bear in mind Blackstone's prescient admonition: "the formal part or method of proceeding, cannot be altered but by or with the sanction of parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself." WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 138 (First Edition 1765).[10]

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[9] *See Chapman v. California*, 386 U.S. 18, 21 (1967)("we cannot leave to the States the formulation of ... remedies designed to protect people from infractions by the States of federally guaranteed rights"). *See also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)("We must examine the constitution itself, to see whether this process be in conflict with any of its provisions....") *See also* Andrew Hyman, *The Little Word Due*, 38 AKRON LAW REV. 1, 30 (2005)("Congress must either respect all of the accused persons' process rights, or let them have their liberty").

Recent substantive due process cases have required that laws be fair, independently of what legislators may think about fairness, and independently of what later members of the Court may think about fairness. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992). However, the court below correctly observed that even a historical due process inquiry that looks for "deep-rooted" traditions is subjective, because ancient principles like self-defense and federalism may conflict with each other. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago,* 567 F.3d 856, 859-860 (7th Cir. 2009); *cf. Washington v Glucksberg*, 521 U.S. 702, 720-721 (1997)("Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'").

Amicus urges the Court to shelve the doctrine of substantive due process, at least with respect to substantive rights that have not yet been applied against the states. If the Court wishes to completely uproot this illegitimate doctrine, then perhaps that would be a matter for a future case dealing with a substantive right that has already been applied against the states. This is not such a case.

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[10] The passage quoted above is sometimes misprinted or misquoted, to say "there would be no inlet" instead of the correct version: "there would be an inlet." See the list of errata following the Table of Contents, in Blackstone's book.

C. The Doctrine Of Implied Reservation Is Inapplicable To This Case

Respondent National Rifle Association argues that the doctrine of "implied reservation" is applicable to this case. See Brief for Respondents The National Rifle Association (NRA) et al. at 23. This *Amicus* respectfully disagrees.

If the people of Illinois did not explicitly surrender the right to keep and bear arms to their state government via their state constitution, then this Court could perhaps infer an "implied reservation" of that right, despite a general grant of power by the people of Illinois. Such an implied reservation could later be overcome by an amendment to the state's constitution. As Chief Justice John Marshall once wrote, there is sometimes an "argument in favor of presuming an intention to except a case, not excepted by the words of the constitution." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

But, the Constitution of Illinois does explicitly say the right to arms is subject to the police power. Constitution of the State of Illinois, Article I, Bill of Rights, Section 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed"). This state constitutional provision precludes application of the doctrine of implied reservation to the present case.

II. A Process Of Elimination Rules Out Implausible Readings Of The Privileges Or Immunities Clause And Supports An Interpretation That Selectively Incorporates The Right To Keep And Bear Arms Without Overturning Precedents Like *Slaughter-House*

We can go a long way toward deducing what the Privileges or Immunities Clause means, by using a process of elimination to rule out what the clause does *not* mean.[11] Generally speaking, "a process of elimination is perhaps not always the most desirable means of arriving at a conclusion,"[12] but it is an honest and realistic one in this case where the meaning of the clause is not obvious on its face, and the meaning intended by the ratifying public is disputed. The goal here is to eliminate implausible interpretations, *not* to eliminate rights. Using a process of elimination has the incidental benefit of helping to ensure that a revived Privileges or Immunities Clause will not become a Frankenstein's Monster in later jurisprudence.

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[11] See, e.g., *United States v. Ramirez*, 233 F.3d 318, 322 (5th Cir. 2000)("the statutory meaning of 'all other cases' is arrived at by a simple process of elimination"); *United States v. Duarte*, 246 F.3d 56, 59 (1st Cir. 2001)("The catch-all provision – which, by process of elimination, covers offenses involving at least fifty but less than one hundred kilograms of marijuana – carries a maximum sentence of twenty years"); *State v. Achterberg*, 201 Wis.2d 291, 300 (1996)("We are compelled by a process of elimination to conclude that this interpretation is the only logical and reasonable result").

Once the implausible interpretations are eliminated, there is only one reasonable interpretation left standing. To wit: the Privileges or Immunities Clause only aids citizens by selectively incorporating against the states fundamental rights that already can be vindicated against Congress nationwide by citizens of the United States. Congressman John Bingham acknowledged that he was not trying to do any more than give the federal government, "the power to enforce the bill of rights as it stands in the constitution today." Cong. Globe, 39th Cong., 1st Sess., 1088 (1866).

Thus, the Court should apply the right to keep and bear arms via the Privileges or Immunities

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[12] Zachary Kaufman, *Transitional Justice Delayed is Not Transitional Justice Denied: Contemporary Confrontation of Japanese Human Experimentation During World War II Through A People's Tribunal*, 26 Yale L. & Pol'y Rev. 645, 655 (2008).

Clause, as Respondent National Rifle Association urges the Court to do, without overturning *Slaughter-House* or *Miller* or *Presser* or *Cruikshank*. Brief For Respondents the National Rifle Association at 38-43.

A. The Privileges Or Immunities Clause Does Not Include Rights That Cannot Already Be Vindicated Against The Federal Government

The phrase "privileges and immunities of citizens" in Article IV Section 2 does not include natural rights even if they are declared by law, unless the law provides a mechanism for vindication of those rights. Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GEORGIA LAW REVIEW 1187-1188 (2009).

Thus, for example, the phrase "privileges and immunities of citizens" excludes natural rights like "justice" and "tranquility" that are unenforceable in the Constitution's preamble. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). The fact that U.S. citizens nationwide have been given a clear constitutional right to sue the federal government for vindication of the right to keep and bear arms shows that that right is a privilege or immunity of citizens of the United States.

1. The Privileges Or Immunities Clause Does Not Include Rights That Some Framers Mistakenly Thought Could Be Vindicated Against the Federal Government

As one scholar has accurately put it, "Republicans in the Thirty-ninth Congress relied on a reading of the privileges and immunities clause of article IV, section 2 that is unorthodox, at least by current legal standards." MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 47 (1986). Republicans such as Senator Jacob Howard believed that Article IV, Section 2 protected a body of national rights that could be vindicated by a person "solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon state legislation." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866). All the same, Howard recognized that he had only "some intimation of what probably will be the opinion of the judiciary." Id.

Petitioners acknowledge that Article IV Section 2 does not actually confer a plurality of national rights. Petitioners' Brief at 65. And Petitioners also acknowledge that the framers of the Privileges or Immunities Clause sought no more than enforcement of Article IV Section 2 and the Bill of Rights against the states. Petitioners' Brief at 30. It therefore would not be plausible to interpret the

Privileges or Immunities Clause as guaranteeing a plurality of unenumerated national rights of citizenship that apply against the states but not against the federal government nationwide.

Justice Bushrod Washington used some expansive language in the case of *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1825), to describe rights protected by the Privileges and Immunities Clause in Article IV. But Justice Washington did not indicate that those rights were judicially enforceable against the federal government. Even with regard to enforcement against the states, the *Corfield* decision was soon clarified by Justice Henry Baldwin, who described Article IV, Section 2 as, "a grant by the people of the state in convention, to the citizens of all the other states of the Union, of the privileges and immunities of the citizens of this state." *Magill v. Brown*, 16 Fed. Cas. 408, 420 (C.C.E.D. Pa. 1833). Some framers of the Fourteenth Amendment may have preferred Justice Washington's interpretation to Justice Baldwin's, but no one suggests that such a preference amended Article IV, Section 2 in any way.

B. The Privileges Or Immunities Clause Is Unlike Other Clauses In That It Does Not Protect Any Aliens

Petitioners assert that the reference to "citizens" in the Privileges or Immunities Clause is for defining the rights involved, rather than for defining the beneficiaries of the clause. Petitioners' Brief, page 62. But if that were true then states would have to respect a right of illegal aliens to keep and bear arms, which is not supported by the text of the amendment or by the history of its adoption.

The text of the Clause only mentions citizens, and not other people, which strongly suggests that neither legal nor illegal aliens are covered. While other clauses in the first paragraph of the Fourteenth Amendment do refer to other people, this Clause plainly does not, which is a telling contrast. Framers such as Senator Jacob Howard understood this very well: "The last two clauses of the first section of the amendment disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be...." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866).

If members of this Court are concerned about the consequences of denying to aliens the substantive protections of the Privileges or Immunities Clause, then it is relevant that the Equal Protection Clause would address that problem, even though the Equal Protection Clause is not in the question presented for this case. A good argument can be made that the Equal Protection Clause supplements the Privileges or Immunities Clause so as to cover the rights of aliens, provided that those aliens are already safeguarded against federal action by the Constitution. See generally

William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court"). Interpreting the Equal Protection Clause in this way would not render the Due Process Clause of the Fourteenth Amendment superfluous, because the latter clause would still prevent states from harming both citizens and aliens by means other than making or enforcing laws. Nor would interpreting the Equal Protection Clause in this way obliterate the Fourteenth Amendment's deliberate distinction between the protections afforded to citizens versus aliens.

C. The Privileges Or Immunities Clause Does Not Apply Federal Statutory Rights Against The States

The phrase "privileges or immunities of citizens of the United States" cannot include mere federal statutory rights. After all, the framers of the Fourteenth Amendment gave Congress power that is not "plenary but remedial." *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997). And framers such as John Bingham assured colleagues that he was proposing "to arm the Congress...with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—*no more*" (emphasis added). Cong. Globe, 39th Cong., 1st

Sess., 1088 (1866). True, Bingham was only referring there to a draft version of the Fourteenth Amendment; and, it is also true that he meant the term "bill of rights" to include not just personal rights listed in the amendments but also personal rights protected by the original Constitution. All the same, his statement was never contradicted by himself or anyone else, and in fact others such as Senator Jacob Howard spoke of the need to enforce pre-existing constitutional rights, and no more. See Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866).

The conclusion that they were not referring to statutory rights is supported by the framer's removal of the expansive word "all" from the language they copied from Article IV Section 2, suggesting that they had a more specific set of rights in mind. They adopted the phrase "*the* privileges or immunities" instead of "*all* privileges or immunities." The word they adopted ("the") has a "specifying or particularizing effect." *Random House Webster's College Dictionary* 1352 (1999).

Some members of Congress in 1866, such as John Bingham, saw their proposed Privileges or Immunities Clause as ensuring the constitutionality of the Civil Rights Act of 1866, 14 Stat. 27. However, they understood the Civil Rights Act as merely enforcing constitutional rights that they thought (mistakenly) already could be enforced against the federal government. As mentioned above, the framers of the Fourteenth Amendment had an unorthodox reading of the privileges and immunities clause of Article IV Section 2, but they also recognized that their interpretation might be wrong.

D. The Privileges Or Immunities Clause Does Not Apply Rights That Are Inapplicable Against Congress Where Federal Power Is Plenary

Under the original meaning of the Privileges and Immunities Clause in Article IV Section 2, if a right was a privilege or immunity of citizenship, that meant any citizen could take advantage of it. Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GEORGIA LAW REVIEW 1117, 1161 (2009). Therefore, if a citizen cannot take advantage of a particular right on federal territory, then it cannot be a privilege or immunity of citizens of the United States, even though citizens within the boundaries of the fifty states may take advantage of such a federal constitutional right. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995)(federal government may not infringe noncommercial right to carry guns near schools where federal power is not plenary).

The statesmen who framed the Fourteenth Amendment understood that "all" immunities of citizens of the United States were possessed by citizens in some of the geographic regions where federal power is plenary. See Treaty Concerning the

Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Article III, 15 Stat. 539, 542 (1867)("The inhabitants of the ceded territory...shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States...."). See also *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828)(treaty with Spain granted inhabitants of Florida, "the privileges, rights, and immunities of the citizens of the United States"). Given that the federal government's powers are stringently limited within the boundaries of the fifty states, it would make little sense to apply those limits against the state governments themselves, via the Privileges or Immunities Clause, and the treaties regarding Alaska and Florida confirm this.

Likewise, Ninth Amendment rights cannot reasonably be considered to be privileges or immunities of citizens of the United States, because they do not attach to citizens in those geographic areas where federal power is plenary. See KURT LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 305 (2009)("Once an enumerated power is found, there can no longer be a claim under either the Ninth or Tenth Amendment"). In this regard, it is significant that Senator Howard's speech of May 23, 1866 specifically referred to the "first eight amendments of the Constitution," which reflected his understanding that Ninth Amendment rights would not be included. See Cong. Globe, 39th Cong., 1st Sess., 2765 (1866).

E. The Privileges Or Immunities Clause Should Be Interpreted Without Overturning Precedents Like *Slaughter-House*

Slaughter-House did not involve any enumerated constitutional right. As Justice Hugo Black once wrote, "The state law under consideration in the Slaughter-House cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was 'no direct constitutional provision against a monopoly.'" *Adamson v. California*, 332 U.S. 46, 76 (1947)(Black, J., dissenting).

According to scholars such as Professor Nelson Lund, it may be that *Slaughter-House* "left open the possibility of incorporation under the Privileges or Immunities Clause." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE LAW REV. 185, 190 (2008). This possibility becomes a probability if one considers selective incorporation of "fundamental" enumerated rights, instead of total (i.e. en bloc) incorporation of every enumerated personal right.

After all, the Court in *Slaughter-House* specifically said that the Clause is confined to "those rights which are fundamental." *Slaughter-House*, 83 U.S. at 76.

In *Slaughter-House*, the Court declined to become "a perpetual censor upon all legislation of the States," *id.* at 78. The Court was correct to eliminate that implausible interpretation of the Fourteenth Amendment. The Court correctly said that the clause in question does not protect privileges or immunities that do not "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. The privilege to vindicate one's right to keep and bear arms, in an action against the federal government, is much more than the natural right that is being vindicated, and therefore this privilege certainly owes its existence to the Constitution.

As for *Cruikshank*, *Presser*, and *Miller*, they pose no obstacle to incorporation via the Privileges or Immunities Clause. *Cruikshank* "did not involve state law or state action," *Presser* "only addressed the supposed right to 'drill and parade with arms,'" and *Miller* merely held that the claim under the Privileges or Immunities Clause "had been waived below." Brief For Respondents the National Rifle Association at 40-41.

F. The Privileges Or Immunities Clause Does Not Merely Confer Rights That Are Already Conferred By Other Parts Of The Constitution

If this clause only did what other clauses already accomplished, then this clause would be entirely useless, i.e. a vain and idle enactment. As of now, the U.S. Supreme Court does not use the Privileges or Immunities Clause to protect any right whatsoever. In the case of *Saenz v. Roe*, 526 U.S. 489 (1999), the Court did construe the clause as protecting an aspect of the right to travel:

> Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

Saenz, 526 U.S. at 503 (emphasis added). However, the *Slaughter-House* opinion actually said: "One of these privileges is conferred by the very article under consideration." *Slaughter-House*, 83 U.S. at 80 (emphasis added). The *Saenz* Court acknowledged that its decision "rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence." *Saenz*, 526 U.S. at 506. The Privileges or Immunities Clause was unnecessary to the result in *Saenz*, and thus that Clause continues to be treated by American jurisprudence as basically a nullity.

Some scholars have also suggested that the Privileges or Immunities Clause is an antidiscrimination provision. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1387-1388 (1992). However, such an interpretation would not allow the Privileges or Immunities Clause to do anything that the Equal Protection Clause does not already do.

G. The Privileges Or Immunities Clause Does Not Incorporate Rights Other Than Fundamental Rights And Thus En Bloc Incorporation Of Personal Rights Is Implausible

Petitioners argue for en bloc incorporation of all the personal rights memorialized in the Bill of Rights, against the states. Petitioners' Brief at 10. However, en bloc incorporation is very different from selective incorporation. The text and history of the Privileges or Immunities Clause show a primary concern with rights that are "fundamental," which suggests some judicial authority to selectively determine which enumerated rights are *not* fundamental.

The decisions of this Court have not required states to indict by grand jury under the Fifth Amendment, nor have they required states to provide a jury in civil cases under the Seventh Amendment. Those decisions in *Hurtado v. California,* 110 U.S. 516 (1884) and *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875) were well within the range of plausibility, and should therefore stand under the doctrine of stare decisis.

In his speech introducing the proposed Fourteenth Amendment, Senator Jacob Howard emphasized the "fundamental" nature of the protected rights eight separate times. In that speech by Howard, he said that the Privileges or Immunities Clause would incorporate the first eight amendments, and he listed what he thought were the key provisions, while leaving out other provisions which suggests that he regarded some of the left-out provisions as not being fundamental. Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866). Not a single member of Congress explicitly said anything about requiring states to use grand juries, until years after the amendment was ratified. Cong. Globe, 42d Cong., 1st Sess., app. at 84 (1871)(statement of Rep. Bingham).

Whereas en bloc incorporation of personal rights is urged by Petitioners, Petitioners' Brief at 10, selective incorporation under the Privileges or Immunities Clause remains a viable alternative that has been discussed and supported by various scholars. See Michael Kent Curtis, *John Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON LAW REV. 617, 626 n.30 (2003). *See* also Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE LAW JOURNAL 1193 (1992) (proposing a "refined incorporation" of some but not all parts of the first eight amendments). Selective incorporation of the right to keep and bear arms under the Privileges or Immunities Clause would not undermine the holdings in *Hurtado* or *Walker*, whereas en bloc incorporation of personal rights would do so.

Although there are some obvious differences between the Privileges or Immunities Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV Section 2, there is also some common terminology. Therefore, it is relevant to mention the case of *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). Neither the majority nor the dissenters in *Baldwin* suggested that the Privileges and Immunities Clause in Article IV Section 2 robotically extends every single right of citizens to visitors from out-of-state. By analogy, no justice should now assume that the Privileges or Immunities Clause in the

Fourteenth Amendment robotically applies every single right in the Bill of Rights against the states.[13]

H. The Proper Interpretation Of The Privileges Or Immunities Clause Becomes Apparent Given Its History And That All Other Interpretations Are Implausible

As discussed above, many implausible interpretations of the Privileges or Immunities Clause can be ruled out. The only one left standing is an interpretation that incorporates fundamental enumerated constitutional rights and nothing else.

This conclusion is similar to that drawn by Professor Kurt Lash who has extensively analyzed antebellum legal terminology, although Lash (like Justice Hugo Black) infers en bloc rather than selective incorporation. Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, LOYOLA-LA LEGAL STUDIES PAPER (2009).[14]

A selective "fundamental" rights inquiry under the Privileges or Immunities Clause of the Fourteenth Amendment would indeed be somewhat subjective. However, it would be cabined by the requirement that a proposed privilege or immunity must already be protected nationwide against infringement by Congress.

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[13] In other words, there is no reason to now completely overturn *Barron v. Baltimore*, 32 U.S. 243 (1833).

[14] Available at SSRN: http://ssrn.com/abstract=1457360.

III. If The Court Incorporates The Right To Keep and Bear Arms Via The Privileges Or Immunities Clause Then The Court Should Not Use The Avoidance Doctrine To Bypass A Due Process Clause Analysis

The Second Amendment protects from federal action those aliens who have "sufficient connection with this country to be considered part of the [national] community." *District of Columbia v. Heller*, 128 S.Ct. 2783, 2791 (2008)(internal citation omitted). Therefore, even if the Court now holds that the Privileges or Immunities Clause incorporates the right for citizens, that would not release the Court from the necessity of considering whether the Due Process Clause incorporates Second Amendment rights for persons who are *not* citizens.

Petitioners now seek to facially invalidate a provision of the Chicago Municipal Code,[15] and that provision applies to any "person."[16] Accordingly, the question presented in this case covers aliens. The question presented does not explicitly mention "aliens" but it does not mention other groups either. Petitioners are arguing to extend the right to aliens, and so the Court must address this issue. See Petitioners' Brief, page 62.

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[15] Petitioners seek an order permanently enjoining enforcement of Chicago Municipal Code §8-20-050(c). See generally *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)(partial invalidation is preferred).

Amicus is not aware of any statement by the framers of the original Constitution or Bill of Rights explicitly denying that lawful resident aliens are within the meaning of the term "the people" as used in the Second Amendment. James Wilson explained at the constitutional convention that, "it was necessary to observe the twofold relation in which the people would stand. 1. as Citizens of the Genl. Govt. 2. as Citizens of their particular State. The Genl. Govt. was meant for them in the first capacity: the State Govts. in the second." MAX FARRAND, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 405 (1911). But Wilson did not explicitly say anything about aliens; he also did not say anything about citizens of the United States who are not citizens of a particular state (e.g. residents of the nation's capital).

The due process issue is unavoidable. The Court should hold that the Due Process Clause does not incorporate any right to keep and bear arms for aliens or anyone else, though other clauses not now before the Court (e.g. the Equal Protection Clause) may well protect this right for lawful resident aliens.

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[16] Chicago Municipal Code §8-20-040 ("No person shall...."). These gun control regulations are subject to a severability clause. Chicago Municipal Code §1-4-200.

CONCLUSION

For the foregoing reasons, the decision below should be reversed with respect to citizens who wish to keep and bear arms.

Respectfully submitted,

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November 23, 2009

AMICUS
CURIAE
BRIEF

No. 08-1521

IN THE

Supreme Court of the United States

OTIS P. MCDONALD, et al.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF PROSECUTING ATTORNEYS AND DISTRICT ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS CITY OF CHICAGO, ILLINOIS, ET AL.

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BRIEF OF THE ASSOCIATION OF PROSECUTING ATTORNEYS AND DISTRICT ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS CITY OF CHICAGO, ILLINOIS, ET AL.

The Association of Prosecuting Attorneys ("APA") and the Hons. Anita Alvarez, State's Attorney for Cook County, Illinois; Glenn F. Ivey, State's Attorney for Prince George's County, Maryland; Robert T. Johnson, District Attorney of Bronx County, New York; and Kim Worthy, Prosecuting Attorney for Wayne County, Michigan respectfully submit this brief as *amici curiae* in support of respondents City of Chicago, Illinois, et al.[1]

STATEMENT OF INTEREST

The APA was founded as a national organization to represent all prosecutors and provide additional resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make our communities safer. The APA acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, among other ways by submitting briefs as *amicus curiae* in appropriate cases. The APA's board of directors includes current and former prosecutors from states throughout the nation.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed by the parties with the Clerk, *amici curiae* have permission of all parties to file because they gave all parties notice of their intent to file a brief more than ten days prior to the due date for the *amici curiae* brief.

The other *amici* are elected District Attorneys, who collectively represent millions of citizens in several states:

The Honorable Anita Alvarez is the elected State's Attorney for Cook County, Illinois. Cook County is the second largest county in the United States with a population of approximately 5.3 million residents.

The Honorable Glenn F. Ivey is the elected State's Attorney for Prince George's County, Maryland. The County has 850,000 residents.

The Honorable Robert T. Johnson is the District Attorney of Bronx County, New York. The County has 1.4 million residents.

The Honorable Kym Worthy is the elected Prosecuting Attorney for Wayne County, Michigan, which includes Detroit. The County has approximately 2 million residents.

Amici have a significant interest in this case. They confront serious, violent crimes on a daily basis. State and local prosecutors and the communities they help to protect rely upon the enforcement of state and local gun laws in prosecuting violent crimes. Until recently, the validity of those laws under the Second Amendment was not in doubt. This case has far-reaching implications for the enforcement and prosecution of state and local gun laws, and *amici* believe that this Court's decision should be informed by the views of the officials responsible for enforcing state and local gun laws.

INTRODUCTION AND SUMMARY

At issue in this case is whether the Second Amendment should be held for the first time to apply to the states, where gun laws have evolved and been adapted to changing conditions without federal constraint throughout the nation's history. As the problem of gun violence has grown, these laws have become crucial instruments in keeping the public safe. As a result, prosecutors have come to rely upon state and local gun laws ("state gun laws") at every stage of law enforcement: from identifying and disrupting criminal activity; to charging criminal conduct; to obtaining convictions at trial and defending them on appeal.

First, state gun laws play a significant role in basic law enforcement functions, particularly in urban areas and increasingly in neighboring suburbs. Gun violence is an acute problem in the nation's cities, and it is especially dangerous to police officers. Guns — disproportionately handguns — are used in connection with the most serious crimes. The cities with the nation's toughest gun laws — like Chicago and New York — have reached the reasonable and permissible judgment on behalf of their residents that rigorous gun laws are necessary and effective. These cities have determined that such laws reduce violent crime in a number of ways. Most directly, the laws reduce the gun supply, thereby keeping dangerous weapons out of the hands of dangerous criminals. In their view, gun laws also assist police in enforcing the laws by making it safer to execute search warrants and providing the basis for police disruption of violent crime before it happens.

Second, state gun laws are important to prosecutors in bringing cases to trial, a power that is fundamental to ordered liberty. *Illinois* v. *Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."). Because the Second Amendment previously has not been interpreted to operate as an independent restriction on state authority to enact and enforce gun laws, criminal defendants typically enjoy little leverage over the charging decision when it comes to illegal possession of a firearm. Thus, the Second Amendment has to date not generated litigation in state criminal cases on a scale comparable to litigation under the Fourth Amendment, whose protections often present prosecutors with difficult decisions when evidence may be subject to exclusionary rule challenges. In the face of such challenges, prosecutors often are forced to drop charges altogether or to enter into plea agreements under terms that do not hold defendants fully accountable for their criminal conduct.

Extension of the Second Amendment's restrictions to the states will undermine regulation of violent criminal conduct at every stage of the criminal justice process. If possession of a firearm is presumptively legal, police will be less able to intervene and prevent violent crime before it occurs. Incorporation of the Second Amendment would also promote routine challenges to firearms possession charges on Second Amendment grounds and thereby significantly increase the burden on prosecutors in obtaining convictions for violation of state firearms laws and defending them on appeal. Incorporation would threaten to embroil a wide range of firearms prosecutions in litigation similar to litigation under the Fourth Amendment's exclusionary rule. Indeed, it also would complicate Fourth Amendment litigation itself by threatening to redefine "probable cause" and "reasonable suspicion" in firearms prosecutions.

The implications of incorporation would be dramatic in scope. Ninety percent of firearms convictions are obtained at the state level. These convictions are based on laws that have been carefully calibrated to local conditions based on experience. Subjecting states and localities to an unbending national standard concerning the right to bear arms would ignore the importance of these local solutions and substantially undermine the ability of elected representatives to take actions to ensure public safety. The position of state and local prosecutors throughout the nation is quite different from that of federal prosecutors who, by definition, operate under a single national standard.

For these reasons, and for the reasons stated by respondents City of Chicago, Illinois, et al., the Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. State Gun Laws Are Critical To Law Enforcement Efforts In Many Jurisdictions.

For many jurisdictions, state and local gun legislation has been crucial to promoting public safety. Gun violence is an enormous challenge, against which prosecutors and police are the public's primary line of defense. For some of the nation's largest cities, state and local lawmakers have determined that strict gun laws are the most effective solution to fighting violent crime. The experience of these jurisdictions has shown, in their considered judgment, that tough laws reduce criminals' access to dangerous weapons and improve the safety and efficacy of law-enforcement efforts. These important gains, as understood by the representatives elected to protect public safety, would be substantially undercut by a decision to incorporate the Second Amendment against the states, which would cast doubt on the constitutionality of a wide range of state gun laws.

Reasonable people may disagree about the wisdom of a particular policy, or about conclusions to be drawn from the extensive research on gun violence. That is why such decisions and determinations appropriately are left, under the Constitution, to state and local governments, who may change and adapt their policies over time in light of experience, exigency, and democratic preference. The healthy process of democratic experimentation in this vital area of public safety should not be distorted or truncated by a national constitutional mandate that strips state and local governments of important authority and flexibility.

A. Gun violence is a serious problem in urban areas and a direct threat to law enforcement personnel.

"[P]rosecutors have the duty to seek justice and the obligation to protect public safety." Jennifer A. Fahey, U.S. Dep't of Justice, *Using Research to Promote Public Safety: A Prosecutor's Primer on Evi-*

dence-Based Practice 25 (2008), *available at* http://nicic.org/Downloads/PDF/Library/023361.pdf. Gun violence presents a singular challenge to the prosecutor's obligation to protect public safety. During 2006, 67% of the 17,034 murders nationally — more than two thirds — were committed with firearms. See Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 Alb. Gov't L. Rev. 440, 443, 447 (2008). Likewise, in 2006, firearms were used in 155,770 aggravated assaults and 153,285 robberies. *Id.* at 448-49.

Handguns are disproportionately more likely to be used to commit violent crimes than are other firearms. Although handguns account for only 35% of nearly 200 million firearms in the United States, they accounted for 88% of all firearms murders in 2006 and 60% of murders overall. See *id.* at 447; see also Firearm & Injury Ctr. at Penn, *Firearm Injury in the U.S.* 7-8 (rev. 2009), http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf; Craig Perkins, U.S. Dep't of Justice, *Weapon Use and Violent Crime*, at 8 tbl. 10 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/wuvc01.pdf (1993-2001 statistics).

Handguns are a weapon of choice for violent crime due to their easily concealable nature, their light weight, their ease of use, and their lethal power. See Garen J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 J. Am. Med. Ass'n 1749, 1753 (1996); Firearm & Injury Ctr. at Penn, *supra*, at 7. Indeed, in a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates said that they were armed with a handgun. Caroline Wolf Harlow, U. S. Dep't of Justice, *Firearm Use by Offenders* 3 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf.

Although the problem of gun violence is national in scope, its severity depends greatly on local circumstances. Between 1976 and 2005, firearms homicides were unevenly distributed across the nation: 59.3% took place in large cities, while only 10.1% occurred in rural areas, 10.6% in small cities, and 19.8% in suburban areas. See Bureau of Justice Statistics, U. S. Dep't of Justice, *Homicide Trends in the U. S., Trends by City Size*, http://bjs.ojp.usdoj.gov/content/homicide/city.cfm (last visited Dec. 29, 2009). Several large cities have suffered particularly dramatic firearms homicide rates: In 2007, 80% of homicides in Los Angeles, 82% of homicides in Baltimore, and 84% of homicides in Philadelphia were committed with firearms. See Brief for Major American Cities et al. as *Amici Curiae* Supporting Petitioners at 6-7, *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (filed Jan. 11, 2008) (No. 07-290).

Furthermore, the disproportionate use of handguns in firearms homicides is especially pronounced in large cities. In Baltimore, nearly 99% of all of the homicides committed using a firearm in 2007 involved handguns. See *id.* at 7. Likewise, in Chicago, over 96% of homicides committed using a firearm and approximately 73% of all homicides in 2005 involved handguns. See Chi. Police Dep't, *2005 Murder Analysis* 25-26 (2006), *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/Murder2005.pdf. In addition, handguns accounted for more than 86% of "crime guns," defined as firearms used in a crime, suspected to have been used in a crime, or illegally possessed, recovered and traced by police in Chicago in 2000. See Bureau of Alcohol, Tobacco & Firearms, Dep't of the Treasury, *Crime Gun Trace Reports (2000) Chicago Il.* 6 (2002), *available at* http://www.atf.gov/publications/download/ycgii/2000/cityreports/chicagoil.pdf.

The prevalence of gangs substantially contributes to the danger of firearms. In the mid-1980s, as the cocaine supply increased and as crack cocaine emerged as the drug of choice in urban areas, drug dealers recruited large cohorts of teenage distributors. See Alfred Blumstein, *Youth Violence, Guns, and the Illicit Drug Industry*, 86 J. of Crim. L. & Criminology 10, 29-30 (1995). During this period, gang membership rose rapidly, and gang involvement in drug dealing grew. See Ray Risley, *A Police Officer's Perspective on Gangs, Drugs, and Guns on the Streets of Chicago*, Compiler, Fall 1998, at 1, 6, *available at* http://www.icjia.state.il.us/ public/pdf/compfall98.pdf. The growth of gang-operated street drug-markets spurred territorial conflict, and teenage gang members peddling crack cocaine armed themselves with guns. See *ibid.* Once some gang members acquired guns, their peers followed suit. See David Hemenway et al., *Gun Carrying Among Adolescents*, 59 Law & Contemp. Probs. 39, 44-46 (1996); see also David Hemenway, *Private Guns Public Health* 115-16, 215 (2004). Once strictly an urban problem, gang-related violent crime now also occurs increasingly in suburbs "where gangs have expanded their drug distribution operations." Nat'l Gang Intelligence Ctr., U.S. Dep't of Justice, *Na-*

tional Gang Threat Assessment 2009, at 8 (2009), *available at* http://www.fbi.gov/publications/ngta2009.pdf.

Studies demonstrate that gang members and individuals involved in drug trafficking carry firearms at elevated rates. *See, e.g.*, Lawrence Rosenthal, *Second Amendment Plumbing After* Heller: *Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 18-19 (2009); Joseph F. Sheley & James D. Wright, *In the Line of Fire: Youth, Guns and Violence in Urban America* 95-103 (1995). For instance, a study of gang members in Rochester found that gang membership increased the likelihood of carrying a firearm between seven and twelve times, depending on age, even when controlling for past and current offending. Rosenthal, *supra*, at 18 (citing Terence P. Thornberry et al., *Gangs and Delinquency in Developmental Perspective* 128-31 (2003)). Among a sample of 99 St. Louis gang members studied, 80 owned guns and the median number of firearms owned was four. *Id.* at 18 n. 85 (citing Scott H. Decker & Barrick Van Winkle, *Life in the Gang: Family, Friends and Violence* 175-76 (1996)). Of the weapons owned by these gang members, 75% were handguns. See *ibid.*

The results of gang members' penchant for carrying and owning firearms were devastating: 94% of all gang-related homicides in 2004 involved firearms. Nat'l Inst. of Justice, U. S. Dep't of Justice, *Gun Violence*, http://www.ojp.usdoj.gov/nij/topics/crime/gun-violence/welcome.htm (last visited Dec. 29, 2009). Likewise, between 1991 and 2005, approximately 95% of all gang-motivated murders in Chicago were committed using firearms. See Chi. Police Dep't, *supra*, at 50, 58. In Chicago, the most frequent cause of murder in 2005 was altercations between street gangs, and such altercations together with gang-related narcotics activity accounted for over 38% of all murders committed in 2005 in Chicago. See *id.* at 28-30. Overall, Chicago saw a significant increase from 1991 through 2005 in the percentage of murder incidents caused by altercations between street gangs and gang-related narcotics activities. See *id.* at 29. For instance, between 2004 and 2005 alone, the percentage of murder incidents caused by street gang altercations in Chicago increased by 7.5%. See *id.* at 29-30, 58. Likewise, gang-related homicides in Chicago increased five-fold between 1985 and 1994. See Risley, *supra*, at 4-5.

Moreover, the prevalence of gang violence in gang-dominated neighborhoods creates a contagion effect. See Rosenthal, *supra*, at 19. High levels of gang violence in gang-ridden neighborhoods become a further stimulus to the carrying of firearms, for offensive or defensive purposes, real or imagined. See *ibid.* For instance, an ethnographic study of at-risk youth in New York indicated that inner-city youth are more likely to both arm themselves and respond to real or perceived threats and provocations with lethal violence when they live under the increasing threat of violence in an environment in which firearms are prevalent. See *id.* at 19-20 (citing Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity, in Youth Violence* 105, 137-71 (Michael Tonry & Mark H. Moore eds., 1998)). Indeed, studies have shown that gang-related homicides have an independent and upward effect on the overall homicide rate. See *id.* at 20. For instance, one study demonstrated that firearms violence in New York had a contagion effect: firearms violence stimulated additional firearms violence in nearby areas. See *id.* (citing Jeffrey Fagan et al., *Social Contagion of Violence*, *in The Cambridge Handbook of Violent Behavior and Aggression* 688, 701-10 (Daniel J. Flannery et al. eds., 2007)).

The dramatic increase in gun-related violence among gangs had a particularly pronounced impact on large cities. One study, for example, concluded that 69.3% of all gang-related homicides occurred in cities with populations over one million. See *id.* at 18 (citing James Alan Fox et al., *The Will to Kill: Making Sense of Senseless Murder* 56 & tbl. 3.6 (rev. ed. 2008)).

Gun violence poses a significant risk to law-enforcement personnel. Of the 562 law enforcement officers killed in the line of duty in the United States between 1997 and 2006, 521 — approximately 93% — were killed with firearms.[2] See Fed. Bureau of Investigation, U.S. Dep't of Justice, *Law Enforcement Officers Killed & Assaulted, 2006*, at tbl. 27 (2007), http://www.fbi.gov/ucr/killed/2006/table27.html. Of the 521 officers killed by firearms, 380, or about 73%, were killed with a handgun. See *id.* In 2006, 46 of the 48 officers killed in the line of duty, or approximately 96%, were killed with firearms, and of those 46 officers killed by firearms, 36, or about 78%, were killed with handguns. See *id.* at pt. "Officers Feloniously Killed," http://www.fbi.gov/ucr/

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[2] These figures exclude the law-enforcement officers killed in the terrorist attacks of September 11, 2001.

killed/2006/feloniouslykilled.html. Furthermore, firearms caused the deaths of over 90% of law enforcement officers who were killed while responding to felonies. See Josh Sugarmann, *Every Handgun Is Aimed at You: The Case for Banning Handguns* 79 (2001). Of these fatalities involving firearms, 77% were caused by handguns. See *ibid.*

B. *Many jurisdictions have enacted state gun laws — and handgun restrictions in particular — to reduce violent crime.*

In the view of many jurisdictions, state gun laws play an important role in reducing violent crimes. Supporting the permissibility of these conclusions, scholars and researchers have concluded that these bans have had a demonstrated empirical effect of reducing violent crime. Their research explains that this reduction in crime occurs because bans on handguns have been effective at limiting access to such firearms.

Empirical research demonstrates that handgun bans have succeeded in reducing gun violence. For instance, according to one study, the proportion of homicides and robberies between 1991 and 1996 that involved guns was about six percentage points lower in Cook County, Illinois, which is dominated by Chicago, compared to the other 200 largest counties in the country. See Philip J. Cook et al., *Underground Gun Markets*, 117 Econ. J. F558, F580 (2007). Ac-

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These conclusions were reached after controlling for factors such as race, geography, population, and the burglary rate. See Cook, *Underground Drug Markets*, *supra*, at F580. The result is similar when the burglary rate is not controlled for. See *id.* at F580 & n. 39.

cording to another report, in 1982, the year when Chicago's handgun ban came into effect, the number of handgun homicides in Chicago dropped significantly and remained at similar low levels for the next seven years, followed by a short spike, and a return to levels nearly as low as those observed in 1982. See Carolyn Rebecca Block & Antigone Christakos, Ill. Criminal Justice Info. Auth., *Major Trends in Chicago Homicide: 1965-1991*, at 1, 18 (1995).

Likewise, one group of commentators noted that around the time the District of Columbia enacted its recently invalidated handgun ban in 1976, homicides and suicides in the District declined by approximately 25%. See Philip J. Cook et al., *Gun Control After* Heller: *Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1076 (2009) (citing Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615, 1616-17 (1991)). Another commentator reported that gun-related homicides fell by more than 25%. Bogus, *supra*, at 157 (citing Loftin et al., *supra*, at 1615). While the decline in homicides occurred abruptly after the handgun ban came into effect, the mean murder rate in Washington was 25% lower in the nine years following the enactment of the handgun ban than in the preceding nine years. See *id.* at 157-58 (citing Loftin et al., *supra*, at 1615, 1616 tbl. 1). Meanwhile, there was no statistically significant change in gun-related homicides in immediately surrounding areas in Maryland and Virginia or in homicides with other weapons within the District, suggesting that criminals did not switch to other weapons. See *id.* at 157. Furthermore, while Baltimore, which did not have a handgun ban, also experienced a decline in firearms homicides around 1976, unlike Washington, it exhibited a reduction in non-gun as well as gun homicides, suggesting that there was some general change in Baltimore during this time frame that was not specific to guns. See Cook et al., *Gun Control After* Heller, *supra*, at 1077 (citing David McDowall et al., *Using Quasi-Experiments to Evaluate Firearms Laws: Comment on Britt et al.'s Reassessment of the D. C. Gun Law*, 30 Law & Soc'y Rev. 381 (1996)). Similarly, while Washington exhibited a 23% decline in gun-related suicides, there was no decline in gun suicides in Baltimore. See *ibid.* (citing McDowall et al., *supra*); Bogus, *supra* at 457 n. 118 (citing Loftin et al., *supra*, at 1615).

Notably, a 1990 Maryland law that banned one type of handgun (the short-barreled inexpensive handguns known as "Saturday Night Specials") appeared to have reduced homicides by 9% without any increase in homicides with other weapons. See Bogus, *supra*, at 458 (citing Hemenway, *supra*, at 170 (citing Daniel W. Webster et al., *Effects of Maryland's Law Banning "Saturday Night Special" Handguns on Homicides*, 155 Am. J. Epidemiology 406 (2002))). These data support elected representatives' conclusions that rigorous gun laws, and handgun bans in particular, can be effective at reducing violence and murder when implemented at the local level. See *id.* at 457-58.

The reason handgun bans reduce violent crime is simple: bans have been found to be effective at restricting criminal access to handguns. According to one group of researchers, obtaining a gun in Chicago, where private handgun ownership was essentially banned in 1982, is now more difficult than in other cities. See Cook et al., *Underground Gun Markets*, *supra*, at F573. Accordingly, many young people and criminals in Chicago face serious difficulty obtaining a gun. Cook et al., *Gun Control After* Heller, *supra*, at 1078 (citing Cook, *Underground Gun Markets*, *supra*, at F598, F601-02). Underground gun markets in Chicago are characterized by high transaction costs and price mark-ups, as compared to gun markets elsewhere. See Cook et al., *Underground Gun Markets*, *supra*, at F558, F561, F564-65, F572, F580-81; Philip J. Cook & Jens Ludwig, *Aiming for Evidence-Based Gun Policy*, 25 J. Pol'y Analysis & Mgmt. 691, 713-14 (2006); Robert Blau, *Cop Death Resurrects Guns as Issue*, Chi. Trib., Jan. 11, 1991, at 1. For instance, interviews with Chicago youths and illegal gun brokers report that certain types of low quality guns that typically sell legally outside of Chicago for between $50 and $100 sell for between $150 and $100 within the city. See Cook et al., *Underground Gun Markets*, *supra*, at F564. Likewise, in June 1990, a Chicago illegal-gun dealer was arrested for attempting to sell seven semi-automatic handguns purchased legally outside the city for $1800 to an undercover police officer in Chicago for $2800. See Blau, *supra*. In addition, illegal gun brokers in Chicago typically charge $30-50 per transaction. See Cook et al., *Underground Gun Markets*, *supra*, at F565.

Furthermore, according to one study, approximately 30% to 40% of attempted illegal gun transactions in Chicago fail. See *ibid*. Reasons for this failure include the broker's inability to procure a gun from a supplier, failure of the customer and broker to agree on a place for the transaction, the broker's distrust of the customer's intentions, and the broker's suspicion that the customer is a law enforcement officer. *Id.* Likewise, according to empirical research, ammunition (which, like handguns, is generally illegal in Chicago) carries a markup up to fifty times higher in Chicago than elsewhere. *See id.* at F567-68. Ammunition in Chicago reportedly is scarce: waits of one to four weeks in the underground market are not uncommon. See *id.* at F567.

Interviews with individuals arrested in Chicago conducted in 1996 and 1997 also demonstrate the difficulties prospective criminals face in obtaining a gun in Chicago. About 70% of surveyed Chicago arrestees who never owned a gun but said that they might want a gun said that it would take them at least one week to procure a gun or that they would be unable to obtain one. *Id.* at F574. Only about 60% of such arrestees surveyed in other cities said the same. *Ibid.* Likewise, around 15% of this group of Chicago arrestees — compared to around 20% of such arrestees surveyed in other cities — said that they could obtain a gun in one day. *Ibid.*

Not surprisingly, gun ownership among arrestees in Chicago is lower than in other parts of the country. In Chicago, 21% of surveyed arrestees reported that they have owned a gun at some point prior to their arrest, while the respective mean and median percentages for twenty-two cities across the country in which arrestees were surveyed were 31% and 33%. *Ibid.* Among gang members arrested in Chicago and surveyed, 30% reported having owned a gun while 58% of gang members arrested in other cities stated that they had owned one. See *id.* at

F577. In addition, some commentators have noted that Chicago's handgun ban may also have helped to reduce criminal access to guns by preventing licensed gun dealers from locating in high-crime neighborhoods in the city and by rendering "owners . . . less likely to resell their guns through unregulated secondary market transactions." *Id.* at F576.

C. *Prosecutors and police rely on gun laws — especially handgun restrictions — in stopping violent crime.*

State prosecutors and police rely on gun laws in important ways — both in avoiding escalation of already dangerous enforcement activities and in preventing violent crime before it occurs.

1. *State gun laws help keep police safe.*

First, state gun laws play an important role in preventing escalation of violence in already dangerous law-enforcement activities. Execution of warrants is one of the most dangerous duties that a police officer routinely undertakes. The presence of an armed occupant exacerbates the danger of the situation, for both the officers and the occupant. *See, e. g.*, William Lee, *2 Officers Shot Serving Warrant*, Chi. Trib., July 17, 2009, at 10 (indicating that two Chicago police officers were shot when they entered an apartment to execute a search warrant for drugs); Joseph J. Simeone, *Duty, Power, and Limits of Police Use of Deadly Force in Missouri*, 21 St. Louis U. Pub. L. Rev. 123, 130 (2002) (indicating that Kansas City police officers shot a man while serving a search warrant during a drug raid when he approached them with a gun). Gun laws render it less likely that police officers executing warrants will be met by an occupant wielding a gun, thus reducing the risk of escalation. Indeed, a report from the International Association of Chiefs of Police indicated that gun laws can help protect police officers operating on the front lines against gun violence. See Christine Allred & Valerie Denney, Int'l Ass'n of Chiefs of Police, *Taking a Stan*[illegible] *Reducing Gun Violence in Our Communities* 26-27 (2007), *available at* http://www.theiacp.org/LinkClick.aspx?fileticket=fdvruxYEhXg%3d&tabid=328. Laws that restrict gun possession also make it less likely that law-abiding citizens could inadvertently escalate a confrontation with police in a case of mistaken identity. Cf. *Bletz v. Gribble*, 640 F. Supp. 2d 907, 922 (WD Mich., 2009) (indicating application of Second Amendment presents "difficult conceptual issues" when police enter the wrong home and the occupant is shot while brandishing a weapon at police).

Expansion of the Second Amendment's prohibitions to the states would, at the very least, give constitutional immunity to gun possession in the home and make law enforcement more dangerous. Police would face a legal regime in which every house could be defended by a firearm, substantially increasing the risk of miscalculation and escalation, thereby endangering police and citizens alike. And state and local governments would be hamstrung in their efforts to protect their police officers — "the foot soldiers of society's defense of ordered liberty," *Roberts v. Louisiana*, 431 U. S. 633, 647 (1977) (Rehnquist, J., dissenting) — during the execution of one of their most dangerous duties.

2. *State gun laws help to prevent crime before it occurs.*

Second, state gun laws — and handgun restrictions in particular — aid police in heading off violent illegal conduct before it occurs. When applicable law bans the possession and carrying of firearms, courts have held that police officers have reasonable suspicion to stop an individual who appears to be carrying a firearm, such as when the officer observes a suspicious bulge in a person's waistband indicative of the presence of a handgun. Rosenthal, *supra*, at 38 & n. 201 (collecting cases); see also, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 24 (1968) ("When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."); see also, *e. g.*, *United States* v. *Black*, 525 F. 3d 359, 364-66 (CA4 2008); *United States* v. *Mayo*, 361 F. 3d 802, 807-08 (CA4 2004).

Gun laws thus have important implications for law enforcement. For example, New York City's aggressive enforcement of its gun laws — including police intervention where an individual appears to be carrying a gun — has reportedly played an important role in reductions in violent crime observed in the City since the early 1990s. See Rosenthal, *supra*, at 39-44. New York City requires application for a handgun permit, and such permits are rarely issued. See *id.* at 39 (citing N. Y. Penal Law § 400.00(6)). Issuance of these permits is highly discretionary, and the applicant must face some extraordinary personal danger that requires the applicant to carry a handgun. See *ibid.* (citing Rules of the City of N. Y. tit. 38, § 5-03 (2008)). Thus, because individuals are rarely permitted to carry guns in New York, especially handguns, when an officer has reasonable suspicion that an individual is carrying a handgun or other firearm, the Fourth Amendment permits intervention because possession itself is suggestive of criminal activity. See *ibid.*

Indeed, weapons stops pursuant to New York's enforcement regime are central to New York's policing strategy. See *id.* at 39-40. Data collected by the New York Attorney General indicates that suspected weapons charges were the most common reason for New York police to stop an individual in 1998 and the first three months of 1999, when 44.6% of stops involved a suspected weapons charge, and weapons stops were the type of stop most likely to result in a frisk. See *id.* at 31, 39-40 & tbl. 1 (citing Civil Rights Bureau, Office of the Att'y Gen. of the State of N. Y., *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* app. tbl. I.A.5, tbl. I.B.3 (1999) [hereinafter *N. Y. Police Report*]). The police department's rationale behind the strategy was "to eradicate gun violence by stepping up efforts to find and seize illegal firearms." *N. Y. Police Report*, *supra*, at 53.

New York City's enforcement strategy has resulted in an increased number of arrests and decreased violent crime. See Rosenthal, *supra*, at 31-32. In particular, the data suggest a substantial reduction in violent crime in areas surrounding New

York public housing projects, especially visible crime in public places, the type of crime most like to be reduced by New York City's enforcement tactics. *Id.* at 32-33. And New York's focus on concealed handguns has contributed to the disruption of open-air drug sales and a reduction in associated violent crime. See *id.* at 31, 34.

Because New York City's gun laws render handgun purchase difficult, policing of weapons possession may be especially effective because it is difficult to replace handguns seized by the police. See *id.* at 41. Legal and practical difficulties of leaving New York to purchase a firearm legally, or purchasing one illegally from a gunrunner, may reduce the replacement rate. See *ibid.* Additionally, modest increases in the price of handguns due to illegality may have a significant inhibitory effect on gang crime since the wages of foot soldiers are not much higher than wages in the legitimate low-skill labor market. *Ibid.* When a jurisdiction bans the possession and sale of handguns, raising the cost and difficulty of replacing them once they are seized, offenders may be less likely to carry handguns in public places where they are vulnerable to search upon reasonable suspicion of carrying a handgun. See *ibid.*

Incorporation of Second Amendment rights against the states would erect a significant obstacle to the kind of policing strategy that has proven so effective in New York City, Chicago, and other jurisdictions. Although the Second Amendment right recognized in *Heller* concerned possession in the home for self-defense, the boundaries and contours of that right have not been charted, and significant litigation about its reach beyond the immediate context of *Heller* (if any) is inevitable. For example, to the extent that *Heller* recognized "'a right to possess and carry firearms in case of confrontation,'" Rosenthal, *supra*, at 46 (quoting *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2797 (2008)), it may be argued that such "confrontation" is equally (if not more) likely to occur outside the home as inside.[4]

Accordingly, incorporation of the Second Amendment would at least cast doubt on (and perhaps eliminate) important law enforcement techniques. In New York City, for example, "the ability of the authorities to conduct weapons searches consistent with constitutional limitations is vitally dependent on" the City's strict gun laws; police intervention based on more generalized indicia of criminality — such as the refusal to answer questions or provide identification, avoidance of the police, nervous reaction on questioning, or presence in a high crime area — is impermissible. Rosenthal, *supra*, at 40 (citing *N. Y. Police Report*, *supra*, at 30-31, 36-40). Even if handgun possession could still be regulated heavily through licensing, such a legal regime might not permit an officer to stop an individual based solely on speculation that a suspect lacks the requisite license. See *Commonwealth* v. *Couture*. 552 N. E. 2d 538. 541 (Mass. 1990) ("The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun [without a license] and the stop [of the suspect's vehicle] was therefore improper under Fourth Amendment principles."). Thus. if it were legal to possess and carry handguns. the ability of police and prosecutors to implement an aggressive intervention regime based on the officers' visual perception of handgun possession could be sharply circumscribed.

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[4] Some states already have expressly provided by law for a right to carry and use firearms in self-defense outside the home. Steven Jansen & M. Elaine Nugent-Borakove, Nat'l Dist. Att'ys Ass'n, *Expansions to the Castle Doctrine* 5-8 (2008), *available at* http://www.ndaa.org/pdf/28250-NDAA_F1.pdf. Some commentators have cautioned other jurisdictions not to adopt such laws out of a concern that such laws have multiplied the incidence and severity of violent confrontations. See *id.* at 8 (noting that the murder rates in Florida increased 42% in the months following adoption of self-defense law). The implications of incorporating the Second Amendment on this ongoing democratic deliberation are, at the very least, unclear.

Legal precedent bears this out. Even before *Heller*. courts had held that. where applicable law does not ban the carrying of a firearm. the Fourth Amendment does not permit a stop-and-frisk on the basis that the suspect is armed and potentially dangerous: in the absence of a strict gun prohibition. there is no indication that he is violating the law by possessing the gun. Rosenthal. *supra*. at 38 & n. 202 (collecting cases): see. *e. g.*. *United States* v. *Ubiles*. 221 F. 3d 213. 217-18 (CA3 2000). The reasoning of these cases has been extended in the wake of *Heller*. Some courts have suggested that. if the Second Amendment applies. mere possession would never give law-enforcement personnel reasonable suspicion for a detention. For example. one federal district court suggested that possession of firearms and ammunition would no longer serve as the basis for probable cause to stop and search a vehicle. Cf. *United States* v. *Moore*. No. RWT-08-203. 2009 U. S. Dist. LEXIS 47882. at *3-4 (D Md.. June 4. 2009) (upholding such a search and seizure after *Heller* on the basis that it occurred before *Heller* was decided).

Another district court offered the same conclusion as to possession of a firearm in public. See *Lund v. Salt Lake City Corp.*, No. 2:07-CV-0226BSJ, 2008 U. S. Dist. LEXIS 98722, at *24 n. 9 (D Utah, Dec. 4, 2008) (noting that "possession of a firearm in public . . . may well represent the exercise of a fundamental constitutional right guaranteed by the Second Amendment" in holding that a police officer was not entitled to qualified immunity on the issue of unreasonable or excessive force under the Fourth Amendment).

In sum, as one commentator has concluded, the "data suggest that New York's gun control laws deserve a good part of the credit for New York's precipitous decline in violent crime." Rosenthal, *supra*, at 40. Incorporation of the Second Amendment would pose a significant threat to the ability of states and cities to employ similar laws to combat violent crime, leaving urban residents to rely on other means of protection — including arming themselves. Such a result would undermine the

> "function of law in preserving ordered liberty. Civilized people refrain from 'taking the law into their own hands' because of a belief that the government, as their agent, will take care of the problem in a organized, orderly way with as nearly a uniform response as human skills can manage." *Rosenfeld v. New Jersey*, 408 U. S. 901, 902 (1972) (Burger, C. J., dissenting).

The Court should decline to upset these settled expectations and safeguard "ordered liberty" by affirming the authority of state and local governments to enact and enforce gun laws that, in their considered judgment, protect the public from violence and deadly assaults by strictly limiting or banning handguns.[5]

II. State Gun Laws Play A Significant Role In Prosecuting Gun Crimes.

The law governing gun crimes plays an important role in prosecuting criminal conduct. Gun violence is destructive, pervasive, and costly. In light of these realities, even outright bans on the possession of entire classes of weapons had been almost universally upheld by the courts prior to this Court's decision in *Heller*. And even following that decision, it has remained relatively easy to charge and try gun possession as criminal conduct under state laws precisely because settled precedent from this Court has precluded use of the Second Amendment to challenge or invalidate state or local gun laws. While there has been some satellite litigation over the constitutionality of laws criminalizing gun possession, courts have been able to deal with these issues quickly in light of the understanding that the Second Amendment does not bind the states in their gun laws. See, *e. g.*, *Wilson* v. *Cook County*, 914 N. E. 2d 595, 603 (Ill. App. Ct. 2009); *Williams* v. *State*, No. 01999, 2009 Md. App. LEXIS 169, at *11 (Md. Ct. Spec. App., Oct. 30,

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[5] As the City of Chicago and Village of Oak Park point out, other constitutional provisions also are not incorporated, such as the grand-jury requirement of the Fifth Amendment and the civil-jury requirement of the Seventh Amendment. Brief of Respondents City of Chicago and Village of Oak Park at 40-41.

2009); *People* v. *Abdullah*, 870 N. Y. S. 2d 886, 887 (N. Y. Crim. Ct. 2008).[6]

The utility of gun laws in prosecuting violent crimes is not limited to cases of mere gun possession. Drug possession charges are often accompanied by gun charges. For example, a 2005 study observed that drug and gun possession charges were highly correlated in Brooklyn. N. Y. City Criminal Justice Agency, *New York City's Gun Court Initiative: The Brooklyn Pilot Program* 19 tbl. 6 (2005), *available at* http://www.cjareports.org/reports/guncourt.pdf. Other violent crimes, such as homicide and rape, are likewise often accomplished with the assistance of a gun. Gun possession charges can serve as important alternative charges in cases where a prosecutor has clear evidence of weapons possession but is unable to prove a defendant's role in drug activity or other violent conduct.

Incorporation of the Second Amendment against the states would radically transform the prosecution of violent crimes. Most obviously, every gun crime would be subject to potential challenge on the ground that the law in question infringed the right to keep and bear arms. Moreover, heightened gun-possession rights would translate to heightened Fourth Amendment protection in a broad range of cases: any arrest precipitated by an officer's suspi-

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Some of the post-*Heller* decisions alternatively held that the law would survive scrutiny even if the Second Amendment were incorporated and applied against the states. See, *e. g.*, *State* v. *Knight*, 218 P. 3d 1177, 1189-90 (Kan. Ct. App. 2009). These decisions generally have avoided extensive Second Amendment analysis.

cion of weapons possession would be subject to a challenge that the officer lacked reasonable suspicion of criminal activity. These challenges would imperil both weapons-possession charges and any related charges of criminal conduct, such as drug possession. The result would be fewer arrests, more dropped charges, and more favorable plea deals for armed offenders. And even cases that were successfully tried to conviction would be more difficult to defend on appeal.

First, there is no question that an incorporation decision would greatly complicate prosecution of gun crimes. The *Heller* decision itself — despite expressly avoiding the incorporation issue — already has prompted some litigation in state courts in contexts that range far beyond the context presented in *Heller*. In Missouri, for example, the constitutionality of a law that bars possession of a loaded firearm while intoxicated was recently litigated all the way to that state's supreme court. See *State* v. *Richard*, No. SC89832, 2009 Mo. LEXIS 531 (Mo. Nov. 17, 2009); see also, *e. g.*, *Pistol-Packing Soccer Mom Sues County Sheriff*, Press-Register (Mobile, Ala.), Nov. 25, 2008, at A2 (Pennsylvania woman sued sheriff for revoking her gun permit after she took her gun to a child's soccer game, claiming she had a Second Amendment right to carry); Lisa Redmond, *Top Court Considers Local Gun-Lock Appeal*, Sun (Lowell, Mass.), June 24, 2009, *available at* 2009 WLNR 12063805 (Westlaw); *Trial Over Gun at Obama Rally to Begin*, Beaver County Times (Beaver, Pa.), July 14, 2009, *available at* 2009 WLNR 13389121 (Westlaw) (man arrested by state police for disturbing the peace claimed he had a Second

Amendment right to bring semiautomatic handgun to Obama rally).

Such litigation would mushroom and become significantly more complicated in the wake of a decision by this Court concluding that state and local gun laws may be challenged under the Second Amendment. These undeniable consequences already are on display in the federal courts, which have heard more than 100 Second Amendment challenges since *Heller* was decided less than two years ago. And the federal courts already have begun to question the constitutionality of gun laws under the Second Amendment — even as to categories of laws that are defended as "longstanding prohibitions" that were not to be "cast" in "doubt" by *Heller*. See *Heller*, 128 S. Ct. at 2816-17. In *United States* v. *Skoien*, for example, the Seventh Circuit vacated a district court order, which had relied on this statement in *Heller*, as an insufficient justification for dismissing a Second Amendment challenge to 18 U. S. C. § 922(g)(9) (which bars persons convicted of a misdemeanor crime of domestic violence from possessing a firearm). No. 08-3770, 2009 U. S. App. LEXIS 25375, at *11 (CA7 Nov. 18, 2009) ("We note for starters that it is dicta, and although we can hardly ignore it, we think it would be a mistake to uphold this or other gun laws simply by invoking the Court's reference to these 'presumptively lawful regulatory measures,' without more."); see also *United States* v. *McCane*, 573 F. 3d 1037, 1048 (CA10 2009) (Tymkovich, J., concurring) ("[T]he felon dispossession dictum may lack the 'longstanding' historical basis that *Heller* ascribes to it."), *petition for cert. filed*, 78 U. S. L. W. 3221 (U. S. Oct. 1, 2009) (No. 09-402).[7]

Second, an incorporation decision would further complicate prosecution of violent crimes by providing defendants with a new Fourth Amendment basis to challenge *any* arrest in which the arrestee was armed. As previously explained, an officer would likely require more than mere suspicion of weapons possession to make a stop if the Second Amendment were held to protect a person's right to carry a firearm in public, either as a general rule or in certain circumstances (for example, when an individual concluded that such possession in a public place was necessary for self-defense). Thus, any arrest that began with a police stop could be challenged as having been unreasonably based upon suspicion of mere gun possession.

Applying the Second Amendment to states, for the first time in the nation's history, would lead to a tidal wave of new Second Amendment challenges by defendants in weapons-related cases. Beyond the Second Amendment itself, such a decision by this Court would profoundly reshape the concepts of reasonable suspicion and probable cause in weapons-related contexts. Accordingly, it is appropriate to consider the effects of this dramatic expansion.

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[7] By citing these decisions, *amici* do not agree with their interpretations. Rather, these decisions, which already have been issued less than two years after *Heller*, illustrate the confusion and uncertainty that likely would result from a ruling by this Court that the Second Amendment's restrictions apply to the states.

Experience demonstrates the significance of such a development. While the Fourth Amendment exclusionary rule serves important constitutional values, it also unquestionably exacts very real costs on prosecution of dangerous crimes. See *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' . . . which sometimes include setting the guilty free and the dangerous at large." (quoting *United States* v. *Leon*, 468 U. S. 897, 907 (1984))). Indeed, issues related to the Fourth Amendment exclusionary rule can be the deciding factor for prosecutors when deciding whether to bring charges in the first place, and prosecutors routinely decide not to file charges in cases where critical evidence is likely to be challenged and suppressed under the Fourth Amendment exclusionary rule. See David W. Neubauer, *America's Courts and the Criminal Justice System* 265 (9th ed. 2008) ("Prosecutors may refuse to file charges because of a search-and-seizure problem . . . ."); Robert C. Fellmeth, *The Optimum Remedy for Constitutional Breaches: Multiaccessed Civil Penalties in Equity*, 26 Pepp. L. Rev. 923, 933 (1999) ("[T]he influence of police constitutional error is considerable on decisions to issue a case, which crimes to charge, and the bargained disposition of a case."); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669, 675 (1998) ("[A] prosecutor would be reluctant to file a case where suppression of critical evidence seemed likely."); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 688, 707 (1970) (indicating that prosecutors in the District of Columbia exercised a screening function by engaging in this practice); see also Frank

W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 36-40 (1969).

Similarly, the exclusionary rule has a major impact on the number of charges that make it to trial. Prosecutors may be forced to drop some or even all charges prior to trial, including charges that are dismissed after evidence is suppressed. See, *e. g.*, *United States* v. *Tejada*, 956 F. 2d 1256, 1259-60 (CA2 1992) (indicating that the government dropped a firearms charge after a gun was suppressed but went to trial and secured a conviction on drug charges); Sharon Tubbs, *Faith and the Top 10*, St. Petersburg Times, Oct. 3, 2004, at 1E (indicating that all charges were dropped in a Polk County, Florida case against singer R. Kelly because police obtained evidence illegally); Oaks, *supra*, at 746 (indicating that charges were dismissed "in every single one of these cases in which a motion to suppress was granted").

The prospect of excluding evidence necessary to secure a conviction also affects prosecutors' decisions regarding plea agreements and related sentencing decisions, including charging and sentencing recommendations. See Fellmeth, *supra*, at 933; Oaks, *supra*, at 748; cf. Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 Ariz. St. L. J. 805, 817 n. 73 (1997). If the prosecutor believes that the defendant may prevail on a motion to suppress based on police conduct that is invalid or arguably invalid, she is likely to try to eliminate the risk of dismissal or acquittal by offering more favorable plea agreement terms, resulting in a shorter sentence than the defendant would otherwise receive to induce the defendant to plead guilty. See Oaks, *supra*, at 718; see also Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 80-82 (1968); cf. Misner, *supra*, at 817 n. 73; Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 Harv. L. Rev. 564, 573 (1977) ("The policies behind the exclusionary rule thus are expressed in the form of sentencing discounts in numerous uncertain cases rather than in total acquittal in only a few cases.").

Finally, the exclusionary rule leads to delay inasmuch as it complicates the charging process as described above. The exclusionary rule — with its attendant motions to dismiss, which consume prosecutorial resources at the trial as well as appellate levels — weighs heavily on the scarce time and resources of prosecutors and increases their backlog of cases. As commentators have explained,

> "it is beyond dispute that the exclusionary rule increases the monetary cost of criminal prosecutions. Even if one accepts that the majority of these motions are denied, the motions are quite costly to the system in terms of attorney and court costs. Each motion brought by the defense demands a response from the prosecution, followed by full evidentiary judicial hearings. These motions consume a large amount of court time, lawyer time, and witness time which are compounded if the issues are relitigated on appeal." Perrin et al., *supra*, at 677.

Accord Oaks, *supra*, at 718; see also Fellmeth, *supra*, at 935-37.

Application of the Second Amendment to the states, bringing with it a complex array of new constitutional challenges, thus would substantially complicate prosecution of gun crimes and would further stretch prosecutorial resources that are already under tremendous strain. The negative impact of these developments cannot be overstated. As this Court observed in *Heller*, "[f]or most of our history, . . . the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens." 128 S. Ct. at 2816. That remains true even today. States are on the front line in the fight against gun violence: "90 percent of all weapons convictions occur in state courts." Linda Hirsch, *The Gun Fight: Analyzing NRA Statistics*, ABC News, Oct. 9, 2000, http://abcnews.go.com/print?id=95437. A holding that the Second Amendment binds the states would thus be far more sweeping in effect than this Court's decision in *Heller*.

Moreover, a ruling extending the Second Amendment's reach would interfere with laws that, unlike federal gun laws, are highly adapted to local conditions. In this way, too, an incorporation ruling would be far more profound than this Court's ruling in *Heller*. Indeed, Justice Kennedy has previously observed that "the reserved powers of the States are sufficient to enact" gun restrictions and that such measures reveal the "theory and utility of our federalism" as "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995)

(Kennedy, J., concurring). But the states "would find their own programs for the prohibition of guns in danger of displacement by the federal authority," *id.* at 583, were they to become subject to a national, monolithic Second Amendment standard.

The Court should therefore decline to extend *Heller's* rule to state laws. Such an extension would unduly restrict the police powers of the states and significantly disrupt the prosecution of the most dangerous and violent crimes. Incorporation would thereby threaten the very value the Second Amendment was intended to promote — "the security of a free State." U. S. Const. amend. II. Public safety would better be preserved by leaving the states with the flexibility they have always enjoyed to craft and enforce gun laws that are tailored to local conditions.

CONCLUSION

For the foregoing reasons, and for the reasons stated by respondents City of Chicago, Illinois, et al., the Court should AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,

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AMICUS
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BRIEF

38

No. 08-1521

IN THE
Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, INSTITUTE OF MEDICINE OF CHICAGO, WAYMAN AFRICAN METHODIST EPISCOPAL CHURCH OF CHICAGO, ILLINOIS COUNCIL AGAINST HANDGUN VIOLENCE, LEGAL COMMUNITY AGAINST VIOLENCE, VIOLENCE POLICY CENTER, STATES UNITED TO PREVENT GUN VIOLENCE, FREEDOM STATES ALLIANCE, CONNECTICUT AGAINST GUN VIOLENCE, MAINE CITIZENS AGAINST GUN VIOLENCE, CITIZENS FOR A SAFER MINNESOTA, OHIO COALITION AGAINST GUN VIOLENCE, WISCONSIN ANTI-VIOLENCE EFFORT EDUCATIONAL FUND, AND GUNFREEKIDS.ORG IN SUPPORT OF RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

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STATEMENT OF INTEREST

With the written consent of the parties, the following *amici curiae* submit this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.[1] *Amici curiae* are the Board of Education of the City of Chicago and the non-profit organizations Institute of Medicine of Chicago, Wayman African Methodist Episcopal Church of Chicago, Illinois Council Against Handgun Violence, Legal Community Against Violence, Violence Policy Center, States United to Prevent Gun Violence, Freedom States Alliance, Connecticut Against Gun Violence, Maine Citizens Against Gun Violence, Citizens For A Safer Minnesota, Ohio Coalition Against Gun Violence, Wisconsin Anti-Violence Effort Educational Fund, and Gunfreekids.org.

Amici are governmental, civic and religious organizations actively engaged in efforts to reduce handgun violence and the destructive impact it has on the local communities and urban centers they serve. A brief description of each organization's mission is set forth in the Appendix. *Amici* submit this brief to assist the Court in evaluating the merits, and wisdom, of potentially making the Second Amendment applicable to the states.

---

[1] All parties have consented to the filing of *amicus* briefs in support of a party in this case and copies of their letters have been filed with this Court. Counsel of record for all parties received timely notice of the intention of *amici curiae* to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The right to arms, even for personal self-defense, is fundamentally different from all other liberties retained by individuals in society, because of the inherent lethality of firearms. We tolerate few restrictions on the right to free speech because of its salutary effects, and because "sticks and stones may break my bones but words can never hurt me," as the children's rhyme goes. Guns, on the other hand, will kill you.

1. The structure of the Second Amendment prevents incorporation against the states of the right to keep and bear arms articulated in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008). The reason the Second Amendment was added to the Constitution was to prevent the federal government from destroying the militia, a body concurrently governed by the states and which, when "well-regulated" (*i.e.,* composed of men trained to arms), stood as a check against federal tyranny. The Amendment accomplished this by "confer[ring] an individual right to keep and bear arms (although only arms that 'have some reasonable relationship to the preservation or efficiency of a well-regulated militia')" and only "arms 'in common use at the time' for lawful purposes like self-defense." *Heller,* 128 S. Ct. at 2814, 2815 (quoting *United States v. Miller,* 307 U.S. 174, 178, 179 (1939)). It would be illogical to use the Fourteenth Amendment to turn such a federalism provision *against* the states.

2. Petitioners fail to show that the Second Amendment is incorporated under the Due Process Clause of

the Fourteenth Amendment.[2] Under that clause, a constitutionally enumerated right must be essential to ordered liberty to be incorporated. We have a long history in this country of state and local legislatures exercising their exclusive police powers to ban arms in common use that states and cities determine pose too great a danger to public safety to be allowed. The exercise of these powers has only increased since the founding.

It seems implausible that the Second and Fourteenth Amendments have been understood all along to confer a fundamental right to have *any* weapon an individual prefers merely *because* the weapon is in common use. Rather, history supports that the states always have retained their police power to ban inappropriate common-use weapons (including pistols), as long as access to other weapons sufficient for the asserted need – for example, self-defense – is preserved. This suggests perhaps there is a fundamental (though unenumerated) right to self-defense, but that the right to any particular arm is *not* fundamental, unless shown to be essential to the ability to exercise the right of self-defense.

Petitioners' position would require the Court to find that the Fourteenth Amendment was understood to elevate *all* common-use weapons beyond the reach of any legislative body's power to ban. This is not a plausible description of the country's regulatory history of arms and, if followed to its logical conclusion, would undermine the ability of democratic government to preserve order and, ultimately, persevere. To the extent Petitioners really just want to replace local legislatures with the federal judiciary in this area of the police power, they are asking the Court, unwisely, to enter unbounded territory. *See* J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law,* 95 Va. L. Rev. 253 (2009).

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[2] We fully agree with Respondents' argument that the Second Amendment is not incorporated by the Privileges or Immunities Clause, and add only that adoption of the virtually unlimited natural-law-rights definition of "privileges and immunities" advanced by Petitioners, *see Petitioner's Brief* at 6, 17, would effectively replace elected legislatures with an imperial and unelected judiciary. This Court should reject the invitation.

3. Even if the Court incorporates the right to keep and bear arms against the states, the right must be subject to normal police-power regulation and remain subordinate – as are *all* rights – to the greater right of "personal security" that *all* individuals possess in society. That is how Blackstone understood the right to arms for self-defense, and that is how it has been understood in the states since the founding. In the event of incorporation, this Court's First Amendment obscenity jurisprudence provides a useful analogue and affirms that the determination of what are appropriate common-use weapons ought to remain a local matter.

The Court in *Heller* struck down the DC handgun ban, but did not hold that a right to handguns is reasonably necessary for effective self-defense in the home. Rather it struck the federal ban because the ordinance "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller,* 128 S. Ct. at 2817-18. There are two basic problems with applying a uniform proscription against handgun bans to the states.

First, to the extent the Court is suggesting that *American society* has overwhelmingly chosen handguns for self-defense in the home, that premise is false. Only about 10.1% of all American adults have one or more handguns primarily for self-defense or as their sole firearm(s) (*i.e.*, the only firearm available for self-defense), and only about 10.3% of American adults have one or more long guns primarily for self-defense or as their sole firearm(s) (*i.e.*, the only firearm available for self-defense). It is not true that Americans overwhelmingly keep *any* firearm, much less handguns, to defend themselves – in the home or anyplace else. There are many negative externalities that handgun ownership visits on the community. Among other things, handguns are used offensively seven times for every one time they are used defensively.

Second, firearm choice among the fraction of American adults who have handguns is not a workable basis for examining state laws. If popularity of a weapon is the standard, does that mean the federal judiciary can strike down the assault-weapon bans in place in seven states because, following the election and inauguration of President Obama, assault weapons apparently were purchased in other states in large numbers in fear of a federal ban? Does the Constitution require us to take a poll to determine which weapons are in common use and which are most preferred? The results vary greatly by region, of course.

Control of arms to prevent crime and secure the entire community has always been primarily a matter of state and local action. *Cf.* Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* 136-137 n.13 (Amy Gutmann ed., Princeton U. Press

1997) ("Of course, properly understood, [the Second Amendment] is no limitation upon arms control by the states."). The Court's "most popular weapon" rationale for overturning the federal handgun ban should not be expanded to preclude state and local legislatures from acting under their police power to prevent crime and protect *everyone's* right to personal security. As Justice Jackson wisely cautioned 60 years ago in a case striking down an incitement-to-violence conviction on First Amendment grounds: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). He was vindicated two years later when the Court upheld an incitement conviction, recognizing that even broad First Amendment rights must yield to clear and present dangers to public safety. *Feiner v. New York,* 340 U.S. 315 (1951).

ARGUMENT

I. THE SECOND AMENDMENT'S STRUCTURE PRECLUDES ITS INCORPORATION.

The Second Amendment's "prefatory clause" makes plain that the Amendment was added to the Constitution to ensure the preservation of a "well-regulated militia." *See Heller,* 128 S. Ct. at 2799-2802. It accomplished this by "confer[ring] an individual right to keep and bear arms (although only arms that 'have some reasonable relationship to the preservation or efficiency of a well-regulated militia')" and only "arms 'in common use at the time' for lawful purposes like self-defense," *id.* at 2814, 2815 (quoting

United States v. Miller, 307 U.S. 174, 178, 179 (1939)). The states exercised control over the militia concurrently with the federal government, and they had exclusive control over training and officering the militia within their borders. They also governed the militia when it was not in actual service of the federal government.[3] The "well-regulated militia" in the Second Amendment's "prefatory clause" is the militia trained to arms. *Heller,* 128 S. Ct. at 2800. The founders protected "a well-regulated militia" because that institution rendered large standing armies unnecessary and would provide the states with the means for resisting federal tyranny. *Id.* at 2800-01.

Because the Second Amendment plainly was intended to protect the state militias from disarmament, it would be illogical to turn such a federalism provision against the states. Doing so would mean that the Fourteenth Amendment was understood to grant federal judges final authority to decide whether a state improperly has interfered with that state's ability to keep federal tyranny in check. There is no evidence to support such an understanding. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (arguing for "unincorporation" of First Amendment establishment clause because it was federalism-based provision designed to allow states to establish religions without interference).

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[3] *See* U.S. Const., art. I, § 8, cl. 16; *Houston v. Moore,* 18 U.S. (5 Wheat) 1, 24 (1820) (opinion of Washington, J.); *id.* at 37 (opinion of Johnson, J.); *id.* at 50 (Story, J., dissenting on other grounds).

Insofar as the "right to keep and bear arms" articulated in *Heller* protects the keeping and bearing of weapons for any other lawful purpose, including self-defense, the right historically has been significantly regulated by the states under their police power. *See infra* pp. 11-20. Such regulation includes the banning of some "common use" weapons, *e.g.*, *Andrews v. State,* 50 Tenn. (1 Heisk.) 165, 186 (1871) (upholding legislature's banning of, *inter alia,* non-military revolvers and dirks); Cal. Penal Code § 12125 (banning junk handguns); the determination of what purposes are lawful, *e.g.*, Cal. Penal Code § 245 (punishing more harshly the use of a firearm to commit specified offenses than commission of same offense without firearm); the allowance and determination of the scope of the common law right of self-defense, *e.g.*, Wayne R. LaFave, 2 *Substantive Criminal Law* § 10.4 (2d ed. 2003) (discussing law of self defense and duty to retreat); and specification of and control over arms for state militia purposes, *e.g.*, Va. Code Ann. § 44-54.12 (providing that "[m]embers of the Virginia State Defense Force shall not be armed with firearms during the performance of training duty or state active duty, except under circumstances and in instances authorized by the Governor"); Act of Apr. 21, 1818, ch. CCXXII, 1818 N.Y. Laws 210, 211. It would be nonsensical for the Court to begin applying a right whose scope is defined under state law against the states themselves.

II. THE DUE PROCESS CLAUSE DOES NOT SUPPORT INCORPORATION.

The Second Amendment right to keep and bear arms articulated in *Heller* does not meet the Due Process Clause test for incorporation under the

Fourteenth Amendment. To be incorporated, and therefore applied against the states, a right enumerated in the Bill of Rights must be so essential it is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969), or "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968). *See also* Respondents' Br. at 8-10. In determining whether a right is "implicit" in the concept of ordered liberty, the Court asks whether "neither liberty nor justice would exist if [the right] were sacrificed." *Palko*, 302 U.S. at 326. The Court also looks to the right's history, and the extent to which it is found in federal and state law. *Id.; see also Duncan*, 391 U.S. at 154.

In *Heller*, the Court indicated that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S. Ct. at 2798. But the Court did not hold that in England or in the United States there is (or was) a fundamental right to have a handgun, or any particular weapon in common use. The states have long exercised their police powers to regulate, and in some cases ban, arms that, although in common use, are found to pose too great a danger to public safety to remain. *See infra* pp. 11-20. The states' exercise of these powers only increased after the founding, due to improvements in firearms and the rise in violence that accompanied the growing practice of carrying concealed deadly weapons such as pocket pistols, Bowie knives, dirks and sword canes. *E.g.*, Clayton E. Cramer, *Armed America* 224-35 (Nelson Current 2006); Saul Cornell, *A Well Regulated Militia* 138-141 (Oxford U. Press 2006); Charles G. Worman, *Firearms in American History* 44-104 (Westholme

Publishing 2007) (describing the development of the percussion cap and the emergence of repeating pistols and revolvers). Since the states have always decided which common-use weapons are acceptable, Petitioners' contention that there is a fundamental right to have *all* "weapons in common use" is not plausible.

The only way a right to arms can be fundamental in the Due Process Clause sense is if it is shown that denial of a particular weapon is tantamount to denial of a constitutionally protected liberty or of justice. Since the liberty interest at stake in this case is the right to have arms for self-defense, Petitioners must show that the handgun bans prevent them from defending themselves, *i.e.*, that there are no reasonable alternatives. This claim they do not (and cannot) make.

Although a right to self-defense may or may not be fundamental, its existence, scope and "fundamentalness" are not directly at issue in this case. The Second Amendment expressly protects a right to arms, not a right to self-defense. Finding an unenumerated right to self-defense in the Second Amendment, and applying it against the states, would have to occur under the Court's "substantive due process" jurisprudence, the judge-made doctrine that has been described as "an oxymoron" and a license for "judicial usurpation." *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring); *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

Determining the scope of such a right would inherently require a balancing of the liberty interests of all involved, including taking into account the externalities of exercises of the right. *E.g., Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) ("We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people – rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."). If a right to self-defense were found to be fundamental and therefore incorporated, a determination still would have to be made whether the ban of a *particular* weapon amounted to a denial of the ability defend oneself. Petitioners do not try to make that showing for handguns.

Petitioners' position would require the Court to find that the Fourteenth Amendment was understood to elevate *all* common-use weapons beyond the reach of any legislative body's power to ban. This is not a plausible description of the country's regulatory history of arms and, if followed to its logical conclusion, would undermine the ability of democratic government to preserve order and itself persist.

III. EVEN IF THE COURT INCORPORATES THE RIGHT TO KEEP AND BEAR ARMS, THE RIGHT REMAINS SUBORDINATE TO THE GREATER RIGHT OF ALL INDIVIDUALS TO PERSONAL SECURITY.

A. States Always Have Exercised Their Police Power Over Arms, Including the Banning of Common Use Weapons.

Even if the Court incorporates into the Fourteenth Amendment the right to keep and bear arms articulated in *Heller*, the right should remain, like all individual liberties, subordinate to the greater right of "personal security" that all individuals acquire upon entering society from the state of nature.

In the social-contract political theory that pervaded post-revolutionary American thought,[4] "civil government is the proper remedy for the inconveniences of the state of nature." John Locke, *Second Treatise of Government* § 13, at 12, (C.B. Macpherson ed., Hackett Publ'g 1980) (1764). Locke posited that in nature people have the right to enforce their individual rights against others. *Id.* But since humans are partial to themselves and their friends, and susceptible to passion and revenge when punishing others, only "confusion and disorder" exist in nature. *Id.* To escape this perpetual anxiety and exposure, people join together to create "government to restrain the partiality and violence of men." *Id.*

Blackstone recognized that "the principal aim of society" is to protect individuals in the enjoyment of their natural, "*absolute* rights." 1 William Blackstone, *Commentaries on the Laws of England* 120 (Univ. of Chicago Press 1979) (1765) (emphasis added). These rights "could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities," and therefore "the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals." *Id.*

Blackstone's three "absolute" rights are the rights of "personal security" (life, limb, health and reputation), "liberty" and "property." *Id.* at 125-36. To "serve principally as barriers to protect and maintain inviolate the[se] three great primary rights," the English constitution established five other "auxiliary subordinate rights of the subject." *Id.* at 136. The fifth, which most immediately concerns us in this case,[5] is the right of subjects to "hav[e] arms for their defence, suitable to their condition and degree, *and such as are allowed by law*. Which is also declared by the same statute 1 W. & M. st. 2. c.2. [the English Bill of Rights] *and is indeed a public allowance, under due restrictions*, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 139 (emphasis added).

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[4] *See, e.g.*, Gordon S. Wood, *The Creation of the American Republic 1776-1787* 282-91 (U.N.C. Press 1969, 1998).

In the United States, the people have delegated limited powers to the federal government under the Constitution. Powers not delegated "are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see also Printz v. United States*, 521 U.S. 898, 919 (1997). In the American system, the states and their political subdivisions are the branches of government with principal responsibility for enacting legislation to "maintain and regulate" Blackstone's absolute rights through their "police power." *The Federalist No. 17* (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

The police power has always been understood to provide the states with authority "to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* 597 (Lawbook Exch., reprint 1999) (1868). "The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them." Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from both a Civil and Criminal Standpoint* 1-2 (Lawbook Exch., reprint 2001) (1886).

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[5] For context, the first four are: (i) the constitution, powers, and privileges of parliament, 1 Blackstone, *Commentaries* at 136, (ii) the limitation of the king's prerogative, *id.* at 137, (iii) the right to apply to the courts of justice for redress of injuries, *id.*, and (iv) the right to petition the king or either house of parliament for injuries not otherwise redressable, *id.* at 138-39.

States and their political subdivisions thus always have been free under the police power to reasonably regulate the right to arms. Cooley, for example, explains that Blackstone's fifth auxiliary subordinate right is preserved in America "by express constitutional provisions" but "extends no further than to keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters, and therefore the carrying of these, concealed, may be prohibited." 1 *Blackstone's Commentaries on the Laws of England* 143 n.24 (Lawbook Exch., reprint 2003) (Thomas M. Cooley ed., 1884); *see also Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (stating that the Second

Amendment is not infringed by laws prohibiting the carrying of concealed weapons).[6]

In a prominent 19th Century case, the Tennessee Supreme Court construed the state constitutional right to keep and bear arms to be parallel to the federal right, and held that the legislature was free to "'prohibit the wearing or *keeping* [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defense.'" *Andrews v. State,* 50 Tenn. (1 Heisk.) 165, 185 (1871) (emphasis added) (quoting *Aymette v. State,* 21 Tenn. (1 Hum.) 154, 159 (1840)). At the practical level, this meant that "the Act of the Legislature in question, so far as it prohibits the citizen 'either publicly *or privately* to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol,' is constitutional." *Andrews,* 50 Tenn. at 186 (emphasis added). The prohibition against keeping pistols extended to revolvers, and was upheld as constitutional to the extent it applied to nonmilitary revolvers, but could not be upheld if it applied to military revolvers. *Id.* at 186-87; *see also State v. Wilburn*, 66 Tenn. 57, 59-60 (1872); *Dycus v. State*, 74 Tenn. 584, 585 (1880).

An 1871 Texas statute prohibiting the carrying of deadly weapons – defined as "pistols, dirks, daggers, slingshots, sword canes, spears, brass knuckles and bowie knives" – was likewise upheld under that state's police power. *English v. State,* 35 Tex. 473, 474-78 (1872). The court noted that almost every state in the union has "a similar law upon their statute books, and indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration." *Id.* at 479.

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[6] *See generally* Randy E. Barnett, *The Proper Scope of the Police Power,* 79 Notre Dame L. Rev. 429 (2004); Charles Bufford, *The Scope and Meaning of Police Power,* 4 Cal. L. Rev. 269 (1916).

A well-established principle of the police power is that "the police requirements of a city are different than those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely peopled portions of the country." *In re Cheney,* 90 Cal. 617, 620 (1891). When a city regulates under its police power "for the prevention of crime and the preservation of the public peace" and "to protect the law-abiding citizen," it has great latitude. *Id.* at 621. Thus an ordinance prohibiting the concealed carrying of "any pistol, dirk, or other dangerous or deadly weapon" without a permit – available only to "peaceable person[s]" whose profession or occupation requires him to be "out at late hours of the night" – is a valid exercise of the power because "[i]t is a well-recognized fact that the unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides, as well as other breaches of the peace, that would not otherwise occur." *Id.*

Significant threats to urban public safety may be met with commensurate regulation that community legislatures find appropriate. *Darling v. Warden of City Prison,* 154 A.D. 413, 424 (N.Y. App. Div. 1913) (holding that legislature may prohibit possession of any pistol in the home without permit – "the Legislature has now picked out one particular kind of arm, the handy, the usual and the favorite weapon of the turbulent criminal class, and has said that in our organized communities, our cities, towns and villages where the peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit"). As the Court below noted, "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *NRA v. Chicago,* 567 F.3d 856 (7th Cir. 2009) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")).

Regulation also may extend to the complete prohibition of an entire class of arms. *See* Robert R. Dykstra, *The Cattle Towns* 121-22 (U. Nebraska Press 1968) (describing 1872 Witchita ban on pistols); Cal. Penal Code §§ 12125 (banning junk handguns), 12275.5(b) (.50 caliber rifles). In upholding Cleveland's city-wide ban on assault weapons, the Supreme Court of Ohio reaffirmed that "the police power includes the power to prohibit," and noted that "[t]he ordinance at issue affects a class of firearms" but does not violate the right to keep arms for self-defense because it does not ban the right to "*all* firearms." *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993). "For this reason, we are not persuaded by appellants' argument that by banning certain firearms 'there is no stopping point' and legislative bodies will have 'the green light to completely ignore and abrogate an Ohioan's right to bear arms.'" *Id.*

An assault weapons ban in Denver has likewise been upheld against the contention that "restricting the types of weapons that may be used in exercising the right to bear arms in self-defense constitutes a *per se* violation of that right." *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994). The Colorado Supreme Court observed that "[t]here can be no doubt that an ordinance, intended to prevent crime, serves a legitimate governmental interest sufficiently strong to justify its enactment" and that the "concealability" of certain weapons along with "the prevalent use of such weapons for criminal purposes establish . . . a substantial threat to the health and safety of the citizens of Denver." *Id.* at 332. The Court concluded that, while "carving out a small category of arms which cannot be used for purposes of self-defense undoubtedly limits the ways in which the right to bear arms may be exercised," the obstacles posed by a weapons-class ban "do not significantly interfere with this right" because "there are ample weapons available for citizens to fully exercise their right to bear arms in self-defense." *Id.* at 333.[7]

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[7] Denver is not alone in prohibiting assault weapons. Cities with a class ban on assault weapons include: Boston (1989 Mass. Acts 596, §§ 1-7); Chicago (Chicago, Ill., Code §§ 8-24-025, 8-20-030(h)); Cleveland (Cleveland, Ohio, Code §§ 628.01 – 628.99); Columbus (Columbus, Ohio, Code §§ 2323.11(L), (M), 2323.31, 545.04(a)); and New York City (New York, N.Y., Admin. Code §§ 10-301(16), 10-303.1; New York, N.Y., Rules tit. 38, § 17-01). Seven states also ban assault weapons: California (Cal. Penal Code § 12275); Connecticut (Conn. Gen. Stat. §§ 53-202a-53-202o); Hawaii (Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8); Maryland (Md. Code Ann. §§ 4-301 – 4-306); Massachusetts (Mass. Gen. Laws ch. 140, §§ 121, 122, 123, 131, 131M); New Jersey (N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13); and New York (N.Y. Penal Law §§ 265.00(22), 265.02(7), 265.10).

Regulating arms under the police power to prevent crime and protect the safety of the broader community is in fact pervasive, and has been subject only to "reasonableness" review in virtually every state to consider the question.[8] As long as a regulation does not prohibit the use of *all* firearms, it does not unduly burden the right to have arms for self-defense.

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[8] *See, e.g., Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984); *City of Tucson v. Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998); *Jones v. City of Little Rock*, 862 S.W.2d 273, 275 (Ark. 1993); *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994); *Rabbitt v. Leonard*, 413 A.2d 489 (Conn. 1979); *In re Wolstenholme*, 1992 Del. Super. LEXIS 341 at *18 (Del. Super. Ct. Aug. 20, 1992); *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978); *State v. Mendoza*, 82 Haw. 143, 153 (Haw. 1996); *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945); *Kalodimos v. Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984); *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006); *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *Hilly v. Portland*, 582 A.2d 1213, 1215 (Me. 1990); *People v. Swint*, 572 N.W. 666, 676 (Mich. Ct. App. 1997); *In re Application of Atkinson*, 291 N.W.2d 396, 399 (Minn. 1980); *State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 75 P.2d 900, 902-03 (Okla. 1998); *James v. State*, 731 So.2d 1135, 1137 (Miss. 1999); *State v. White*, 253 S.W. 724, 727 (Mo. 1923); *State v. Comeau*, 448 N.W.2d 595, 600 (Neb. 1989); *Burton v. Sills*, 53 N.J. 86, 101 (N.J. 1968); *State v. Dees*, 669 P.2d 261 (N.M. Ct. App. 1983); *State v. Rivera*, 853 P.2d 126 (N.M. Ct. App. 1993); *Grimm v. New York*, 289 N.Y.S.2d 358, 362 (N.Y. 1968); *North Carolina v. Fennell*, 95 N.C. App. 140, 143 (N.C. Ct. App. 1989); *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Morley v. City of Phila. Licenses & Inspections Unit*, 844 A.2d 637, 641 (Pa. Commw. Ct. 2004); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *Masters v. State*, 653 S.W.2d 944, 946 (Tex. Ct. App. 1983); *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969); *Parham v. Commonwealth*, 1996 Va. App. LEXIS 758, at *5 (Va. Ct. App. Dec. 3, 1996); *City of Princeton v. Buckner*, 377 S.E.2d 139, 148 (W. Va. 1988); *State v. Rupe*, 683 P.2d 571, 597 n.9 (Wash. 1984); *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003); *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982).

Throughout the history of the republic, "the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically . . . matters of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (citation omitted). The determination of what are appropriate and inappropriate common-use weapons inherently is and should remain a local matter, even if the Court incorporates the right. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) ("This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment.") and *Miller v. California,* 413 U.S. 15, 30 (1973) (holding that "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'" and that "these are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists").

B. The Court's "Most Popular Weapon" Rationale In *Heller* Is Not A Workable Principle Of Constitutional Law.

In *Heller*, this Court held that the Second Amendment protects firearms "in common use," and struck down the federal ban on handguns in Washington, D.C., because the ordinance "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Heller*, 128 S. Ct. at 2817. The Court did not find that a right to handguns is "fundamental," or even reasonably necessary for effective self-defense in the home. Instead, it held, without citing a single authority or citation, that the availability of long guns as an alternative to handguns "is no answer" because "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 2818. The Court listed several reasons, again without citing a single source, why "a citizen *may* prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." *Id.* (emphasis added). The Court concluded, again without a single factual source: "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.*

This rationale suffers from two fundamental problems that should preclude application of *Heller* to "extirpate" local choices pursued to protect everyone's right to personal security.

1. Americans have not "overwhelmingly chosen" handguns for self-defense.

The notion that the handgun "is overwhelmingly chosen by American society for [self-defense]" is inaccurate. The overwhelming majority of American adults and households have no gun whatsoever – hand or long. Only 25% of adults and 35% of households have some kind of gun.[9] Handgun owners are a subset of gun owners: only 16% of adults (24% of households) have one or more handguns.[10] Of the 16% of adults who own handguns, just over two-thirds – or 10.1% of all American adults – have one or more handguns primarily for self-defense or as their only firearm. Only 19.9% of adults own long guns, and this group overlaps substantially with handgun owners. Of those, just over half – or 10.3% of American adults – have one or more long guns primarily for self-defense or as their only firearm.[11] Thus it is not true that Americans overwhelmingly keep *any* firearm, much less handguns, to defend themselves – in the home or anyplace else. Among the minority who do, owners of handguns and long guns are nearly evenly split in the guns they have for self-defense.

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[9] Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, National Institute of Justice, Research in Brief, May 1997, at 1-2, *available at* http://www.ncjrs.gov/pdffiles/165476.pdf (hereinafter "*Guns in America Overview*"); Philip J. Cook & Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use* (Police Foundation 1996), *available at* http://www.policefoundation.org/pdf/GunsinAmerica.pdf (hereinafter "*Guns in America Report*"). More recent surveys have found even lower levels of gun ownership, concluding that in 2006 only 21% of individuals and 35% of households had at least one gun. *See* Tom W. Smith, National Opinion Research Center at the University of Chicago, *Public Attitudes Towards the Regulation of Firearms*, April 2007, at Figure 2, *available at* http://www-news.uchicago.edu/releases/07/pdf/070410.guns.norc.pdf.

[10] Cook & Ludwig, *Guns in America Overview*, at 1-2.

While it is true that *among* handgun owners, just under two-thirds have handguns *primarily* for self-defense,[12] no data indicates that such owners would be *less secure* in their homes with an alternative firearm (a long arm) or other weapon if handguns were banned. This point, which we made nearly verbatim in our *amicus* brief in the Court below, is critical to Petitioners, for they have the burden under the Due Process Clause of showing that handguns are *essential* to their self-defense. Yet Petitioners and their *amici* never attempt to make the necessary showing.

The Court's articulation of reasons as to why some "may" prefer a handgun seems not to withstand careful scrutiny. Experts say that handguns are poorly suited to self-defense in the home and that shotguns are superior.[13] The Court's notion that a handgun is easier to store in an accessible location suffers from two problems. First, as Chief Justice Roberts noted during oral argument in *Heller*, "there is always a risk that the children will get up and grab the firearm and use it for some purpose other than what the Second Amendment was designed to protect." Transcript of Oral Argument at 71, *Heller*, 128 S. Ct. 2783 (Mar. 18, 2008). Second, it assumes that intruders will be accommodating by breaking in only at times when occupants have sufficient proximity to their guns. For the "accessibility" argument to work, even as a matter of logic, it would appear that a gun would have to be stored in *every* room. Otherwise, an unprepared homeowner might find himself in the bathroom at the time of the intrusion.[14]

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[11] *Id.*; Cook & Ludwig, *Guns in America Report*, at 13-15, 36-38. The 11.2% and 10.3% figures are derived from the text and tables in the *Guns in America Report* and *Guns in America Overview* as follows. For each class of firearm (handgun and long gun) owned, the number of owners who have one or more guns in that class "primarily for self-defense" was added to the number of those who own only guns in that class (e.g., someone who owns one or more handguns and no long guns) but did not acquire them "primarily" for self-defense. This seems essential since guns that are not acquired "primarily" for self-defense still may be used for self-defense.

[12] Cook & Ludwig, *Guns in America Report*, at 38.

We made these points in an *amicus* brief we filed in the Seventh Circuit. The International Law Enforcement Educators and Trainers Association, which also filed an *amicus* brief in that Court, now challenges the argument, contending, without citation, that in "a much more typical home invasion, a burglar might enter an unoccupied room, and the noise of the entry (or an alarm, or a barking dog) would alert the victim in her bedroom to pick up the gun there." ILEETA Br. at 44. This actually makes our point, as it assumes the gun is stored in the room where the occupant already is located. It also fails to show why handguns are preferable to long guns in such situations since either can be stored where the occupant is located. *See* Bill Clede, *The Practical Pistol Manual* 8-9 (Jameson Books 1997).

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[13] *E.g.*, Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry and Shoot a Gun in Self-Defense* 40 (3d ed. 2002).

[14] This subject is explored on gun-enthusiast web sites. *See, e.g.*, http://www.thehighroad.org/showthread.php?t=7560 (discussion thread entitled "Home Defense question DO YOU HAVE A BATHROOM GUN") (last visited Dec. 30, 2009).

The suggestion that handguns cannot easily be redirected or wrestled away by an attacker must confront two facts: most handgun owners do not have proper training to use their guns for self-defense,[15] and even among highly trained police officers, 16% of officer homicides occur with the officers' own service weapons.[16] Regardless of whether it is "easier" for those lacking upper body strength to lift a handgun, no data shows that women and the elderly are any less able to use, for example, a lightweight-model 20-gauge shotgun with low recoil ammunition than a handgun.[17] The ILEETA brief now contends that many people would find "a handgun to be far easier to handle than a long gun, including a 20-gauge shotgun." ILEETA Br. at 42. But this fails to address the point – people are still able to defend themselves with a lightweight-model 20-gauge shotgun.

The idea that a handgun can be pointed at a burglar with one hand while the other hand dials the police appears, on its face, to be a suboptimal solution for summoning the police – except for those physically gifted individuals who can observe, hold and dial the phone with one hand and one eye while leveling a handgun and keeping watch on the intruder with the other hand and eye. Much more effective is directing the intruder to dial the police, which can be accomplished persuasively with either a shotgun or a handgun.[18] One also can direct the intruder to lie on the floor. Or one can do what police trainers advise in case of an intruder: gather the family into a safe room, call the police, and do not try to locate the burglar in order to hold him at gunpoint. Clede, *The Practical Pistol Manual* at 41-42.

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[15] Massad F. Ayoob, *In the Gravest Extreme: The Role of the Firearm in Personal Protection* 2 (Police Bookshelf 1980).

[16] Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 St. Louis U. Pub. L. Rev. 47, 78 n. 116 (1999).

[17] *See, e.g.*, Doug Little, *What is the best home defense shotgun for women?*, Arizona CCW Permit Website, June 3, 2008, *available at* http://arizonaccwpermit.com/2008/06/03/what-is-the-best-home-defense-shotgun-for-women/.

The ILEETA brief in the Seventh Circuit claimed that Chicago's handgun ban was directly responsible for at least part of a "drastic" deterioration in the city's violent crime rate immediately after the ban was adopted (ILEETA 7th Cir. Br. at 27-28). The brief presented no supporting evidence other than an ILEETA-constructed chart showing differences from one year to the next in FBI crime data. The argument rested entirely on fallacious post-hoc-ergo-propter-hoc reasoning. In response, we wrote:

> This claim is not serious. The chart in the ILEETA Brief tracking each year's crime rate was constructed from FBI crime data tables, a simple review of which shows that the Chicago data for each year from 1982 through 1984 was qualified by an endnote explaining that the "figures are not comparable with previous years." This means the data in each of those years cannot be compared with data from the preced-

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[18] *See 85-Year-Old Granny Pulls Gun On Intruder, Makes Him Call 911,* The Pittsburgh Channel, Aug. 21, 2008, *available at* http://www.thepittsburghchannel.com/news/17232825/detail.html?rss=pit&psp=news.

> ing years. The reason is that prior to 1983, Chicago had been seriously undercounting crime by categorizing 25% or more of reported crimes as "unfounded" and therefore nonexistent. At the FBI's request, this practice changed in 1983; hence the overnight 25% increase on paper in 1983.[19]

In its brief in this Court, ILEETA now presents our explanation, our data and our sources on the underreporting as its own – without attribution or explanation of its erroneous presentation to the Court below. ILEETA Br. at 17-22. ILEETA also now argues that it has "adjusted" the FBI crime figures to account for the undercounting during the period in question (without explaining how), and determined that Chicago's violent crime numbers are still higher after the ban than before. Therefore, the brief concludes, the difference must be the gun ban. *Id.* But the brief presents no evidence of a causal connection.

ILEETA also argued in the Court below that Chicago's handgun ban has failed to protect police officers because "[p]olice in the Chicago area are killed at a rate about 42% higher than the national rate." ILEETA 7th Cir. Br. at 2-3. We noted the meaninglessness of this claim, since major cities generally have higher rates of police-officer homicides (and crime) than the country as a whole, so one generally would expect to find disparities between them and the nation as a whole. ILEETA now attaches a chart to its brief in this Court ranking cities by officer-homicide rates, but the chart actually supports our position, as it clearly shows that the four largest U.S. cities have officer-homicide rates above the national average. More generally, however, it is unclear whether most of the cities listed even share traits that would make them comparable.

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[19] *See, e.g.,* Bob Warner, *Criminal Math: In 25 Years, One Other City Has Had Crime Counts Tossed/Errors Uncommon*, Phila. Daily News, Oct. 21, 1997, at 4; *see also, Burying Crime in Chicago*, Newsweek, May 16, 1983, at 64.

While handguns can be used for lawful self-defense, the social costs of handgun ownership are enormous. A starting point is the simple fact that as the rate of handgun ownership increases, so do the rates of handgun criminal-homicide and handgun suicide.[20] Handguns are used to commit more than 737,000 of the roughly 847,000 firearm violent crimes that are perpetrated each year (homicide, rape/sexual assault, robbery, assault).[21] No reliable data supports anything near a comparable number of defensive uses.

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[20] *See, e.g.*, Garen Wintemute, "Guns and Gun Violence," in *The Crime Drop in America* 46 (Alfred Blumstein & Joel Wallman eds., 2006) ("Not surprisingly, the more guns there are, the more gun crime there is. Many correlational studies, some geographic and some temporal, have established a close relationship between gun availability and rates of gun violence at the population level."); *see also* Franklin E. Zimring et al., *Crime is Not the Problem: Lethal Violence in America* 110 (Oxford U. Press 1997).

[21] Craig Perkins, "National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime," *Bureau of Justice Statistics Special Report*, at 3 (Sept. 2003).

2. No meaningful data supports claims of defensive handgun use at levels equal to or in excess of violent criminal handgun use.

Defensive gun use ("DGU") is notoriously difficult to measure, but however great the number of DGUs, *hostile* gun displays are much greater – by about a 7-to-1 ratio.[22] Hostile gun uses at home against family members, which are typically acts of domestic violence against women, may be more common than all DGUs.[23] A large number of claimed DGUs appear to be illegal and undesirable.[24]

The Court in *Heller* seems, unwittingly, to have relied upon an infamous DGU survey when it quoted the court of appeals' decision for the proposition that "banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' 478 F.3d [370,] at 400 [(D.C. Cir. 2007)], would fail constitutional muster." *Heller,* 128 S. Ct. at 2817-18. The authority offered by the appeals court to support the quoted language is a survey best known for its discredited claim that 2.5 million adults use guns defensively every year.[25]

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[22] David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey,* 15 Violence & Victims 257, 269 (2000).

[23] Deborah Azrael & David Hemenway, *In the Safety of Your Own Home: Results from a National Survey on Gun Use at Home,* 50 Social Science & Medicine 285, 289-91 (2000).

[24] David Hemenway et al., *Gun Use in the United States: Results from Two National Surveys,* 6 Injury Prevention 263, 266-67 (2000).

[25] The court of appeals cited pages 182-83 of Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and*

Even on its face, the survey does not show that handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Rather, it claims to show that among the small fraction of adults who say they have used a firearm defensively, more than three-quarters (80%) used a handgun rather than a long gun.[26] And even among that small purported cohort, most of the claimed defensive uses (63%) occurred *outside* the home.

Several of the most prominent and respected researchers in the field of gun violence have explained that the survey wildly overstates the number of DGUs; they nominated it for an award for "most outrageous number mentioned in a policy discussion by an elected official."[27] The survey's primary problems are telescoping (reporting incidents outside the covered time period as having occurred within it), self-presentation bias, and false-positives (in surveys of relatively rare events – where the actual rate of occurrence is, say, only 1 out of 100 or 1 out of 1,000 – even one or two false positives greatly skews the results).[28] The researchers show that, in order to believe the survey results, one has to believe a number of absurdities, based on undisputed crime rates. For example, if the survey is correct, then

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Nature of Self-Defense with a Gun, 86 J. Crim. L. & Criminology 150 (1995).

[26] *Id.* at 185.

[27] Philip J. Cook et al., *The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?*, 16 J. Policy Analysis & Mgmt. 463, 463 (1997).

[28] *Id.*; Jens Ludwig, *Gun Self-Defense and Deterrence*, 27 Crime & Just. 363, 366 (2000); David Hemenway, *Private Guns, Public Health* 64-78 (U. Mich. Press 2004).

more burglary victims used their guns in self-defense than there were burglaries in which burglary victims were at home and not asleep.[29] Similar problems occur with respect to claimed DGUs and robberies, rapes and gunshot victims.[30] The survey results simply are not valid.

3. Popularity of firearm choice is not a workable principle of constitutional law.

The popularity of a firearm among a small fraction of Americans is not a workable principle for determining the constitutionality of state and local laws. If popularity is determinative, the assault-weapon bans presently in place in seven states may be vulnerable because, following the election and inauguration of President Obama, assault weapons apparently were purchased *en masse*.[31] Smith & Wesson now makes the most powerful factory-production revolver in the world, a .50 caliber handgun called the Model 500. The company worked with an ammunition manufacturer to jointly develop a new magnum cartridge that gives the 500 the power to easily penetrate the highest grade concealable body armor typically worn by law enforcement officers.[32] If the Model 500 becomes popular enough, will it acquire constitutional protection? If the Constitution requires us to take a poll to determine which weapons are most preferred, how will we reconcile the fact that gun ownership varies tremendously by region: in Mississippi 55% of adults own a firearm, while in Massachusetts fewer than 13% do.[33] Do the various poll results in different states affect the constitutionality of every state's regulation? The inevitable escalation of firepower on American streets from a "popularity" standard will reduce, not increase, personal security.

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[29] *E.g.*, Hemenway, *Private Guns, Public Health* at 67.

[30] *Id.* at 67-68.

[31] Kevin Bohn, *Gun Sales Surge After Obama's Election*, CNN.com, Nov. 11, 2008, *available at* http://www.cnn.com/2008/CRIME/11/11/obama.gun.sales/; Jeff Wiehe, *Fears Drive Hordes to Gun Shops*, Journal Gazette, Apr. 5, 2009, *available at* http://www.journalgazette.net/article/20090405/LOCAL/304059928.

[32] *E.g.*, Dick Metcalf, *Smith & Wesson's Monster Magnum*, Shooting Times, *available at* http://www.shootingtimes.com/

CONCLUSION

Firearms regulation to prevent crime and secure the entire community has always been a matter of state and local judgment under the police power. It seems odd – and oddly short-sighted – that a Second Amendment jurisprudence could be crafted to elevate the mere *preferences* of handgun owners over the *crime-prevention* and *safety* needs of the entire community. It need not be so. The Supreme Court has always tempered pure doctrine, even when dealing with the Bill of Rights, with pragmatism when crime-prevention and public safety are at stake. As Justice Roberts wrote last term in an

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handgun_reviews/monster_1103/ (last visited Dec. 30, 2009); Chris Christian, *Smith & Wesson Model 500 .50-Cal. Magnum Is the King of Handguns*, Popular Mechanics, Sept. 2003, *available at* http://popularmechanics.com/outdoors/sports/1277336.html.

[33] These figures were taken from the results of a 2001 survey conducted by the Behavioral Risk Factor Surveillance System, which were published by the Washington Post. *See, e.g., Gun Ownership by State*, Wash. Post, May 26, 2006, *available at* http://www.washingtonpost.com/wp-srv/health/interactives/guns/ownership.html.

important Fourth Amendment case: "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. '[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Herring v. United States,* 129 S. Ct. 695, 700-01 (2009). That same pragmatism and awareness of consequences should inform the scope of the developing constitutional law on the right to keep and use arms for self-defense in the home.

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January 6, 2010

APPENDIX

APPENDIX

DESCRIPTIONS OF *AMICI CURIAE* ORGANIZATIONS

Board of Education of the City of Chicago

The Board of Education of the City of Chicago, which educates more than 400,000 students in 600 schools, strongly supports the prevention of youth gun violence. Last school year, 29 Chicago Public School students were killed in gun-related violence. Since 2000, more than 100 guns have been confiscated on school grounds. Gun violence has a profoundly negative impact on the educational opportunities of children in large urban centers like Chicago. Children who live in terror of gun violence find it difficult to shed that fear at the schoolhouse door. They struggle to concentrate on their school work and some see no reason to study, doubting they will live to adulthood. Gun violence also imposes extraordinary burdens on school administrators, teachers and security personnel, who must be vigilant to keep guns out of schools and to keep children safe during the school day.

Institute of Medicine of Chicago

Over its ninety-year history, the Institute of Medicine of Chicago ("IOMC") has both led and reflected the advances, the turmoil, and the challenges within the practice of medicine and the business of healthcare in the United States and, more specifically, contributed to the public health and welfare of the citizens of the metropolitan Chicago region. IOMC has partnered with the Illinois Campaign to Prevent Gun Violence, a research-based public education campaign, during which IOMC focused on providing for multiple constituencies, including both the public and state legislators in Springfield. In addition, IOMC has collaborated with the law enforcement and legal communities to push for common sense laws to get guns, "street sweeper" 20-50 round clips, sniper rifles, assault weapons, and armor piercing ammunition out of the hands of criminals.

Wayman African Methodist Episcopal Church

Wayman African Methodist Episcopal Church of Chicago has been lead, since 1992, by Reverend Dr. Walter B. Johnson, Jr., a prominent community activist known for advocating education to prevent violence among inner city youth. Reverend Johnson has partnered with the Chicago Public Schools, the Chicago Department of Human Services, and the Chicago Alternative Strategy to implement the Safe Schools, Safe Neighborhoods initiative.

Illinois Council Against Handgun Violence

The Illinois Council Against Handgun Violence ("ICHV") is the state's oldest and largest non-profit educational organization working to reduce death and injury caused by gun violence. ICHV informs the public, the media, and policymakers about the epidemic of gun violence and serves as a clearinghouse for information on gun violence.

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an amicus, LCAV has provided informed analysis in a variety of firearm-related cases, including those brought on the basis of the Second Amendment. *See, e.g., District of Columbia v. Heller*, 128 S.Ct. 2783 (2008); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009); *White v. United States*, No. 08 -16010-DD (11th Cir. filed Apr. 1, 2009).

Violence Policy Center

Violence Policy Center ("VPC") is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, organizations, researchers, advocates, and the general public. VPC examines the role of firearms in the United States, analyzes trends and patterns in firearms violence and works to develop policies to reduce gun-related deaths and injuries. VPC has conducted numerous fact-based studies on a full range of gun violence issues. These studies have influenced congressional policy-making and shaped congressional debates over gun control as well as state regulation of firearms. VPC actively participates in the debate over the meaning of the Second Amendment by monitoring and joining in Second Amendment litigation throughout the country.

States United to Prevent Gun Violence

States United to Prevent Gun Violence ("States United") is an association of independent state-wide gun-violence-prevention organizations. The purpose of States United is to allow our members to share best practices, programs and legislative ideas in order to work effectively to prevent gun deaths and injuries. Members of States United include: Arizonans for Gun Safety, Women Against Gun Violence, Connecticut Against Gun Violence Education Fund, Florida Coalition to Stop Gun Violence, Georgians for Gun Safety, Illinois Council Against Handgun Violence, Hoosiers Concerned about Gun Violence, Iowans for the Prevention of Gun Violence, Maine Citizens Against Handgun Violence, CeaseFire Maryland, Stop Handgun Violence, Citizens for a Safer Minnesota Education Fund, Ceasefire New Jersey, New Yorkers Against Gun Violence, North Carolinians Against Gun Violence—Education Fund, Ohio Coalition Against Gun Violence, Ceasefire Oregon, CeaseFire Pennsylvania, Texans for Gun Safety, Gun Violence Prevention Center of Utah, Virginia Center for Public Safety, Ceasefire Foundation, and WAVE Educational Fund.

Freedom States Alliance

The Freedom States Alliance is a national nonprofit organization working to free Americans from gun violence. Its focus is to reduce gun-related deaths and injuries through public awareness campaigns and by providing technical assistance and support to grassroots organizations.

Connecticut Against Gun Violence

Connecticut Against Gun Violence ("CAGV") has been working since 1993 to reduce gun violence through public education and legislative advocacy. CAGV's mission is to identify, develop, and promote passage of legislation designed to enhance gun safety. CAGV will pursue this mission at the local, state of Connecticut, and national levels through the political process.

Maine Citizens Against Handgun Violence

Maine Citizens Against Handgun Violence ("MCAHV") is a non-profit organization governed by and representing Mainers who are committed to preventing injuries and deaths caused by the excessive proliferation of firearms in our society. Founded in 1999, the organization is a combination of two organizations—Maine Citizens Against Handgun Violence whose mission includes legislative and lobbying work and, Maine Citizens Against Handgun Violence Foundation whose primary mission includes education through programs like the Gun Lock Giveaway which has distributed over 23,000 locks to Maine families. MCAHV works to prevent gun violence by raising public awareness and by advocating for personal responsibility, practical legislation, enforcement of laws, and increased manufacturer responsibility.

Citizens for a Safer Minnesota

Citizens for a Safer Minnesota ("CSM") is a non-profit member-based advocacy organization dedicated to ending gun violence. CSM promotes sensible public policy at both the state and federal level. The mission of CSM is to prevent gun death and injury and to free our communities from the fear of gun violence. Over the past decade, CSM has effectively used limited resources to influence the gun policy debate in Minnesota. CSM's greatest accomplishment was passing the law that prohibits individuals convicted of domestic abuse from keeping or purchasing a firearm. Other successes include passage of the Child Access Prevention law that holds an adult responsible if a child is harmed by an improperly stored firearm. And CSM has successfully defeated efforts to loosen the restrictions on who may carry a loaded handgun in public

Ohio Coalition Against Gun Violence

The Ohio Coalition Against Gun Violence ("OCAGV") is a non-profit organization working to prevent gun violence through education, advocacy and public awareness. OCAGV began as a volunteer committee in 1995 based on the concern about gun violence felt by the Interracial Religious Coalition, an organization promoting racial, ethnic and religious harmony. OCAGV's goal is to increase safety in Ohio in regards to firearms. OCAGV educates about gun homicides, suicides, and unintentional deaths and injuries, and supports and encourages local, state and federal legislation to reduce the accessibility of firearms in our communities and families.

Wisconsin Anti-Violence Effort Educational Fund

Wisconsin Anti-Violence Effort ("WAVE") Educational Fund is Wisconsin's only statewide grassroots organization solely dedicated to reducing gun violence, injuries and deaths. Through research, education and advocacy, WAVE Educational Fund raises awareness about firearm violence throughout the state, provides up to date information to the public and to policy makers, and promotes common sense measures that will bring our state to the forefront of gun violence prevention. Founded in 1995, WAVE Educational Fund has established a proven track record as the only viable, statewide organization solely dedicated to reducing gun violence, injuries and deaths.

GunFreeKids.org

Founded in 2007, GunFreeKids.org ("GFK") is an Internet-based issue advocacy organization, which provides tools for people to take action on pending state and national legislation and assists voters nationwide in learning about and supporting state-based candidates who favor sound gun violence prevention policies. GFK maintains a growing list of 10,000 nationwide subscribers and acts as a strategic resource for several state based gun violence prevention organizations.

AMICUS CURIAE BRIEF

(2)

No. 08-1521

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE BRADY CENTER TO PREVENT GUN VIOLENCE, THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, AND THE NATIONAL BLACK POLICE ASSOCIATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether governmental regulations of the exercise of the Second Amendment right are subject to strict scrutiny, or whether such regulations are subject to a more deferential standard of review for reasonableness.

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IN THE

Supreme Court of the United States

No. 08-1521

OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO, ILLINOIS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICI CURIAE[1]

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted to jeopardize the public's interest in protecting families and communities through strong government action to prevent gun violence. Through its Legal Action Project, the Brady

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[1] Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

Center has filed numerous briefs amicus curiae in cases involving gun laws, including in the recent cases *District of Columbia* v. *Heller* and *United States* v. *Hayes*.

The law enforcement amici listed below have a compelling interest in ensuring that the Second Amendment does not stand as an obstacle to strong gun laws that help police protect the public from gun crime and violence.

The International Association of Chiefs of Police is the world's oldest and largest organization of police executives, representing more than 20,000 members in 112 countries.

The International Brotherhood of Police Officers is one of the largest police unions in the country, representing more than 50,000 members.

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to keep and bear arms is unique among constitutional rights in the risks to public safety associated with its exercise. Unlike other constitutionally protected conduct, gun possession and use increase the risk of grave—all too often deadly—harm to the individuals exercising the right, their families, friends, neighbors, and the public at large. This Court has recognized that the exercise of constitutional rights must be balanced against legitimate public interests, chief among which is public safety. In light of that precedent, and the unparalleled societal risks associated with firearms, the Second Amendment right to keep and bear arms should not prevent citizens, through their elected representatives, from enacting the reasonable laws they desire and need to protect their families and communities from gun violence.

Courts already have been grappling with over 190 Second Amendment challenges brought against firearms laws and prosecutions in the year and a half since *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008). Among those are challenges to statutes barring the carrying of loaded guns on public streets,[2] the possession and sale of guns on designated government property,[3] the sale of particularly dangerous firearms,[4] and the possession of firearms by indicted individuals.[5] If this Court holds that the Second Amendment is incorporated, state and federal courts undoubtedly will be further inundated with challenges to gun laws. Absent this Court's guidance on the standard of review applicable to such cases, these challenges will lead to inconsistent outcomes and uncertainty in the legal system.[6]

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[2] *Palmer* v. *District of Columbia*, No. 09-cv-1482 (D.D.C. filed Aug. 6, 2009).

[3] *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009), *rehearing en banc ordered*, 575 F.3d 890 (9th Cir. 2009).

[4] *Peña* v. *Cid*, No. 2:09-cv-01185 (E.D. Cal. filed Apr. 30, 2009).

[5] *Compare United States* v. *Arzberger*, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008) (finding "no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm"), *with United States* v. *Kennedy*, 327 F. App'x 706 (9th Cir. 2009) (vacating and remanding to trial court to modify release conditions to include prohibition on firearm possession).

[6] *Compare, e.g., United States* v. *Miller*, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (rejecting strict scrutiny), *with United States* v. *Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny).

Even worse, unless this Court articulates a deferential standard of review for these and similar enactments, lower federal and state courts may invalidate important public safety measures. *See, e.g., United States* v. *Skoien*, No. 08-3770, 2009 WL 3837316 (7th Cir. Nov. 18, 2009) (vacating and remanding conviction for gun possession by domestic violence offender); *Commonwealth* v. *Runyan*, No. 0811-CR-2207 (Mass. Dist. Ct. dismissed Oct. 15, 2008) (dismissing indictment for unlawful storage of unlocked firearm), *appeal docketed*, No. 10486 (Mass. June 8, 2009).

Clarification of the standard of review would be particularly necessary were this Court to apply the Second Amendment to the states under the theory that the right recognized in *Heller* is fundamental and therefore merits incorporation through the Fourteenth Amendment.[7] If this Court reaches such a decision, it should also acknowledge that regulations implicating fundamental constitutional rights are often reviewed deferentially—even when the exercise of those rights, unlike that secured by the Second Amendment, does not create risk of physical harm. Reasonable restrictions on the exercise of such rights are permitted to further governmental interests no more important (and often clearly less important) than protecting the public from lethal violence. It would be entirely consistent with this Court's incorporation precedents to employ a deferential standard of review under the Second Amendment, whatever the ruling on incorporation may be.

Deferential review is also consistent with *Heller*, where this Court identified a broad (and non-exhaustive) array of firearms restrictions that it deemed "presumptively lawful," 128 S. Ct. at 2816-2817 & n.26, signaling that the Second Amendment does not foreclose reasonable gun laws. Similarly, a virtually unbroken line of state court decisions has applied a deferential standard of review to uphold gun laws against challenges based on the right to bear arms found in state constitutions. Strong gun laws have existed in America since colonial days, and the English antecedent to the Second Amendment has long coexisted with broad governmental authority to protect the public from the risks posed by guns.

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[7] *See* Pet. Br. 66-72; Nat'l Rifle Ass'n Br. 22-38.

Gun policy is best determined as it always has been in this country: in the political arena, without courts second-guessing reasoned legislative judgments. In keeping with the deference granted to public safety regulations generally, and firearms regulations in particular, this Court should adopt a test that allows for "reasonable regulation" of the right to keep and bear arms. A "reasonableness" test would take appropriate account of the state's strong interest in public safety and the democratic will.

ARGUMENT

I. DEFERENTIAL REVIEW OF FIREARMS LAWS IS APPROPRIATE IN LIGHT OF THE UNIQUE PUBLIC WELFARE CONCERNS IMPLICATED BY THE RIGHT TO POSSESS AND USE FIREARMS

The right to keep and bear arms recognized in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), is unique among rights safeguarded in the Constitution. While the exercise of rights to free speech, to worship, or to vote, for example, does not generally create an increased risk of physical harm or death, gun possession poses grave risks to the gun's possessor, his or her family, and the public. A handgun kept in the home for self-defense is all too often used by a child to shoot himself or another child unintentionally, turned against a partner in a domestic dispute, used to end the life of a depressed teenager or adult with (often fleeting) suicidal thoughts, or obtained by criminals.

Guns in America kill more than 30,000 people in homicides, suicides, and unintentional shootings nationwide each year, and injure 70,000 more.[8] Last year, Americans reported more than 340,000 incidents of firearm use in non-fatal crimes.[9] Members of the law enforcement amici face gun-wielding criminals daily, and officers suffered almost 20,000 firearm assaults from 1997 to 2006,[10] in which 562 were killed.[11] Shootings account for ninety-two percent of police deaths from felonious assaults.[12] All told, the costs of gun violence to American society, including medical costs, lost earnings, pain, disability, and the costs of lost life, approach $100 billion annually.[13]

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[8] *See, e.g.*, Centers for Disease Control and Prevention, WISQARS Nonfatal Injury Reports, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html ("CDC Nonfatal") (query for "All Intents" and "Firearm" and "2006" shows 71,417 non-fatal firearm injuries in 2006); *id.*, WISQARS Injury Mortality Reports, 1999-2006, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html ("CDC Fatal") (query for "All Intents" and "Firearm" and "2006" shows 30,896 firearm fatalities in 2006). Results for other recent years are similar.

[9] Michael R. Rand, Bureau of Justice Statistics, Criminal Victimization, 2008, Sept. 2009, text tbl. 3, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv08.pdf.

[10] Federal Bureau of Investigation, Uniform Crime Reports, tbl. 68 ("Law Enforcement Officers Assaulted Type of Weapon by Number of Assaults and Percent Injured, 1997-2006"), *available at* http://www.fbi.gov/ucr/killed/2006/table68.html

[11] *Id.* at tbl. 27 ("Law Enforcement Officers Feloniously Killed, Type of Weapon, 1997-2006"), *available at* http://www.fbi.gov/ucr/killed/2006/table27.html.

These costs would be higher if not for reasonable firearms regulations that states and the federal government have enacted—including laws of the type deemed "presumptively lawful" in *Heller*, 128 S. Ct. at 2816-2817 & n.26. If the right recognized in *Heller* were construed to threaten these and other reasonable regulations under a regime of unduly exacting judicial scrutiny, the current plague of gun violence could be transformed into something far worse. The citizenry should retain the ability to enact reasonable measures allowing the right conferred by the Second Amendment to coexist safely with the public's overarching interest in security, the safeguarding of which is surely the first function of government.

A. The Right Recognized In *Heller* Is Unique In The Risks Its Exercise Poses To The Person Exercising The Right, Other Innocent Persons, And The Community At Large

A wide array of social science research confirms that firearm ownership poses substantial risks to the owner, the owner's family, and the wider community.

Because firearms are much more readily available in the United States than in other western democracies, our nation's homicide rate is several times greater than in those countries, even though our overall crime rate is comparable.[14] As one pair of researchers explains, "an increase in gun prevalence causes an *intensification* of criminal violence—a shift toward greater lethality, and hence greater harm to the community."[15] This "lethality effect" associated with gun availability frequently transforms what would otherwise be minor crimes, arguments, or non-fatal assaults into serious confrontations more likely to cause severe injury or death.

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[12] *Id.*

[13] *See* Philip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* 117 (2000).

In light of this "lethality effect" of guns, researchers have found that as the rate of gun ownership in a community increases, the homicide rate increases as well.[16] Indeed, states with the highest levels of gun ownership have 114 percent higher firearm homicide rates and sixty percent higher overall homicide rates than states with the lowest levels of gun ownership.[17] Likewise, the risk of homicide in the home is nearly three times higher in homes with firearms.[18]

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[14] Franklin E. Zimring & Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America, reprinted in Crime, Inequality and the State* (Mary E. Vogel ed., 2007), at 125.

[15] Philip J. Cook & Jens Ludwig, *The Social Cost of Gun Ownership*, 90 J. Pub. Econ. 379, 387 (2005).

[16] Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1086 (2001).

[17] Matthew Miller et al., *State-level Homicide Victimization Rates in the U.S. in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 Soc. Sci. & Med. 656, 659-660 (2006).

[18] Arthur L. Kellermann et al., *Gun Ownership As a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084, 1089 & tbl. 4 (1993); *see id.* at 1084 ("Rather than confer protection,

The presence of firearms also greatly increases the homicide risk for women suffering from domestic abuse, such that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *United States* v. *Hayes*, 129 S. Ct. 1079, 1087 (2009). In 2006, 1,905 women were murdered with guns and 4,772 women were treated in emergency rooms for gunshot wounds stemming from an assault.[19] Abused women living in homes with firearms are six times more likely to be killed than other abused women.[20] Women are more than twice as likely to be shot to death by their male partner as killed in any way by a stranger.[21] And women living in homes with guns are more than three times as likely to be victims of homicide.[22]

Guns in the home, often improperly stored,[23] are also used in unintentional shootings, many times result-

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guns kept in the home are associated with an increase in the risk of homicide by a family member or intimate acquaintance.").

[19] CDC Fatal (query for "Homicide" and "Firearm" and "Females" and "2006"); CDC Nonfatal (query for "Assault-All" and "Firearm" and "Females" and "2006").

[20] Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, Nat'l Inst. Just. J., Nov. 2003, at 15, 16.

[21] Arthur L. Kellermann & James A. Mercy, *Men, Women, and Murder: Gender-Specific Differences in Rates of Fatal Violence and Victimization*, 33 J. Trauma 1, 1 (1992).

[22] James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 Archives of Internal Med. 777, 777 (1997).

[23] More than forty percent of gun-owning households with children store their guns unlocked. *See* Mark A. Schuster et al., *Firearm Storage Patterns in US Homes With Children*, 90 Am. J. Pub. Health 588, 590 (2000).

ing in the death or serious injury of a child. In 2006, there were 15,320 unintentional gun deaths and injuries in the United States.[24] The unintentional firearm-related death rate for children under fifteen is nine times higher in the U.S. than in twenty-five other industrialized countries combined.[25]

Guns also greatly increase the risk of death from suicide. When firearms in the home are accessible to adolescents or adults suffering from depression, suicide attempts are far more likely to end in death than when other means are used.[26] One study found that more than ninety percent of people who attempt suicide with firearms succeed in killing themselves, far more than those who attempt drug overdose (eleven percent) or cutting (four percent).[27] The risk of suicide is three to five times higher in homes with firearms.[28]

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[24] CDC Fatal (query for "Unintentional" and "Firearm" and "2006"); CDC Nonfatal (query for "Unintentional" and "Firearm" and "2006").

[25] Centers for Disease Control and Prevention, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children—26 Industrialized Countries*, 46 Morbidity & Mortality Weekly Report 101 (1997), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00046149.htm.

[26] Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 Epidemiology 517, 522 (2002).

[27] Matthew Miller et al., *The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43 Annals Emergency Med. 723, 724 (2004).

[28] Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467, 467 (1992); Douglas J. Wiebe, *Homicide and Suicide Risks Associated With*

Deaths and injuries resulting from easy access to firearms are not offset by a decrease in criminal acts through general deterrence or the use of firearms in self-defense. To the contrary, Harvard's David Hemenway and Deborah Azrael estimated that the number of gun crimes exceeded the number of self-defense gun uses by a ratio of between four-to-one and six-to-one.[29] Another recent study found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," leading the authors to conclude that "guns did not protect those who possessed them from being shot in an assault."[30] Individuals possessing guns were 4.46 times more likely to be shot in an assault than unarmed individuals, and 4.23 times more likely to be shot fatally.[31]

The fact that approximately one million Americans have been wounded or killed by gunfire in the last decade alone[32] serves to distinguish the Second Amendment right from those protected by any other constitutional provision.

Firearms in the Home: A National Case-Control Study, 41 Annals Internal Med. 771, 771 (2003).

[29] David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 Violence & Victims 257, 269 (2000).

[30] Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, Am. J. Pub. Health, Vol. 99, No. 11, at 1, 4 (Nov. 2009).

[31] *Id.*

[32] *See* CDC Fatal and CDC Nonfatal (extrapolation based on 1999-2006 data for fatal shootings and 2000-2008 data for nonfatal shootings).

B. Given The Harms Associated With Firearms And The Governmental Interest In Public Safety, Deference To Legislative Judgments Regarding Firearms Is Appropriate

Given the dangers associated with firearms, there is a forceful governmental interest in regulating their possession and use. States have "cardinal civic responsibilities" to protect the health, safety, and welfare of their citizens. *Department of Revenue of Ky.* v. *Davis*, 128 S. Ct. 1801, 1811 (2008); *see also Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 82-83 (1946) ("[T]he legislature may choose not to take the chance that human life will be lost[.]"). In fulfilling their responsibility to protect the public welfare, states have historically found it necessary and proper to enact a wide variety of laws to ensure that guns are made, sold, stored, and used responsibly and possessed only by responsible, law-abiding persons. *See infra* Part II.A. These laws also are a product of democratic will, demanded by Americans, by solid majorities.[33]

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[33] For example, eighty-seven percent of Americans support background checks on private sales of guns; sixty-five percent support limiting handgun purchases to one per person per month to curb bulk purchases by traffickers. *See* Greenberg Quinlan Rosner Research & The Tarrance Group, *Americans Support Common Sense Measures To Cut Down on Illegal Guns*, Washington, D.C., Apr. 10, 2008, at app. A, *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf. Eighty-two percent of Americans support limiting the sales of assault weapons; seventy-nine percent support requiring a police permit before the purchase of a gun. *See* Tom W. Smith, *Public Attitudes Towards the Regulation of Firearms*, National Opinion Research Center, University of Chicago (Mar. 2007), at 1, *available at* http://www-news.uchicago.edu/releases/07/pdf/070410.guns.norc.pdf. Seventy-nine percent of Americans support gun registration. *See*

Such firearms regulations are paradigmatic examples of the exercise of state "police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006) (internal quotation marks omitted). Because of the gravity of the states' responsibility to protect public safety and welfare, they are generally afforded "great latitude" in exercising those police powers. *Id.* Firearm regulations are clearly an appropriate exercise of those powers, for the "promotion of safety of persons and property is unquestionably at the core of the State's police power." *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976).

The forceful governmental interests in protecting public safety and welfare that justify the states' exercise of their police powers can also justify limitations on the exercise of constitutional rights. This is particularly true when the exercise of the right at issue involves conduct that affects the welfare of the community. *See, e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304, 308 (1940) (Although the First Amendment's Free Exercise Clause protects both the "freedom to believe and freedom to act," "[t]he first is absolute but ... the second cannot be."). In fact, the Court has ruled that even speech can be constitutionally prohibited when it can lead to potentially dangerous consequences. For instance, speech may be prohibited when it "inflict[s] injury or tend[s] to incite an immediate breach of the peace," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), and when it is "directed to inciting or producing imminent lawless action and is likely to incite

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CNN/Opinion Research Corporation Poll, June 4-5, 2008, *available at* http://www.pollingreport.com/guns.htm.

or produce such action," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383 (1992) (certain restrictions on the content of speech permissible). Thus, "fighting words" are "generally proscribable under the First Amendment," *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (citing *Cohen* v. *California*, 403 U.S. 15, 20 (1971)), as are "true threats," *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam).

Exercise of the Second Amendment right to keep and bear arms necessarily involves conduct that creates grave risks to the public, generally greater than those associated with other rights for which the Court has upheld reasonable governmental regulation. The government's interest in protecting the public from the risks posed by firearms is surely no less significant than the interest in preventing an "immediate breach of the peace" and certainly more significant than other interests such as protecting citizens from "unwelcome noise." *See infra* p. 26. Yet the paramount governmental interest in public safety could be impaired were this Court to adopt an inappropriately exacting level of scrutiny for Second Amendment challenges.

The policy implications of such a ruling could be devastating, given the demonstrated success of reasonable state and federal gun laws in reducing the use of guns in crime and saving lives. Reasonable gun laws such as licensing for gun dealers and owners, registration, background checks, and safe storage laws have been associated with reduced risk of gun deaths and criminal access to guns.[34] A particularly significant success story is the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Before that law went into effect, criminals in many states could "lie and buy" guns from dealers without criminal background checks. After the Brady Act mandated checks on handgun purchases in 1994, the number of violent crimes committed with firearms, which had risen in nine of the ten preceding years, decreased substantially, from more than one million gun crimes in 1993 to about 313,000 in 2008, a decline of more than seventy percent.[35] The percentage of all violent crimes committed with firearms also declined.[36] The impact of Brady background checks is also dramatically illustrated by the thirty-one percent drop in murders from

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[34] *See, e.g.*, D.W. Webster et al., *Relationship Between Licensing, Registration, and Other State Gun Sales Laws and the*

Source State of Crime Guns, 7 Injury Prevention 184, 184 (2001); Lisa Hepburn et al., *The Effect of Child Access Prevention Laws on Unintentional Child Firearm Fatalities, 1979-2000*, 61 J. Trauma, Injury, Infection & Critical Care 423, 423 (2006); Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. Urban Health: Bulletin N.Y. Acad. Med. 525, 525 (2009); Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 J. Am. Med. Ass'n 1759, 1759 (1996).

[35] *See* Bureau of Justice Statistics, *Nonfatal Firearm-Related Violent Crimes, 1993-2008*, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm (data on nonfatal gun crimes); Bureau of Justice Statistics, *Homicide Trends in the U.S., Weapons Used*, *available at* http://ojp.usdoj.gov/bjs/homicide/tables/weaponstab.htm (homicide data from 1976-2005); DOJ, *Murder Victims by Weapon, 2004–2008*, *available at* http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/data/shrtable_08.html (homicide data 2004-2008).

[36] *See* Bureau of Justice Statistics, *Percent of Murders, Robberies, and Aggravated Assaults in Which Firearms Were Used, 1973 to 2007*, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm.

1993 to 2007 (from 24,530 to 16,929), with more than two-thirds of the decrease due to the sharp drop in gun murders.[37] Since its inception, the Brady Act has blocked nearly 1.8 million prohibited buyers from buying a gun.[38]

While others may hold different opinions on the net risks posed by guns in our society,[39] that disagreement only demonstrates that the scope and content of firearms regulation are best suited for debate and resolution in the legislative arena. This Court has repeatedly stressed that legislatures are better situated than courts to make empirical judgments about the need for and efficacy of regulation, even when that regulation affects the exercise of constitutional rights. *See, e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377,

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[37] *Id.*

[38] Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2008—Statistical Tables*, *available at* http://ojp.usdoj.gov/bjs/pub/html/bcft/2008/bcft08st.pdf.

[39] For example, some claim that gun ownership or carrying deters crime, *see, e.g.*, John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (2d ed. 2000), but those claims have not withstood scrutiny, *see, e.g.*, Duggan, *supra* n.16, at 1086. Likewise, studies have found that laws entitling citizens to carry concealed weapons "are associated with uniform *increases* in crime." John J. Donahue, *The Impact of Concealed Carry Laws*, *in Evaluating Gun Policy: Effects On Crime and Violence* (Jens Ludwig & Philip J. Cook eds., 2003), at 289-290 (emphasis in original); *see also* Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence From State Panel Data*, 18 Int'l Rev. L. & Econ. 239, 239 (1998) ("[S]hall-issue [concealed carry permit] laws have resulted, if anything, in an *increase* in adult homicide rates.").

402 (2000). Federal, state, and local governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976); *see also Ewing* v. *California*, 538 U.S. 11, 28 (2003) (upholding sentencing law: "We do not sit as a 'superlegislature' to second-guess these policy choices."); *Kelo* v. *City of New London*, 545 U.S. 469, 488-489 (2005) (declining "to second-guess the City's considered judgments" in takings case). The need for firearms regulations is a quintessentially legislative judgment, and the risk of error in invalidating those judgments is severe. On such life-and-death issues, this Court should assess Second Amendment challenges to firearm regulations under a deferential standard.

C. This Court Indicated In *Heller* That Strict Scrutiny Is Inappropriate For Second Amendment Challenges

In *Heller*, this Court indicated that the Second Amendment could accommodate reasonable firearms regulations. The individual right to possess a firearm in the home for self-defense, the *Heller* Court made clear, "is not unlimited." 128 S. Ct. at 2816 (no right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"); *see also id.* at 2799. Rather, the Court explicitly recognized that the Constitution leaves governments "a variety of tools for combating" "the problem of handgun violence"—including "measures for regulating handguns." *Id.* at 2822. Further, the Court listed a broad and non-exhaustive set of firearms restrictions that are "presumptively lawful." *Id.* at 2816-2817 & n.26.

The Court's acknowledgement of constitutionally permissible restrictions on firearm possession, use, and sale underscores several important points regarding the appropriate level of judicial scrutiny. *First*, the Court recognized that firearm possession can carry serious—even fatal—consequences for society. *See supra* Part I.A. *Second*, the Court recognized that the Second Amendment right can coexist with the exercise of broad governmental power to regulate and restrict that right. An excessively stringent standard of review would improperly curtail a state's power to protect its citizens' welfare and safety. *See supra* Part I.B. *Third*, by observing that a variety of firearms regulations are "presumptively lawful," 128 S. Ct. at 2816-2817 & n.26, without having undertaken a more detailed analysis of the government interests at stake or the degree to which the regulations are tailored to effectuate those interests, the Court implicitly rejected any standard of review that would jeopardize the identified, or similar, restrictions. *See id.* at 2851 (Breyer, J., dissenting) (constitutionality of laws identified by the *Heller* Court "under a strict scrutiny standard would be far from clear"). Although the *Heller* Court did not articulate the proper standard of review, its opinion signaled that rigorous scrutiny would be inappropriate because it would impede the government's ability to protect public health and safety.

II. ANGLO-AMERICAN JURISPRUDENCE HAS LONG RECOGNIZED THAT STATES HAVE BROAD POWERS TO PROTECT THE PUBLIC BY REGULATING FIREARMS, AND SUCH LAWS HAVE BEEN AND CONTINUE TO BE REVIEWED WITH DEFERENCE

There is a long tradition of regulating firearms in this country, predating even the adoption of the Constitution, and courts have consistently deferred to legislative judgments as to which regulations are appropriate. This history shows that the Second Amendment should be understood as allowing for reasonable firearms restrictions.

A. The Right To Bear Arms Has Always Been Understood As Subject To Extensive Regulation

For the entirety of its existence, the right to keep and bear arms has been understood as subject to reasonable regulation. Indeed, firearms regulations predate that right, and have been enforced consistently since its recognition.

While many American liberties can be traced to the Magna Carta, the right to be armed had no antecedent before its inclusion in the English Declaration of Rights in 1689. Before 1689, firearms were subject to multiple and significant restrictions, including minimum property requirements for those permitted to possess them, mandatory registries, and bans on their sale or wear. *See* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 34-36 (2000); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of the Anglo American Right* ix (1994) (prior to 1689, the right to bear arms was "neither true, ancient, nor indubitable").

The Declaration of Rights itself qualified the right to bear arms, providing that "the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." *Heller*, 128 S. Ct. at 2798 (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)). As a result, the Declaration granted the right to "perhaps no more than three percent" of the population. Schwoerer, 76 Chi.-Kent L. Rev. at 48; *see id.* at 45-47. Moreover, Parliament reserved the power to regulate that right through the phrase "as allowed by law." *See* Carl T. Bogus, *The*

Hidden History of the Second Amendment, 31 U.C. Davis L. Rev. 309, 383-384 (1998).

Blackstone's treatise confirms that the right to possess arms was understood to be subject to regulation and limitation. In discussing the right to possess arms, Blackstone explained that the arms had to be "suitable to [the possessor's] condition and degree" and had to be "allowed by law." William Blackstone, 1 *Commentaries* *139. Blackstone further described the right as subject to "due restrictions" and "necessary restraints." *Id.* at *139, 140.

Consistent with the understanding that governments remained free to regulate the use and possession of arms, "colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used guns." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162 (2007). "Hundreds of individual statutes regulated the possession and use of guns in colonial and early national America." *Id.* at 143; *see also Heller*, 128 S. Ct. at 2819-2821; *id.* at 2848-2850 (Breyer, J., dissenting). These restrictions included total bans on the firing of weapons in Boston, Philadelphia, and New York City. Churchill, 25 Law & Hist. Rev. at 162. Pennsylvania—whose right-to-bear-arms provision was relied upon by the *Heller* Court for "confirm[ation]" of its construction of the Second Amendment, 128 S. Ct. at 2801—disarmed individuals unwilling to swear a loyalty oath, and other states followed suit. Churchill, 25 Law & Hist. Rev. at 159-160. During the Founding era, the right to bear arms "was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner." Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 679 (2002). The only limitation on the power to regulate arms was that the restrictions had to "be aimed at a legitimate public purpose and had to be consistent with reason." Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 Law & Hist. Rev. 197, 198 (2007).

During the nineteenth century, laws regulating firearms became even more prevalent. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 512-513 (2004). During the Jacksonian era, for example, legislatures passed comprehensive laws prohibiting the carrying of handguns and other concealed weapons, Cornell, 25 Law & Hist. Rev. at 199, which "the majority of the 19th-century courts to consider the question held ... were lawful under the Second Amendment or state analogues," *Heller*, 128 S. Ct. at 2816. Time, place, and manner restrictions and bans on selected categories of weapons were enforced as well. *See* Cornell & DeDino, 73 Fordham L. Rev. at 516.

The tradition of gun regulation has carried into the modern era. Congress has determined that there is a need for restrictions including bans on certain types of particularly dangerous weapons, limitations on who can possess firearms, restrictions on where firearms can be carried, *see* 18 U.S.C. § 922, as well as limitations on the manufacture, sale, and importation of firearms, and certain licensing requirements, *see id.* § 923. State legislatures have also enacted a wide array of regulations to protect their citizenries from the risks posed by firearms. *See* Adam Winkler, *Scrutinizing the Second*

Amendment, 105 Mich. L. Rev. 683, 719-720 (2007) (noting a panoply of state regulations). These regulations fall well within the Anglo-American tradition that has broadly tolerated regulation of firearms.

B. State Constitutional Provisions Recognizing A Right To Keep And Bear Arms Have Uniformly Been Enforced Through Deferential Review

Our society's broad acceptance of firearms regulations is confirmed by the fact that while over forty states have constitutions with right-to-keep-and-bear-arms provisions,[40] not one reviews such restrictions under heightened scrutiny. *See* Winkler, 105 Mich. L. Rev. at 686-687; *see, e.g., State* v. *Cole*, 665 N.W.2d 328, 337 (Wis. 2003) ("If this court were to utilize a strict scrutiny standard [for application of the Wisconsin right-to-keep-and-bear-arms provision] Wisconsin would be the only state to do so."). Despite significant differences in the political backdrop, timing, and texts of state right-to-keep-and-bear-arms provisions, state courts have with remarkable unanimity coalesced around a single deferential standard for reviewing limitations on the right to bear arms: the reasonable-regulation test. *See* Winkler, 105 Mich. L. Rev. at 686-687 & n.12; *see also* Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1458 (2009) (noting that "reasonable regulation" is "probably the dominant test in the state cases" and is applied so as to "set the unconstitutionality threshold very high—allowing anything short of a prohibition").

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[40] *See* Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 205 (2006).

Under the reasonable-regulation test, the state may not prohibit all firearm ownership, but "may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson* v. *City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994); *see id.* at 333 n.10; *see also, e.g., Jackson* v. *State*, 68 So. 2d 850, 852 (Ala. Ct. App. 1953) ("It is uniformly recognized that the constitutional guarantee of the right of a citizen to bear arms, in defense of himself and the State is subject to reasonable regulation by the State under its police power." (internal citation omitted)); *Bleiler* v. *Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007) (question is whether "the statute at issue is a 'reasonable' limitation upon the right to bear arms"). This test recognizes "the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people." *State* v. *Comeau*, 448 N.W.2d 595, 599 (Neb. 1989); *see also Mosher* v. *City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976) (The "interest of the governmental unit is, on balance, manifestly paramount.").

State court recognition of broad governmental latitude to regulate firearms is not only uniform, but also longstanding. More than 150 years ago, in a case cited twice with approval by the *Heller* Court, 128 S. Ct. at 2794 n.9, 2818, the Supreme Court of Alabama upheld a ban on concealed weapons, construing the state's constitution "to leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals." *State* v. *Reid*, 1 Ala. 612, 617 (1840). Since the statute did not "amount[] to a destruction of the right" to bear arms, it was valid. *Id.* at 616-617. Similarly, well over a century ago, the Supreme Court of Missouri upheld a regulation prohibiting the possession of firearms by intoxicated individuals, describing the statute as "but a reasonable regulation of the use of such arms, and to which the citizen must yield, and a valid exercise of the legislative power." *State* v. *Shelby*, 2 S.W. 468, 469 (Mo. 1886). Even earlier, the Supreme Court of Texas upheld a ban on certain types of weapons, noting that the "legislature may regulate [the right to bear arms] without taking it away." *English* v. *State*, 35 Tex. 473, 478 (1871).[41]

In sum, courts have overwhelmingly concluded that the right to keep and bear arms does not hinder the government from protecting the public safety by reasonably regulating firearms.

III. EVEN FUNDAMENTAL CONSTITUTIONAL RIGHTS THAT DO NOT CREATE RISKS AKIN TO THE RISK OF GUN POSSESSION ARE NOT NECESSARILY SUBJECT TO STRICT SCRUTINY

Even if this Court resolves the question whether the Fourteenth Amendment incorporates the Second Amendment by holding that the right to bear arms is "fundamental" (Pet. Br. 67 (discussing *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968))), it does not follow that strict scrutiny is required or appropriate for review of regulations of that right. In fact, this Court's cases recognize, in many contexts, that a less rigorous standard of review is appropriate when, for example, regulation of a fundamental right does not substantially burden that right, is not aimed at restricting the right but rather is intended to address the detrimental effects that exercise of the right entails, or does not implicate the core values embodied by that right. *See generally* Winkler, 105 Mich. L. Rev. at 693-698. Moreover, the Court has on numerous occasions concluded, under a more deferential standard of review, that the exercise of "fundamental" rights engendering risks that pale in comparison to the deadly risks created by firearms may be restricted by laws designed to protect public safety.

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[41] *See also, e.g., State* v. *Wilburn*, 66 Tenn. 57 (1872) (prohibiting the wearing or carrying of guns is constitutional); *State* v. *Buzzard*, 4 Ark. 18 (1842). *But see, e.g., Bliss* v. *Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (invalidating concealed weapons ban).

Given the Court's application of more deferential standards of review to other fundamental rights—and especially in light of the Second Amendment's unique impact on the public welfare, *see supra* Part I.A., and in light of historical practice, *see supra* Part II—deferential review is appropriate here.

A. In Many First Amendment Challenges, The Court Has Applied A Far Less Demanding Test Than Strict Scrutiny And Has Deferred To The Government's Interest In Protecting The Public Welfare

Although freedom of speech protected by the First Amendment is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States," *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925); *see also Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931), regulations of the right are not always subject to strict scrutiny.[42] Instead, more deferential review applies in several circumstances, even when the right at stake is speech at the core of the First Amendment. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 785, 793; *Board of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 477-478 (1989). This Court has upheld restrictions on the exercise of First Amendment rights that advance public interests far less weighty than protecting against gun violence.

For example, the Court applies only intermediate scrutiny to restrictions on the time, place, and manner of speech, and has found that the government's interests in preserving tranquility, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 784, 792, 796 (1989), "protecting its citizens from unwelcome noise," *id.* at 796 (citation omitted), "avoiding congestion and maintaining ... orderly movement," *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981), and maintaining public parks "in an attractive and intact condition," *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984), were sufficiently substantial to warrant restrictions on the exercise of fully protected speech. *See also Turner Broad. Sys.*, 520 U.S. at 189 (intermediate scrutiny applies to content-neutral regulations). This less rigorous test permits a "reasonable" restriction that "promotes a substantial government interest that would be achieved less effectively absent the regulation" and leaves open alternative channels for communication; the law need not be the least restrictive means to achieve the government's goals. *Ward*, 491 U.S. at 791, 799; *see also id.* at 798-799 (clarifying "narrowly tailored" prong in time, place, or manner context).

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[42] In its analysis of the Second Amendment, the *Heller* opinion itself invoked the doctrinal relevance of the First Amendment. *See, e.g.*, 128 S. Ct. at 2799.

The Court has applied a similarly deferential test to review content-neutral regulations of expressive conduct, *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)—including expression that conveys a political view, *see, e.g., Clark*, 468 U.S. at 289, 293-295 (demonstration to call attention to the plight of the homeless); *see also Board of Trs.*, 492 U.S. at 477-478 (1989) ("We have refrained from imposing a least-restrictive-means requirement—even where core political speech is at issue—in assessing the validity of so-called time, place, and manner restrictions.... [The same applies] with respect to government regulation of expressive conduct, including conduct expressive of political views."); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289, 296 (2000) (plurality opinion) (applying *O'Brien* scrutiny to expressive conduct); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons From the Twentieth Century,* 36 Pepp. L. Rev. 273, 297-298 (2009).

Laws directed at the "secondary effects" of particular kinds of speech are also subject to relaxed scrutiny. Under that more deferential standard, this Court easily found "vital" the government interests in "preserv[ing] the quality of urban life," including the interest in preventing crime. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986) (ordinance aimed at the secondary effects of adult film theaters on the community constitutionally permissible); *see also City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion).

The government interest in protecting public safety and welfare through particular firearms restrictions is no less "vital" than the various interests described above—and suggests that laws aimed at protecting citizen safety should receive scrutiny no more rigorous under the Second Amendment than the relaxed scrutiny applied to numerous regulations under the First Amendment.[43]

B. In Challenges Based On Other Fundamental Rights, This Court Has Applied A Less Demanding Test Than Strict Scrutiny And Has Deferred To The Government's Interest In Protecting The Public Interest

In contexts involving other fundamental rights, the Court has granted greater deference to governmental action than strict scrutiny demands. For example, to decide when governmental regulation requires just compensation pursuant to the Takings Clause of the Fifth Amendment, *see Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 239 (1897) (Takings Clause incorporated against the States), courts employ a deferential standard. That analysis balances several factors, including the regulation's economic impact and the degree to which it interferes with investment-backed expectations. *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Additionally, courts defer to a legislature's judgment of what constitutes a public use and uphold a taking if it is "*rationally related* to a conceivable public purpose." *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 241 (1984) (emphasis added); *see also Kelo*, 545 U.S. at 488 (rejecting heightened judicial review).

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[43] A standard more deferential than strict scrutiny is also applied where a regulation does not touch upon a right deemed to be at the core of the First Amendment. For example, regulation of commercial speech, even of its content, is reviewed deferentially. A commercial speech regulation need only "directly advance" a "substantial" government interest and be "not more extensive than is necessary to serve that interest"—and only if the speech concerns lawful activity. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 & n.6, 566 (1980); *see Board of Trs.*, 492 U.S. at 480 ("reasonable" fit, not least restrictive means, required).

Strict scrutiny is also not employed in search and seizure cases under the Fourth Amendment. *See Elkins* v. *United States*, 364 U.S. 206, 213 (1960) (right against unreasonable searches and seizures applicable to state officers). Instead, the Court balances the "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests," *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979), to determine whether the intrusion is "reasonable," *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652-653 (1995). This Court has disavowed the application of strict scrutiny and has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Id.* at 663; *see also Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (collecting cases). While the Court's application of reasonableness review is textually based in the Fourth Amendment, even within the confines of the text the Court has determined that the standard of review is deferential rather than robust.

Finally, although voting is a "fundamental political right ... preservative of all rights," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *see also Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979), "[i]t does not follow ... that the right to vote in any manner ... [is] absolute," *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992). This Court has rejected the argument that "any burden upon the right to vote must be subject to strict scrutiny." *Id.* at 432. Instead, a more "flexible" balancing standard weighs "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State," taking into account "the extent to which those interests make it necessary to burden" the right. *Id.* at 434 (internal quotation marks omitted); *see also Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (plurality opinion) (burden on right "must be justified by relevant and legitimate state interests" "sufficiently weighty to justify the limitation").

Thus, the Court has not concluded that stringent judicial review is necessary even where rights at the heart of our constitutional system are restricted. Instead, in many contexts where a regulation affects the exercise of a constitutional right but has neither the purpose nor effect of eliminating that right, the Court has given substantial deference to legislative judgments about the need for government regulation to ensure public health, safety, and welfare. That approach should inform the Court's standard of review in the Second Amendment context as well.

IV. THIS COURT SHOULD ADOPT THE REASONABLE-REGULATION TEST FOR ASSESSING SECOND AMENDMENT CHALLENGES

Given the strong public interest in mitigating the harms associated with firearms, the established tradition of firearms regulation, and the doctrinal coherence of employing deferential review, amici urge that this Court adopt the "reasonable-regulation" standard for reviewing Second Amendment challenges, as it has been applied in numerous state courts.[44] *See supra* Part II.B; *see, e.g.*, *Cole*, 665 N.W.2d at 336-337 (Wis. 2003) ("Generally, when other courts have evaluated challenges to the validity of gun control statutes under state constitutional provisions, the test has been whether the statute constitutes a 'reasonable regulation' in light of the state's police powers."); *see also* Winkler, 105 Mich. L. Rev. at 716-719.[45]

The reasonable-regulation standard is deferential, but not toothless. Regulations of the right designed to further public safety are upheld, but attempts to eliminate the right to keep and bear arms entirely will be invalidated. Winkler, 105 Mich. L. Rev. at 717. This test represents the considered balance struck by virtually all courts between the individual right to keep and bear arms and the strong regulatory interests of the government in protecting citizens from the risks posed by those weapons. *Id.*

This Court has previously found cases construing state constitutional provisions "instructive" in resolving federal constitutional questions. *Heller*, 128 S. Ct. at 2853 (Breyer, J., dissenting) (citing *Bartkus* v. *Illinois*, 359 U.S. 121, 134 (1959)); *see also Harmelin* v. *Michigan*, 501 U.S. 957, 966 (1991); *Benton* v. *Mary-*

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[44] To be clear, amici are not arguing that all cases applying the reasonable-regulation test were rightly decided or that the state right-to-bear-arms provisions they construe have the same scope as the Second Amendment. Indeed, many are far broader.

[45] There is no federal police power, but Congress may, when acting pursuant to a constitutionally enumerated power, act "to promote the general welfare," even though the resulting legislations "may have the quality of police regulations." *Hoke* v. *United States*, 227 U.S. 308, 322, 323 (1913).

land, 395 U.S. 784, 795-796 (1969). Indeed, the *Heller* Court relied in part on thirteen "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment," 128 S. Ct. at 2802; notably, all of those states engage in deferential review of statutes limiting the right to bear arms.[46] Looking to the construction of state constitutional provisions is particularly informative when, as here, the jurisprudence of state courts points so unwaveringly in a single direction. As the Supreme Court of Connecticut observed when considering its own right-to-bear-arms provision: "While we are not bound by the interpretations given by our sister state courts to their own constitutional documents, the uniformity in the analysis they have used to address the question before us lends particular authority to their decisions." *Benjamin* v. *Bailey*, 662 A.2d 1226, 1233 (Conn. 1995).

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[46] *See Bristow* v. *State*, 418 So. 2d 927, 929 (Ala. Crim. App. 1982); *Matthews* v. *State*, 148 N.E.2d 334, 338 (Ind. 1958); *Posey* v. *Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006); *Hilly* v. *City of Portland*, 582 A.2d 1213, 1215 (Me. 1990); *James* v. *State*, 731 So. 2d 1135, 1137 (Miss. 1999); *State* v. *White*, 253 S.W. 724, 727 (Mo. 1923); *State* v. *Johnson*, 610 S.E.2d 739, 746 (N.C. Ct. App. 2005); *Arnold* v. *City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Minich* v. *County of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007); *Wilburn*, 66 Tenn. at 62; *State* v. *Duranleau*, 260 A.2d 383, 386 (Vt. 1969), *superseded by statute on other grounds*. Massachusetts does not interpret its Constitution as providing an individual right to bear arms. *See Commonwealth* v. *Davis*, 343 N.E.2d 847, 848-849 (Mass. 1976). Connecticut has not formally articulated a standard of review, but has cited cases applying a reasonable-regulation standard with approval and has upheld restrictions on firearms that "serve[] a legitimate interest of the state acting pursuant to its police power." *Benjamin* v. *Bailey*, 662 A.2d 1226, 1234-1235 (Conn. 1995). Of these thirteen state constitutional provisions, five have not been amended in a way that would affect their scope (Alabama, Connecticut, Indiana, Massachusetts, and Vermont). *See* Volokh, 11 Tex. Rev. L. & Pol. at 193-204.

Adoption of a reasonableness standard would not only provide legislatures with sufficient flexibility and discretion to devise necessary measures to prevent gun violence, it would also enhance stability and predictability in the law and minimize the disruption that would otherwise result from requiring heightened scrutiny of firearms regulations. Just as the federal and state governments have interests in established legal rules protected by *stare decisis*, *see Arizona* v. *Gant*, 129 S. Ct. 1710, 1728-1729 (2009) (Alito, J., dissenting); *see also Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 785 (1992), so do they have an interest in not seeing their longstanding firearms regulations overturned by a newly expansive approach to the right to keep and bear arms, which could jeopardize countless criminal prosecutions and perhaps even open the prison doors for convicted gun criminals. Many state firearms regulations have been upheld over the years against challenges brought under state constitutional provisions; it would be highly disruptive to subject all of these regulations to a new round of scrutiny in federal court under a federal constitutional provision worded in similar, if not identical, terms. And it could be devastating if crucial firearms laws were struck down under an unduly rigorous review.

The state and federal governments' interests in stability and in the preservation of their reasonable firearms regulations are sufficiently weighty to make it appropriate for the Court to articulate a deferential standard of review in this case. Clarification of the standard of review is particularly crucial if this Court's analysis of the question on which it granted certiorari leads it to describe the Second Amendment right as "fundamental." Otherwise, the states and the federal government will surely be subjected to a generation of litigation over their firearms laws, with many measures perhaps being invalidated before this Court articulates the proper standard of review. Accordingly, amici submit that the Court should adopt a "reasonable regulation" standard of review in this case.

CONCLUSION

This Court should conclude that regulations of firearms are not subject to strict scrutiny, but instead are subject to a deferential, reasonableness standard of review.

Respectfully submitted.

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CURIAE
BRIEF

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In The
Supreme Court of the United States

◆

OTIS McDONALD, *ET AL.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *ET AL.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF BUCKEYE FIREARMS FOUNDATION INC. AND UNITED STATES CONCEALED CARRY ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

◆

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INTERESTS OF *AMICI CURIAE*[1]

Buckeye Firearms Foundation is a non-profit organization dedicated to defending and advancing human and civil rights secured by law, specifically defending and advancing the rights of Ohio citizens to own and use firearms for all legal activities including, but not limited to, self-defense, hunting, competition and recreation. Buckeye Firearms Foundation acts primarily through education and legal advocacy. Buckeye Firearms Foundation has a substantial interest in ensuring that the Second Amendment of the U.S. Constitution is incorporated against the states as intended by the drafters of the Fourteenth Amendment, to wit: The nationwide application of the Second Amendment right to self-defense and the right to carry arms to all persons within the United States. The human and civil right of self-defense applies wherever a person may live or travel, without regard to the political whims of any particular government branch or administration.

United States Concealed Carry Association is a Wisconsin limited liability company and the largest organization in the United States dedicated to protecting and advancing the unique interests of those persons within the United States who may carry concealed weapons for all lawful purposes. The United States Concealed Carry Association acts primarily through education and training of members and other interested parties. The United States Concealed Carry Association has a substantial and particular interest in ensuring that the Second Amendment of the U.S. Constitution is incorporated against the states as intended by the drafters of the Fourteenth Amendment, to wit: members of the United States Concealed Carry Association currently exercise their Second Amendment right to self-defense and the right to carry arms in many geographic areas of the United States, while simultaneously being arbitrarily denied the exercise of these same rights in other geographic areas of the United States on the basis of the member's state of residence. This arbitrary discrimination makes these persons "second-class citizens" in these areas, denied the right to self-defense and the right to carry arms only because of their state of residence.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk, and counsel of record gave each party's attorney at least 10 days notice of the intent to file this brief.

◆

SUMMARY OF ARGUMENT

I. Chicago suffers from violent crime rates that are among the highest in the nation. Most notably, Chicago is currently experiencing a horrific epidemic of school children being killed while going to and from, or during, school. Chicago's criminals obtain, and use, illegal firearms at will. At the same time, Chicago's police force currently experiences a crisis of confidence in the eyes of Chicago's citizens. Added to this volatile mix is a legal system that has failed to hold the police department or the city liable for their failures. In this environment, Chicago has forcibly disarmed the law-abiding in their own homes.

These are familiar circumstances when looking at any large municipality with draconian gun laws, which lead to inevitable quibbling over whether the crime problem is aggravated by the bounty of unarmed victims, or whether the crime rates would in fact be even worse if victims were legally armed and willing to defend their homes. Fortunately, this debate is now largely moot, as this court has already ruled that the Second Amendment is a fundamental, individual, core right that includes the right to own and carry handguns for self-defense in the home.[2] Chicago currently has in force laws which mirror the scope and operation of the laws found unconstitutional in *District of Columbia v. Heller*, 129 S. Ct. 2783 (2008), with Chicago's laws similarly operating to bar lawful possession of operable handguns in the home for self-defense.[3] As such, persons living, visiting or working in Chicago are denied the right to own and carry handguns in their homes for self-defense.

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[2] *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) Syllabus at 1.

[3] See Chi., Ill., Municipal Code § 8-20-040 and § 8-20-050 (2009).

II. The question before this court is: "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses." As other *Amici*, and the parties themselves, are expected to cover the numerous legal and historical arguments for incorporation of the Second Amendment by the Fourteenth Amendment via one clause or the other, this brief will instead examine the compelling policy reasons that support such incorporation, regardless of which clause is ultimately chosen to accomplish incorporation.

Due to the limited jurisdictional nature of *Heller*, persons living in Washington D.C., and arguably also persons living in American Samoa, Puerto Rico, Guam and the U.S. Virgin Islands, enjoy a robust right to own, and carry within their homes, handguns for lawful purposes, including the right of self-defense, courtesy of the Second Amendment to the U.S. Constitution. At the same time, residents of Chicago do not enjoy this same Second Amendment right, have no analogous right in the Illinois state constitution, and are in fact actively deprived of this right by the political machine of Chicago city government. The result is that persons living in Chicago are second-class citizens compared to those living in D.C., an absurd result without legal foundation or analog. Persons living in Chicago and in D.C. share equal enjoyment of: First Amendment rights to religious worship, free speech and freedom of the press; Fourth Amendment protections against unreasonable search and seizure of their person or property; Fifth Amendment protections against felony charges without grand jury indictment, double jeopardy and coerced self-incrimination; Sixth Amendment protections of speedy, public and fair trials with the assistance of counsel *et seq*. In short, the Second Amendment should apply equally to all persons within the United States, without regard to where the person lives or is temporarily located, and the Second Amendment must be afforded the same dignity and protection against state intrusion this court has extended to rest of the enumerated, fundamental, individual rights contained within the U.S. Constitution.

III. Beyond protecting the Second Amendment rights of persons living in Chicago, incorporation of the Second Amendment of the U.S. Constitution is also compelled in order to protect the rights of persons who do not live within Chicago, or even within Illinois, but are instead merely visiting or traveling to or through Illinois or Chicago. This Court has previously ruled that licensing schemes, so long as they are of a "shall issue" nature, pass constitutional review.[4] The foreseeable, and expected, difficulty with

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[4] *Amici* do not concede that licensing is *per se* constitutional in all instances, as that issue has not been specifically decided by this court. Assuming *arguendo* that licensing is not unconstitutional, this court's holding on licensing in *District of*

(Continued on following page)

Chicago adopting a "shall issue" licensing system in response to an adverse ruling in the instant case is that Chicago currently makes no, and in the future will make no, allowance for non-residents to exercise their Second Amendment rights within Chicago. For instance, Washington D.C. has "complied" with this court's order in *Heller* by implementing several licensing schemes, none of which have made any provision for non-residents.[5] The current Illinois Firearm Owner I.D. card is yet another example; it is only issued to Illinois residents, leaving non-residents with a lesser pool of affirmative defenses and exceptions with which to exercise their Second Amendment

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Columbia. v. Heller, 129 S. Ct. 2783, 2822 (2008), was "Assuming that Heller is *not disqualified from the exercise of Second Amendment rights*, the District *must* permit him to register his handgun and *must* issue him a license to carry it in the home" (emphasis added). This type of licensing scheme, where a license must be issued so long as statutory disabilities are not present, is commonly referred to as a "shall issue" license; whereas a licensing scheme that grants the issuing official discretion over whether to issue the license to an otherwise-qualified applicant is referred to as a "may issue" license. As such, if this court finds for incorporation of the Second Amendment, then incorporation, combined with this court's prior holding in *Heller*, means that state "may issue" licensing schemes are necessarily unconstitutional and only state "shall issue" licensing schemes are constitutional.

[5] See Complaint paragraph 17, *Palmer v. District of Columbia*, 1:09cv1482, United States District Court, District of Columbia. See also therein Defendants' Motion for Summary Judgment, page 20, "The District is not alone in prohibiting the registration of firearms by non-residents, and declining to issue 'carry' licenses, or recognize such licenses from other jurisdictions."

rights, all of which are inferior to that of Illinois residents.[6]

This distinction between residents and non-residents once again creates a category of second-class citizens when it comes to the Second Amendment: persons are denied the exercise of fundamental, enumerated Second Amendment rights within Chicago based only upon their status as non-residents. Simultaneously, residents of Chicago and residents of Illinois will enjoy greater exercise of these same rights compared to non-residents. Incorporating the Second Amendment against states, and therefore Chicago, will avoid this absurdity by applying the full body of Second Amendment protections, including *Heller's* requirement of "shall issue" licensing, to all persons regardless of residency or location within the United States where that person seeks to exercise those rights.

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[6] 430 ILL. COMP. STAT. ANN. 65/2(b)(5)-(10) (2009).

ARGUMENT

I. Chicago Suffers From a Consistently High Violent Crime Rate and Chicago's Disarmed Residents Are Forced to Rely Exclusively Upon the Chicago Police Department for Protection

Persons residing in Washington D.C., and arguably also persons residing in American Samoa, Puerto Rico, Guam and the U.S. Virgin Islands, currently enjoy a broad Second Amendment right to have operable handguns in their homes for self-defense. Residents of Chicago and non-residents forced to travel to Chicago do not enjoy this same protection, despite a desperate need triggered by high crime rates combined with the perceived inability of the police to impact crime.

A. Chicago Has a Very High Violent Crime Rate and, Despite The Absence of a Legal Source, Criminals Easily Obtain Firearms

Despite, and perhaps because of, a *de jure* and *de facto* ban on handguns and other firearms within Chicago, criminals have no problem obtaining and using illegal firearms to commit violent crimes.

> In 2002 and again in 2008, Chicago had more murders than any other city in the U.S., including the much larger Los Angeles and New York. Today, as in the past, Chicago's murder and gun violence problem results from a deadly nexus of illegal guns and gang

> violence. In the last five years, Chicago has averaged 512 murders per year. About 80 percent of these murders are committed with an illegal firearm, and nearly half of are somehow connected to gang-related disputes and activities.[7]

What brings a horrifying personification to this abstract statistical title is the identity of a large portion of the victims. " . . . in the (2008-2009) academic year 36 schoolchildren were slain and more than 500 shot in Chicago."[8]

In a city where there is no legal source of handguns, located in a state where law-abiding citizens must be licensed to own, sell and purchase handguns, criminals are still illegally obtaining, and using, handguns to commit crimes and turn Chicago into the "Murder Capital of the United States." This should come as no surprise, as the criminals also have no legal source anywhere within the United States for crystal methamphetamine, crack cocaine or heroin, yet criminals still continue to obtain abundant supplies of these dangerous drugs.

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[7] Tracey L. Meares and Andrew V. Papachristos, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program*, January 2009 PDF document, http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf retrieved 11/13/2009.

[8] Agence France-Presse, *School Kids Risk Death in Chicago Ganglands*, 10/22/2009 ABC News wire report, http://www.abs-cbnnews.com/world/10/22/09/school-kids-risk-death-chicago-gang lands retrieved 11/13/2009.

This week, Chicago took over as murder capital of the United States. There are several cities that have higher murder rates per 100,000 population, but no city with more total murders.

Even with a population of just over 3 million, Chicagoans can expect more murders – 500 – in their city, than in New York (400 murders and 5 million population) or Los Angeles (300 murders and 3.8 million people).

Chicago is also the gun-confiscation and voluntary hand-in capital of the U. S. Over the past decade, Chicago police have confiscated or had surrendered to them an average of 10,800 guns per year. Chicago has also had a complete ban on handgun sales and possession since 1982.

How come there are so many handgun murders and so many confiscations in the Windy City if handguns are banned?

The answer is simple: Criminals ignore laws against handgun ownership more contemptuously even than they ignore those against robbery, assault, rape, drug-dealing and murder.

Crusading politicians may keep law-abiding citizens from possessing guns, but that will do nothing to stop firearms crimes because law-abiding citizens aren't shooting down

> their rival meth pushers outside strip clubs at 2 a.m.[9]

Beyond mere anecdotal evidence, it is illustrative to look at the exact nature and source of the firearms being used criminally in Chicago. When requested, the Bureau of Alcohol, Tobacco, Firearms and Explosives assists local law enforcement agencies by tracing the ownership of a firearm from the manufacturer/importer to the dealer to the purchaser. This is done by examining records required to be kept by the manufacturer/importer and the firearm dealer. Since the local law enforcement agency must request this service, the trace data is not a perfect snapshot of all firearms used in crimes. For instance, if locally mandated registration records identified the ownership of the firearm, if the owner of the firearm previously reported to the police that the firearm was stolen or if a receipt for purchase and/or a confession of ownership is obtained through other investigation, a trace would likely not be requested.

According to trace data, in 2008 Illinois recovered and traced 11,366 firearms (8,674, or 76.3% handguns), with Chicago alone responsible for 6,300 (not broken down by type) of these, or 55.4%.[10] For the traces in 2008, the "source state" was identified for

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[9] Lorne Gunter Editorial, *Gun Bans Don't Prevent Murder*, 10/27/2008 National Post, Page A14.

[10] ATF 2008 Trace Data, http://www.atf.gov/firearms/trace_data/2008/illinois08.pdf retrieved 11/13/2009.

6,536 (57.5%)[11] of the traces, with Illinois being the source state for 3,300, or 50.5% of the firearms when a source state was determined. The average "time to crime," or the length of time from the retail transaction at the dealer to the time the firearm was recovered from a criminal or crime scene, was 12.16 years. For 2007, Illinois recovered and traced 11,986 firearms (8,782, or 73.2% handguns), with Chicago accounting for 6,690 (not broken down by type), or 55.8%.[12] The source state was identified in 6,640 (55.3%) of the traces, with 3,380, or 50.9%, coming from Illinois. The 2007 "time to crime" was 11.97 years. For 2006, Illinois recovered and traced 13,686 firearms (10,284, or 75.1% handguns), with Chicago picking up 8,367 firearms (not broken down by type), or 61.1% of the total firearms recovered.[13] The source state was determined in 7,463 (54.5%) of the traces, with Illinois accounting for 3,805, or 50.9%. The 2006 average "time to crime" was 11.94 years.

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[11] Reasons for the source state not being identified through the trace include: firearms with no serial number; firearms with obliterated serial numbers; lost/inaccurate records on the part of BATFE, the manufacturer or the dealer; the firearm entering private commerce prior to modern firearm records laws; and the gun was illegally imported into the country by gun smugglers, similar to narcotic importation.

[12] ATF 2007 Trace Data, http://www.atf.gov/firearms/trace_data/2007/illinois07.pdf retrieved 11/13/2009.

[13] ATF 2006 Trace Data, http://www.atf.gov/firearms/trace_data/2006/cy2006-illinois.pdf retrieved 11/13/2009.

2009 appears to be right in line with this remarkably consistent history of gun confiscations. " . . . (t)here have been 7,234 guns recovered or confiscated by Chicago Police so far this year. *When you think about it, that's about one gun for every 400 people, in a city with an ordinance that prohibits them*"[14] (emphasis added). Unfortunately, the full 2009 ATF trace data for Illinois is not available as of the filing of this brief, but there is no reason to suspect that the consistent ratios set forth over the past three years will be any different once 2009's books are closed. Extrapolating this 2009 figure of 7,234[15] guns recovered in Chicago as of November 13, 2009, using the typical ratios from the past three years, it would be expected that 2009 will show approximately 13,100 firearms recovered and traced in Illinois, with approximately 9,825 being handguns and with Chicago accounting for approximately 7,500 of the firearms traced. Source states will be identified in approximately 7,232 traces, with Illinois being the source state for approximately 3,698 firearms. The average gun will have last been involved in a legal transaction approximately 12 years ago.

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[14] Kristyn Hartman, *7,234 Guns Confiscated in Chicago This Year, Number Skyrockets Despite Handgun Ban*, 11/13/2009 CBS News wire report, http://cbs2chicago.com/local/7234.guns.confiscated.2.1309844.html retrieved 11/13/2009.

[15] Assuming this number of 7,234 guns recovered is approximately the number traced by ATF.

Perhaps nothing illustrates the failure of the "gun ban as prevention" model more clearly than Chicago's deployment of SENTRI. In a city with no legal ownership of handguns and very little legal ownership of other firearms, the police have been forced to resort to the installation of permanent gunshot sensors.

> So what if the gunshot automatically triggered a 911 call, and captured video of the shooter? Police in Chicago are hoping to curb gun violence with technology that does just that. The technology – Smart Sensor Enabled Neural Threat Recognition and Identification (SENTRI) – recognizes the sound of a gunshot within a two-block radius, pinpoints the location of the shot with a surveillance camera, focuses on the location, and in less than 1 second, places a 911 call.[16]

Permanent gunshot sensors, murder capital of the United States, 11,000+ firearms recovered and traced each year . . . clearly Chicago's gun ban is not interfering with criminals and their illegal use of illegal firearms.

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[16] Jim McKay, *Triggered Response*, 12/8/2005 Government Technology wire report, http://www.govtech.com/gt/articles/97507 retrieved 11/13/2009

B. Chicago's Police Department Has Earned the Distrust of the Public

"In this city, it seems to me we are bombarded by stories and cases and prosecutions of police misconduct . . . It's been accelerating . . . It's very discouraging . . . There's really nobody more powerful than a policeman in a uniform with a badge and a gun . . . Everyone wants to see the police as their protectors," U.S. District Judge Robert Gettleman, imposing sentence on Chicago Police Officer Richard Doroniuk, who was convicted of robbing drug dealers.[17]

While Chicago Police officials rightly protest[18] that only a small portion of officers bring shame on the department as a whole, it is easy to understand Judge Gettleman's exasperation. As recently as September 2009, seven members of the "elite" Special Operations Section of the Chicago Police Department have pleaded guilty to corruption charges.[19]

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[17] Steve Bartin, *Judge: I'm Tired of Crooked Cops in Chicago*, 6/30/2009 Chicago Sun-Times Media Wire, http://www.cdobs.com/archive/syndicated/judge-im-tired-of-crooked-cops-in-chicago,36349 retrieved 11/15/2009.

[18] *Amici's* members and supporters include many current and retired law enforcement officers, and many law enforcement organizations are supporting Petitioners in the instant case. It is not *Amici's* intent to take a broad brush to law enforcement in general or the Chicago Police Department as a whole.

[19] *Two More Ex-Cops Plead Guilty in SOS Probe*, 9/25/2009 Chicago Sun-Times Media Wire, http://cbs2chicago.com/local/police.corruption.case.2.1208809.html retrieved 11/15/2009.

Investigation of these officers revealed a systemic conspiracy where the officers were "shaking down" criminals, stealing their property, money and drugs while simultaneously fabricating criminal charges against the victims. According to Chicago Officer Keith Herrera, who cooperated with the FBI in a larger probe, police supervisors were aware of the illegal actions occurring and told the officers to "keep it up."[20] Most shocking, Officer Herrera only turned to the FBI after Officer Jerome Finnigan, one of the leaders of the police conspiracy, asked Herrera to help kill two fellow officers for breaking the "code of silence." Thus thwarted, Officer Finnigan followed Officer Herrera's example by agreeing to cooperate with investigators, in return for leniency in the charges resulting from his murder scheme.[21]

In addition to the SOS conspiracy, Chicago residents have endured the following outrageous revelations *in just the past five months*: a Federal Jury verdict ordered the Chicago Police Department to pay a $625,000 award for a brutal beating handed out by five officers during a traffic stop;[22] a Federal Jury

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[20] *Cop Tells FBI He Terrorized Chicago Citizens*, 6/1/2008 CBS wire report, http://cbs2chicago.com/local/keith.herrera.SOS.2.738113.html retrieved 11/15/2009.

[21] *Report: Cop Charged in Murder Scheme Cooperating*, 10/30/2007 CBS wire report, http://cbs2chicago.com/local/corrupt.police.officer.2.462300.html retrieved 11/15/2009.

[22] Andy Thayer, *CPD Hit With $625,000 Fine for Violent Police Assault During Traffic Stop*, 6/23/2009 Chicago

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verdict for $21,000,000 for a man framed by an officer with "a history of fabricated false identifications and then suppressing evidence of such misconduct;"[23] an internal affairs investigation found, and the Chicago Police admitted, misconduct in handling the investigation of a missing teen;[24] an officer placed on administrative leave for allegedly lying on police reports and making over a dozen false arrests;[25] a YouTube video surfaced that shows Chicago officers working special duty in Pittsburgh forcing a 21-year-old student under arrest to pose with the officers for a picture;[26] a revelation that misconduct complaints against the police rose almost 19% in the second and

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Independent Media Center wire report, http://chicago.indymedia.org/newswire/display/86930/index.php retrieved 11/15/2009.

[23] Andy Thayer, *Federal Jury Awards Victim Largest-Ever Amount in Chicago Cop Frame-up*, 6/22/2009 Chicago Independent Media Center wire report, http://chicago.indymedia.org/newswire/display/86921/index.php retrieved 11/15/2009.

[24] Ravi Baichwal, *Police Admit Misconduct in Missing Teen Case*, 9/11/2009 ABC wire report, http://abclocal.go.com/wls/story?section=news/local&id=7008889 retrieved 11/15/2009.

[25] John Byrne, *Administrative Leave for Cop Accused of Making False Arrests*, 10/10/2009 Chicago Breaking News wire report, http://www.chicagobreakingnews.com/2009/10/administrative-leave-for-cop-accused-of-making-false-arrests.html retrieved 11/15/2009.

[26] Don Babwin, *Chicago Police Probed for Posing with Suspect*, 10/16/2009 Associated Press wire report, http://www.cbsnews.com/stories/2009/10/16/ap/national/main5389722.shtml retrieved 11/17/2009.

third quarters of 2009;[27] and Chicago Officer Anthony Abbate, caught viciously beating a female bartender half his size in an infamous surveillance video broadcast worldwide, was sentenced to probation only, despite direct evidence of other officers attempting to bribe and intimidate the bartender victim into silence.[28]

While the examples outlined above are limited to the second half of 2009, the acts of brutality, corruption and cover-up go back much further. In a 2005 case filed by George Garcia against the city of Chicago, a jury found that the Chicago Police department was systematically covering up criminal violence by officers. "The key to Garcia's case was his claim that his injuries were caused by the city because a policy of tolerating such actions by police officers had left (the officer) with the feeling that he could do whatever he wanted."[29] This freedom from accountability was a theme throughout the trial, with multiple "trial ambush" tactics on the part of the city's attorneys,[30] and trial Judge James Holderman reportedly chastised the city's attorneys by asking "is there anything else you want to lie to me about?"[31] Chicago protested that the officers were off-duty, but the jury obviously felt there was sufficient evidence of Chicago covering up for rogue officers to impose liability. "When asked

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[27] David Heinzmann, *Police Misconduct Allegations up Almost 19%*, 10/30/2009 Chicago Tribune online report, http://www.chicagotribune.com/news/chi-police_complaints_upoct30,0,362522.story retrieved 11/15/2009.

[28] Matt Walberg. *Judge Gives Cop Thug Probation in Bartending Beating Case*, 6/23/2009 Chicago Independent Media Center wire report, http://chicago.indymedia.org/newswire/display/86933/index.php retrieved 11/15/2009.

[29] Mike Robinson, *Jury Awards $1 Million to Man Allegedly Beaten by Officer*, 5/2/2003 AP News Wire, http://www.buckeyefirearms.org/publicfiles/documents/TheAssociatedPressState.doc retrieved 11/16/2009.

> [30] The Beavers Resolution was highly significant, 'smoking gun' type of evidence which went a long way toward proving plaintiff's *Monell* claim. The City had not produced the Beavers Resolution during discovery . . . This was not the first time in this litigation that the City's counsel was shown to have violated discovery rules and procedures. The undisputed evidence established at trial that the City withheld other relevant documents during discovery even after a judicial order to produce them had been entered. (citation omitted). Additionally, the evidence established that the City's counsel authorized City personnel to sign and serve false sworn interrogatory answers in this case, (citations omitted). City personnel, after speaking with the City's outside counsel, Darcy Proctor, (Tr.1136) also provided false sworn answers to certain of Plaintiff's Second Set of Requests to Admit (citations omitted).

Judge James F. Holderman, 9/19/2003 *Memorandum Opinion and Order Regarding Defendant City of Chicago's Motion For New Trial*, Pg 17, *George Garcia v. City of Chicago, et al*, 1:01cv8945, United States District Court For The Northern District Of Illinois, Eastern Division.

[31] Chicago Anti-Bashing Network Press Release, *City of Chicago Guilty of Covering Up Criminal Police Violence*, 5/3/2003, http://www.net127.com/wiki/City_of_Chicago_GUILTY_of_Covering_Up_Criminal_Police_Violence_(2005) describing the verdict reached in *Garcia*.

about the amount, city spokeswoman Jenny Hoyle merely said there had been no evidence to show that the injuries suffered by Garcia would justify that much in compensatory damages."[32] It is unclear how Chicago determined an appropriate monetary value to be paid for the officers' actions or for the city's complicity in covering for the officers, but Chicago admittedly has a large sample of civil judgments against them to rely upon in expressing this opinion.

From 1995 through early 1998, Human Rights Watch investigated police brutality in 14 large city police departments, including Chicago.[33] Illustrative of the report's finding is the story of Chicago Police Commander Jon Burge. Credible evidence uncovered by Human Rights Watch and Chicago's Office of Professional Standards indicated that Commander Burge and those under his command *tortured* at least 64 suspects while in custody, with techniques ranging from beating to electroshock administered to genitals to inflicting burns on subjects by chaining them to hot radiators.[34] No criminal prosecutions were ever brought against Commander Burge or the officers under him. Despite internal investigations substantiating this systemic torture and recommending employment sanctions, Commander Burge was the only person who was fired, and two detectives working under Burge were temporarily suspended. Of these two, one went on to be decorated for valor and recommended for promotion by the mayor, and the other retired with full benefits.[35]

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[32] Mike Robinson, *Jury Awards $1 Million to Man Allegedly Beaten by Officer*, 5/2/2003 AP News Wire, http://www.buckeyefirearms.org/publicfiles/documents/TheAssociatedPressState.doc retrieved 11/16/2009. Note: The Court ordered, and Plaintiff accepted, remittitur of $750,000 of the verdict on September 19, 2003 and separately awarded costs and fees of $647,951.81 on the same date.

[33] Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States*, http://www.hrw.org/legacy/reports98/police/index.htm retrieved 11/12/2009.

Far from imposing any sort of liability for these failures, Illinois law actually affirmatively indemnifies the police departments within Illinois against claims of negligence/incompetence from citizens.[36] Even though the city reportedly paid $29,000,000 to settle 1,657 lawsuits between 1992 and 1997, these lawsuits all alleged actual criminal conduct (e.g. excessive force, false arrest, kidnapping, improper search and seizure etc).[37] Under Illinois law, no liability can be imposed for "failure *to provide adequate police protection or service*, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals"[38] (emphasis added).

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[34] The Human Rights Watch report alleged, and documented, a substantial racial animus on the part of the abusive police officers. However, as the minority status of the victims does not add to the use of this report for the purposes of this brief, no further examination of the race of the victims will be set forth.

[35] Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States*, http://www.hrw.org/legacy/reports98/police/uspo53.htm retrieved 11/12/2009.

[36] See, inter alia, 745 ILL. COMP. STAT. ANN. 10/1-101, 10/4-102 (2009) and *Leone v. City of Chicago*, 156 Ill. 2d 33 (1993).

A final area of citizen concern is the ongoing staffing shortages at the Chicago Police Department. As of the writing of this brief, the Chicago Police Department is 2,000 officers short of the authorized level of 13,500 active officers. Of the active officers, a reported 641 officers a day are restricted to desk duty. An additional 730 officers are on medical rolls each day. Department policy allows an officer to take up to 365 sick days every two years.[39] Chicago faces the prospect of up to 1,000 officers retiring in the next year. "I am extremely nervous about the number of officers who may choose to leave based upon the fact the contract may be signed in 2010," Chicago Police Chief Jody Weis said. "We have to be prepared for that type of loss."[40] The staffing problem is so bad

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[37] Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States*, http://www.hrw.org/legacy/reports98/police/uspo57.htm retrieved 11/12/2009.

[38] § 745 ILL. COMP. STAT. ANN. 10/4-102 (2009).

[39] Fran Spielman, *Police Shortage a Growing Problem*, 10/29/2009 Chicago Sun-Times wire report, http://www.suntimes.com/news/cityhall/1853008,CST-NWS-shortage29.article retrieved 11/17/2009.

[40] John Byrne, *Police Chief Worries About Mass Retirement of Officers*, 11/7/2009 Chicago Tribune wire report, http://www.

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that, in response to officers advising citizens of the lack of manpower and the need for citizens to complain to city government, 003rd District Commander Lillie Crump-Hales issued a memo to officers advising them that discussing the lack of manpower with citizens was a violation of department rules and regulations, and officers could face disciplinary action for doing so.[41]

C. In This Environment of High Violent Crime and Mistrust of the Police, Chicago's Laws Have Disarmed the Victims, Not the Criminals

Chicago Municipal Code § 8-20-040(a) prohibits possession of a firearm unless the firearm is registered. Simultaneously, Chicago Municipal Code § 8-20-050(c) prohibits registration of handguns unless the handgun was registered with the city by the owner prior to 1982. Stated another way, Chicago prohibits possession of unregistered firearms and will not register handguns, so no one within the city of Chicago may legally be in possession of a handgun. There is no exception for handguns kept in the home, and there is no exception for self-defense. This same

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chicagotribune.com/news/chi-police-retirementsnov07,0,707360.story retrieved 11/17/2009.

[41] District Commander Lillie Crump-Hales, *Memo to 1st, 2nd and 3rd Watch Commanders*, dated September 4, 2009, http://1.bp.blogspot.com/_9peHv_weEh8/SqXmzBxhZoI/AAAAAAAABPc/uoLif9j01xs/s1600-h/IMG_3076.JPG retrieved 11/17/2009.

prohibition on handguns was struck down by this court in *Heller*. Illinois law is less strict, but only slightly so. Residents of Illinois living outside of Chicago may possess handguns in their homes for self-defense, but only after obtaining a firearm owner identification card from the state, which operates as a form of gun licensing statewide in Illinois.

As outlined previously, criminals are having no trouble obtaining and using illegal firearms in Chicago. Indeed, as outlined previously, the average "age" of the firearms recovered and traced shows that the firearms being used criminally were last transferred "legally" 12 years prior to the criminal use of the firearm. The majority of firearms recovered for which a state of origin could be determined originated from within the borders of Illinois, despite the statewide licensing of firearm ownership by the state.

The crime rates and the trace data clearly reveal that criminals are able to obtain and use firearms at will, and the firearms are being obtained from illegal sources. At the same time, law-abiding residents of Chicago have no ability to legally own handguns, even in their own homes. No matter how much training, licensing or other bureaucratic dancing the resident is willing to endure, there is no relief available to Windy City residents.

Clearly, Chicago's gun ban is disarming the victims, not the criminals.

II. Incorporating the Second Amendment Will Restore the Right of Self-Defense to Residents of Chicago

The residents of Chicago live in a city suffering from one of the highest violent crime rates in the nation. At the same time, these same residents are forcibly disarmed by their own government and forbidden the means to exercise one of the most basic of human rights – freedom from criminal attack. Consequently, the residents of Chicago are 100% reliant upon the Chicago Police Department for protection in a time when the news regularly announces allegations of police corruption, brutality and cover-up.

A. Chicago Does Not Have Any Compelling Policy Argument Against Incorporation

The justifications advanced in favor of Chicago's draconian gun ban, that the ban is needed to "fight crime" or to preserve "law and order," do not withstand serious scrutiny. One need look no further than the discussion in section I(A) and (C) herein to see that the stated purpose is not being achieved. Criminals are readily obtaining a fixed, steady supply of illegal firearms in support of their criminal enterprises, and the consistently high violent crime rate in Chicago attests to the ability and willingness of criminals to use these illegal guns.

Chicago did enjoy the benefit of a federally funded project to bring together federal, state and local resources in an attempt to impact the violent crime rate. Project Safe Neighborhoods was rolled out gradually, with interagency meetings to review and federally prosecute gun crimes commencing in May of 2002 and the rest of the program implemented the next year.[42] This program targeted certain areas and offenders with a previous conviction history for gun violence, with Chicago's program targeted at certain police "beats" with high violent crime rates. The program consisted of meetings and interventions with persons recently released from prison, in which they would be informed of the new program and the accompanying severe prosecution and sentencing they would face if they committed new gun crimes in the future. This component also included outreach and "self-help" type of information to help these felons break from their lives of crime. Simultaneously, the interagency group was screening all new gun crimes in Chicago, with the most serious cases involving repeat gun offenders elevated for federal prosecution with correspondingly longer sentences. Finally, the seizures of illegal guns would be monitored and increased if possible.

A study of the target group versus a control group was conducted from 2003-2005 and concluded that the target group did experience a decrease in homicide rates when compared to the control group.[43] The authors tried to assign values to the various components of the program and identify which components contributed to any decrease in violent crime. Notably, the study's authors concluded that mere membership in one of the program's target groups reduced homicides and gang homicides, and attendance at the offender meetings further reduced homicides, gun homicides and gang-related homicides.[44] The study's authors also concluded that the federal prosecutions and sentencing had some impact on violent crime reduction, as did the seizure of illegal firearms by authorities. However, the program had no impact on non-homicide violent crime (aggravated battery and assaults) and the largest decrease of homicide and gun homicide was attributable to attendance at the offender forums.[45]

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[42] Jeffrey Fagan, Tracey L. Meares, & Andrew V. Papachristos, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, Journal of Empirical Legal Studies, Volume 4, Issue 2, 223-272, July 2007.

Stated another way, by targeting those who had already been convicted of committing violent crime with a gun, putting them into "scared straight" types of groups and offender forums, coupled with the threat of enhanced prosecutions and continued efforts to seize illegal firearms, homicide rates could be lowered. Of particular significance, none of the study participants could legally own, purchase, possess or sell a firearm under federal law, due to their prior convictions. It is also of interest that the number of firearms seized by Chicago and traced by the ATF in 2002 was, according to the authors, 6,252[46] compared to the 6,300 (See Section I(A) herein) seized by Chicago and traced by the ATF in 2008. In both 2002 and 2008, Chicago led the nation in murder.[47] This is a fairly damning result: Chicago led the nation in the year before the "reduction" program and five years into the "reduction" program. The trace data strongly suggests a fixed, easily available supply of illegal guns, with Illinois being the source state for a majority of the guns where a state of origin could be identified, all despite the city and state bans and licensing in place.

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[43] Jeffrey Fagan, Tracey L. Meares, & Andrew V. Papachristos, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, Journal of Empirical Legal Studies, Volume 4, Issue 2, 223-272, July 2007, at 256.

[44] Jeffrey Fagan, Tracey L. Meares, & Andrew V. Papachristos, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, Journal of Empirical Legal Studies, Volume 4, Issue 2, 223-272, July 2007, at 256-258.

[45] Jeffrey Fagan, Tracey L. Meares, & Andrew V. Papachristos, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, Journal of Empirical Legal Studies, Volume 4, Issue 2, 223-272, July 2007, at 259.

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[46] Jeffrey Fagan, Tracey L. Meares, & Andrew V. Papachristos, *Integrating and Evaluating Multiple PSN Strategies in Chicago*, Slide 7, undated PowerPoint Presentation, http://uchicagolaw.typepad.com/faculty/files/meares_cbi_slides.ppt retrieved 11/16/2009.

[47] Tracey L. Meares, & Andrew V. Papachristos, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program*, January 2009 PDF document, http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf retrieved 11/13/2009.

What, exactly, is Chicago's gun ban accomplishing?

Regardless of impact (or lack thereof) on the crime rate, this Court has repeatedly said that preservation of the public peace is not grounds to deny a person a constitutional right. "Thus, law and order are not here to be preserved by depriving the Negro children of their constitutional rights," *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges," *Buchanan v. Warley*, 245 U.S. 60, 80-1 (1917).

Chicago advances a policy argument against incorporation that is demonstrably false; namely, Chicago's gun ban must survive in order to combat violent crime. As examined above, the gun ban is not accomplishing this purported goal. However, even if the ban was having a demonstrable impact, citizens cannot be forced to sacrifice their enumerated constitutional liberties upon the altar of "crime control." This court should redirect governments like Chicago towards "criminal control" and away from gun owner discrimination. Chicago's current strategy is no different than fighting shoddy construction by banning hammers.

B. Residents of Washington, D.C. Enjoy, and Residents of Chicago Are Denied, a Constitutionally Guaranteed Right to Self-Defense

Persons living in Washington D.C., and arguably also persons living in American Samoa, Puerto Rico, Guam and the U.S. Virgin Islands, enjoy a robust right to own, and carry within their homes, handguns for lawful purposes, including the right of self-defense, courtesy of this court's ruling in *Heller*. Residents of D.C. currently benefit from an order from this court establishing "shall issue" licensing of operable handguns in their home for defense of self and family.

At the same time, residents of Chicago do not enjoy this same constitutionally protected right. While the U.S. Constitution provides that residents of D.C. are entitled to a license to possess an operable handgun in the home for self-defense (assuming they are not under firearm disability), residents of Chicago are denied this same right, despite living under the same U.S. Constitution. This discrimination occurs entirely on the basis of the location of the person's residence, and is only possible because the root of these rights, the Second Amendment to the U.S. Constitution, has not been applied to the 50 states.

C. The Right to Possess a Handgun in the Home Applies to Chicago the Same as Other Fundamental, Individual Rights Protected by the U.S. Constitution

This court is going to consider a broad array of scholarly discussion on the origins of the Fourteenth Amendment to the United States Constitution, as well as what was intended by the drafters of the amendment and what was the understood meaning of the amendment by the states that ratified it. Inherent in this discussion is a very thorough discussion of "due process" incorporation versus "privileges and immunities" incorporation. *Amici* do not wish to duplicate these efforts, particularly because NEITHER method of incorporation allows Chicago to deny their residents the rights conferred upon them by the U.S. Constitution.

The residents of Washington D.C. and Chicago share the same right of: free speech, free press, choice of religion, protection from unreasonable search and seizure of their person or property, protection from self-incrimination, requirement of grand jury indictment or presentment for felony charges, reasonable bail, protection against cruel or unusual punishment and speedy public trial with the assistance of legal counsel. These rights, conferred and protected by the U.S. Constitution, are enjoyed equally by residents of Washington D.C. and Chicago without regard to their state of residence. There are no legal or policy grounds to treat the Second Amendment, which is the ultimate guarantor of all other rights, with anything less than the full protection and dignity afforded these other rights. This requires application of these same rights against the states.

> No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The (14th Amendment), therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. *Ex Parte Virginia*, 100 U.S. 339, 346-7 (1879).

D. Absent Incorporation, Residents of Chicago Are Second-Class Citizens When Compared to Residents of Washington, D.C.

This court has previously held there is only one class of national citizenship, and the primary purpose of the Fourteenth Amendment was to guarantee the rights conferred by the Constitution to this single class of national citizen.[48] Beyond establishing this single class standard, the privileges and immunities clause jurisprudence has largely been dormant. Consequently, the instant case will likely invite the court to revisit the field.

Even if this court does not revisit the privileges and immunities field and instead travels down the due process path, the single class standard still applies. While certain protections have been extended or denied to subsets of natural persons, such as affirmative action programs and veteran programs, when it comes to fundamental, individual, enumerated rights, this court has ordered the uniform application of these rights against the states without regard to whether a person lives on one side of a border versus the other side of the border.

However, should this court decline to incorporate the Second Amendment via either method, the result will be exactly that: unequal enjoyment of a fundamental, individual, enumerated right on the basis of a person living on the "right" side of the boundary line rather than the "wrong" side. The residents of Washington D.C. will enjoy a larger "basket" of fundamental, individual, enumerated rights when compared to the residents of Chicago.

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[48] See, e.g., *Bell v. Maryland*, 378 U.S. 226, 250 (1964).

III. Incorporating the Second Amendment Will Restore the Right of Self-Defense to Non-Resident Visitors to Chicago

While incorporating the Second Amendment against Chicago is of critical importance to those living within Chicago, incorporation is no less important to those living outside of Chicago. Currently, members of the United States Concealed Carry Association or supporters of Buckeye Firearms Foundation, who wish to exercise their constitutional right to travel for business or pleasure, must shed all Second Amendment rights at certain state lines. As this brief is being written, members traveling to Chicago are forced to shed their constitutional right to self-defense at both the Illinois state line and the Chicago city limits, as Illinois does not issue Firearm Owner I.D. cards to non-residents[49] and Chicago makes no

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[49] Non-residents may still travel into Illinois with a firearm without a FOID to hunt, attend a firearm showing or display sanctioned by the state police, or to shoot at a firing range sanctioned by the state police. However, the firearm must, at all times other than hunting, shooting or showing, be unloaded and in a closed case, i.e. useless for self-defense. There is a further exception to these requirements for non-residents who are licensed or registered to possess firearms by their resident state.

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provision for non-residents to keep an operable handgun at hand for self-defense.

A. Non-Resident Visitors to Chicago Are Currently Treated as Second-Class Citizens Compared to Residents of Chicago

Chicago currently makes no provision for non-residents to register or otherwise legally possess an operable firearm for self-defense. While Chicago's law does have a limited exception for non-residents, the exception requires that the non-resident be involved in a recreational firearm-related activity within the city and that the firearm be unloaded and securely wrapped, i.e. worthless for self-defense.[50] If a person is traveling on business or to visit a family member instead of attending a recreational firearm activity, there is no possibility of complying with Chicago law.

While almost a practical impossibility, it is theoretically possible for a Chicago resident to have an operable handgun in the home for self-defense, although this would require that the person registered the handgun prior to 1982, successfully renewed this

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See 430 ILL. COMP. STAT. ANN. 65/2(b)(5)-(10) (2009). For a resident of Vermont, for example, this exception would be worthless, as Vermont allows all law-abiding persons to own and carry firearms without government license, registration or permission.

[50] Chi., Ill., Municipal Code § 8-20-040(b)(5) (2009).

registration ever since and has additionally complied with the Illinois FOID requirements. Consequently, residents of Chicago are, on paper, treated more favorably than non-residents. However, the *de facto* operation of Chicago's law is that both residents and non-residents are stripped of the ability to defend themselves.

B. Any Incorporation of the Second Amendment That Is Silent as to Non-Residents Will Result in Non-Residents Being Treated as Second-Class Citizens

This court phrased the question presented as: "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses?" A necessary component of the answer to this question is Chicago's treatment of non-resident visitors. If this court incorporates the Second Amendment against the states, then the operation of that decision, when combined with this court's prior ruling in *Heller*, is that Chicago must, at a minimum, start issuing "shall issue" licenses to persons so they may lawfully keep and carry operable handguns in their residences for self-defense.

Plaintiffs in the instant case are all residents of Chicago, necessarily so because the challenged licensing laws are available to residents only. However, if this court does incorporate the Second Amendment against the states, then this court will have ruled that 1.) The Second Amendment is a fundamental, individual right that encompasses self-defense; 2.) Licensing of handguns requires the "shall issue" variety and must allow the handgun to be kept and carried in an operable condition in the home; and 3.) The ruling in *Heller* applies against Chicago, meaning Chicago must implement some form of "shall issue" licensing, allowing operable handguns to be kept and carried in the home.

As noted earlier, Chicago's current law makes no provision for non-residents to obtain a license and it is expected that any amendments needed to bring Chicago's law into post-incorporation compliance will retain this defect. In such an environment, members of the United States Concealed Carry Association or supporters of Buckeye Firearms Foundation who exercise the constitutional right to travel to Chicago are treated as second-class citizens when they do so. For instance, a member forced to travel back to Chicago to provide extended care for an ill family member will be forced to shed their Second Amendment rights at the Illinois state line and further shed rights at the Chicago city limits. While the resident living next door to the sick relative will be entitled to a "shall issue" license to keep and carry an operable handgun in the home, the non-resident caring for the family member will have no such entitlement, regardless of the length of stay and the fact that the ill family member might be entirely dependent upon the non-resident for constant care, including protection from criminal elements.

This non-resident will, however, still enjoy the same freedom of speech, religion and press, the protection against coerced self-incrimination, unreasonable search and seizure etc. that the neighbor enjoys. The non-resident's First Amendment right to political speech ensures that he may criticize the policies of President Obama equally in his own hometown and the President's hometown of Chicago. It is only Second Amendment protections that are arbitrarily denied to the traveling non-resident while in Chicago, and this denial is based only upon his or her foreign state residency.

The Second Amendment is second in chronological order but not in importance, and the non-resident must be afforded the same protections against state intrusion as residents, regardless of where a person may travel.

◆

CONCLUSION

The United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

OTIS MCDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CALGUNS FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Calguns Foundation, Inc. is a not-for-profit corporation that has no corporate parents and no publicly held company owns 10% or more of the corporation's stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae The Calguns Foundation, Inc. is a non-profit organization incorporated under the laws of California with its principal place of business in Redwood City, California. The purposes of Calguns include supporting the California firearms community by promoting education for all stakeholders about firearm laws, rights and privileges, and securing the civil and constitutional rights of California gun owners, who are among its members and supporters.

STATEMENT

As Petitioners have, and other *amici* will, set forth in considerable and persuasive historical detail, the Framers of the Fourteenth Amendment publicly and clearly expressed their intent to include the Bill of Rights, and the Second Amendment in particular, among the privileges or immunities enforceable against the States via the Fourteenth Amendment. Pet. Br. at 10-42. This Court, of course, has not previously adopted that view and has taken a considerably narrower view of the Privileges or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Instead, this Court has opted for selective incorporation of portions of the Bill of Rights via the Due Process Clause of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968).

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. Per the terms of such consents, written notice was provided to the parties more than ten days prior to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

Amicus agrees with Petitioners that incorporation of the Bill of Rights generally, and the Second Amendment specifically, via the Privileges or Immunities Clause rather than the Due Process Clause is a more coherent and historically accurate reading of the original public meaning of the Fourteenth Amendment and that this Court should rule accordingly. It is not the purpose of this brief, however, to set forth the primary evidence for such incorporation, but rather to address a limited set of arguments that have frequently been raised against incorporation by two prominent opponents of incorporating the Bill of Rights: Charles Fairman and Raoul Berger.

Following the debate regarding incorporation between Justices Black and Frankfurter in *Adamson* v. *California*, 332 U.S. 46 (1947), Professor Charles Fairman – a protégé of Justice Frankfurter – set out to defend his mentor's position supporting selective and limited incorporation and to respond to the historical case for full incorporation of the Bill of Rights set forth by Justice Black in his *Adamson* dissent. The result of that effort was Fairman's seminal work on incorporation: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949), in which he purported to rebut the historical evidence cited by Justice Black.[2] Fairman's work on the subject became the accepted orthodoxy regarding the meaning of the Fourteenth Amendment, has "'shaped much of the constitutional field,'" and is "one of the most cited law review articles written since World War II." Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 58-59 (1993) (citation omitted).

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[2] Decades later Fairman revisited the subject and reached the same conclusions in Charles Fairman, *Reconstruction and Reunion, 1864-1888, Part II* (1971), in 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund ed., 1971) and Charles Fairman, *Reconstruction and Reunion, 1864-1888, Part II* (1987), in 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanley N. Katz eds., 1987).

Decades later, Professor Raoul Berger took up the role of leading critic of incorporation of the Bill of Rights and went Fairman one better, arguing that the Bill of Rights was not incorporated at all, not even selectively. *Id.* at 60 (describing Berger's views).[3]

Unfortunately, the work of these two opponents of incorporation suffers from numerous factual and logical flaws and has seriously distorted the analysis of generations of lawyers and jurists. The purpose of this brief, therefore, is to highlight some of the more recent scholarship that discusses those flaws and demonstrates that the work of Fairman and Berger should not be relied upon by this Court. Rather, this Court should look to the work of scholars such as Richard Aynes, Michael Kent Curtis, and Akhil Amar for a more accurate rendition of the history of the Fourteenth Amendment and the publicly expressed intent if its Framers.

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[3] Berger's critiques of incorporation can be found in his books GOVERNMENT BY JUDICIARY 134-56 (1978) and THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989), as well as in a series of articles in which he debated the subject with Michael Kent Curtis. *See* Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM. & MARY BILL OF RTS. J. 121, 128 (1992) (describing the dueling law review articles of Berger and Curtis).

SUMMARY OF ARGUMENT

1. Fairman's and Berger's attempts to demean John Bingham, the principal Framer of the Fourteenth Amendment, and thus to discredit his expressed intent that the Fourteenth Amendment incorporate the Bill of Rights, are historically inaccurate and unjustifiable. Bingham was a well-regarded Congressman and lawyer with a clear and well-developed constitutional theory supporting incorporation. His statements that the Fourteenth Amendment was written to include the Bill of Rights among the privileges or immunities enforceable against the States were numerous, clear, and understood by his colleagues and the public. There is no reasonable basis for disregarding Bingham's statements, which are direct and reliable evidence of original intent and public understanding.

2. The absence of discussion or objection regarding potential conflicts between the Bill of Rights and some state procedural laws foregoing grand or civil juries does not negate direct and public statements of intent to incorporate. The Framers and others were either unaware of, or insufficiently disturbed by, such potential conflicts and there was a similar absence of discussion of the same conflicts posed by the Fourteenth Amendment's Due Process Clause.

3. Early post-ratification cases in this Court ignoring or rejecting incorporation under the Fourteenth Amendment are not reliable indicia of the original understanding of that Amendment. Still earlier cases in the lower courts correctly reflected the intent to incorporate the Bill of Rights and other Blackstonian and constitutional rights, and this

Court's subsequent decisions were widely understood as having abandoned that original intent.

4. The suggestion by Berger that the Fourteenth Amendment was precisely equivalent to the Civil Rights Act, and thus limited to prohibiting discrimination rather than enforcing concrete rights, is contrary to the text and history of both the Amendment and the Act establishing a broader purpose for both. In addition, the unambiguous guarantee of the Dues Process Clause either disproves the claimed equivalence or is paralleled by language in the Civil Rights Act that would also have been understood to protect the Bill of Rights generally.

5. Both Fairman and Berger are unreliable sources in the debate over incorporation in that they approached their work from a now-repudiated historical perspective that was hostile toward the Reconstruction and contemptuous of the Framers of the Fourteenth Amendment. That perspective created systemic flaws and biases in their treatment of the historical evidence and their inferences therefrom. Such flaws and biases render their work unreliable.

ARGUMENT

CHARLES FAIRMAN'S AND RAOUL BERGER'S WORK ON FOURTEENTH AMENDMENT INCORPORATION OF THE BILL OF RIGHTS IS DEEPLY FLAWED, INACCURATE, AND SHOULD NOT BE RELIED UPON BY THIS COURT.

I. Misleading and Unjustified Attacks on John Bingham, the Principal Framer of the Fourteenth Amendment.

As Petitioners and others set forth in detail, Representative John Bingham, the principal author of the Fourteenth Amendment and its leading proponent in the House, frequently expressed his intent that the Fourteenth Amendment's Privileges or Immunities Clause make the Bill of Rights (and other Blackstonian and constitutional rights) enforceable against the States. *See, e.g.*, Pet. Br. at 29-31 (discussing statements by Bingham). Senator Jacob Howard, the manager of the proposed amendment in the Senate, likewise expressly stated his view that the purpose of the Fourteenth Amendment included making the Bill of Rights enforceable against the States. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866). Such explicit and public explanations of the meaning and purpose of the Fourteenth Amendment ordinarily would and should be extremely compelling evidence for the interpretation of the Fourteenth Amendment.[4]

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[4] As a simple exercise, imagine that such explicit statements regarding the meaning of the Constitution were present in the Federalist Papers or in other statements by Madison. Few would seriously dispute the great weight of such statements.

To overcome such compelling historical evidence, Fairman and Berger attempted to discredit Bingham as befuddled, confused, idiosyncratic in his legal theories, and unclear, thus arguing that his statements should be discounted as offering little indicia of intent or public understanding. Fairman, 2 STAN. L. REV. at 26 (describing Bingham's views as "novel" and "beffuddled"); Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 58 (Fairman dismissed "as unreliable numerous statements by" Bingham, arguing that "Bingham's position was muddled, inconsistent and idiosyncratic.[]") (footnotes omitted); *id.* at 66 (describing Fairman's efforts to discount Bingham).[5] Berger likewise argued that Bingham was a "'muddled' thinker[] whose views should be discounted." *Id.* at 60 (footnote omitted) (quoting Berger, GOVERNMENT BY JUDICIARY 145).

Fairman even suggested that when Bingham expressly referred to the "Bill of Rights" he did not actually mean what he said, but instead was referring only "to two specific provisions of the Constitution." Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 68; Fairman, 2 STAN. L. REV. at 26 (the phrase "'the immortal bill of rights'" used in Bingham's February 26, 1866 speech in Congress "is to Bingham a fine literary phrase not referring precisely to the first eight Amendments"). "It was this unconventional usage of the term 'Bill of Rights' which, in part, led Fairman to conclude Bingham's beliefs were idiosyncratic.[]" Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 68 (footnote omitted).

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[5] Fairman continued his ad hominem attacks on Bingham in his 1971 work. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 65-66 ("Relying on his earlier reading of Bingham's speeches, Fairman wrote that Bingham was 'confused'[] and held 'peculiar conceptions.'[] According to Fairman, Bingham was 'not a man of exact knowledge or clear conceptions or accurate language,' but rather was 'distinguished for elocution but not for hard thinking.'") (footnotes omitted).

Fairman's and Berger's efforts to discredit Bingham, however, are both inaccurate and unjustifiable and cannot diminish the compelling evidence Bingham provides for an original and publicly understood intent to incorporate the Bill of Rights.

First, Bingham's constitutional views were neither confused nor unclear. In making such a charge, "Fairman inaccurately portrayed Bingham and distorted his constitutional theory. [¶] Fairman derived the theory he ascribed to Bingham by ignoring the bulk of Bingham's speeches and the context these provide." *Id.* 66-67.

The crux of Bingham's views turns on the idea that the Constitution, including the Bill of Rights, declared various rights of national citizenship, that state officers were obligated by their oaths to respect the Bill of Rights, but that because of this Court's decision in ***Barron*** v. ***Baltimore***, 32 U.S. (7 Pet) 243 (1833), such an obligation could not be enforced by Congress or the federal courts. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 68-74. The Fourteenth Amendment, therefore, was needed to, among other things, make the previously unenforceable obligation to respect the Bill of Rights enforceable against the States. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (Feb. 28, 1866) (Bingham: the Fourteenth Amendment would "arm the Congress * * * with the power to enforce the bill of rights as it stands in the Constitution today"); *id.* at 1089 (Bingham explaining that *Barron* v. *Baltimore* "makes plain the necessity of adopting this amendment").

After reviewing numerous speeches by Bingham, Professor Aynes persuasively concluded that

> this textual and contextual review shows that Bingham held a clear constitutional theory and that he intended to use the Privileges or Immunities Clause of the Fourteenth Amendment to enforce the Bill of Rights against the states. Fairman reached the opposite conclusion only by narrowly focusing on and misreading Bingham's February 26, 1866, speech and ignoring the context provided by Bingham's other relevant speeches.

Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 74; *see also* Akhil Reed Amar, THE BILL OF RIGHTS 181-83 (1998) (reviewing numerous references by Bingham to the need and purpose of the Fourteenth Amendment to enforce the Bill of Rights and concluding that "[i]n light of all this, it is astonishing that some scholars, most notably Charles Fairman and Raoul Berger, have suggested that when Bingham invoked 'the bill of rights,' he didn't mean what he said.").

Second, not only did Bingham have a coherent theory behind his intent to incorporate the Bill of Rights, his contemporaries apparently had little difficulty understanding that intent. *See* Amar, THE BILL OF RIGHTS 184 n. * (following Bingham's speech introducing the Fourteenth Amendment, "everyone else in the Thirty-ninth Congress understood Bingham's references to 'the bill of rights' as meaning just that."). Even the particular speech in which Fairman found Bingham's references to the Bill of Rights so confusing and peculiar was not viewed with any such difficulty at the time. The separately published pamphlet version of that speech left no doubt about Bingham's intent to enforce the Bill of Rights, and the New York Times readily grasped and reported Bingham's intent to the public. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 72 & n. 84 (the pamphlet version of Bingham's speech was subtitled a speech "in support of the proposed amendment to enforce the bill of rights" and the New York Times' report of that speech described Bingham's view of the proposed amendment as "simply a proposition to arm the Congress of the United States * * * with the power to enforce the Bill of Rights as it stood in the Constitution").

Third, Bingham's views were not especially "novel," "singular," or "peculiar." Fairman, 2 STAN. L. REV. at 26. Such claims stem, in part, from Fairman's (and Berger's) misreading of Bingham's references to the "bill of rights" as meaning something other than their natural import. They also stem, however, from Fairman's seeming incredulity over Bingham's disagreement with *Barron* v. *Baltimore* and the failure to recognize or credit the fact that such disagreement was not at all uncommon among anti-slavery legal theorists. As noted by Michael Kent Curtis, the "major fault with Professor Fairman's effort to understand the Fourteenth Amendment is that it overlooked the antislavery origins of the amendment. * * * Read in light of antislavery legal thought, Bingham's remarks are fairly clear." Michael Kent

Curtis, NO STATE SHALL ABRIDGE 100 (1986). Because Fairman overlooked, or perhaps merely looked down upon, *see infra* at 24-25, antislavery legal theory, he not surprisingly found Bingham's ideas peculiar. But, while Bingham's disagreement with *Barron* and his view that the Bill of Rights should already be binding on the States (though unenforceable absent an amendment) were "contrarian," the "leading scholarly work counts no fewer than thirty Republican Statements in the Thirty-eighth and Thirty-ninth Congresses voicing contrarian sentiments, and not one supporting *Barron*.[]" Amar, THE BILL OF RIGHTS 185-86.

Among Republicans who supported the Fourteenth Amendment, Bingham's ideas were not particularly novel or peculiar at all. But despite the Republican origins of the amendment, "Fairman regularly found the Democrats to be the people who had a clear understanding of the Bill of Rights question[]," and it was the Republicans who were "confused." Curtis, NO STATE SHALL ABRIDGE 100. "In fact, of course, the Republicans and Democrats adhered to different legal philosophies." *Id.*

Having reviewed extensive materials from the relevant time period, Professor Aynes summarized the situation thus:

> [T]he historical evidence reveals that Bingham's views of the Constitution and the Fourteenth Amendment were not idiosyncratic. Elements of his national citizenship, Bill of Rights, compact, and enforcement theories can be found in traditional antislavery theory,[] and in the opinions of well-known lawyers,

> judges, and political leaders. During speeches on the floor of the House and Senate, several congressional leaders espoused positions consistent with Bingham's theories. The authors of three contemporary legal treatises each shared Bingham's view concerning the purpose of the Fourteenth Amendment.

Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 74 (footnote omitted).

Ultimately, the attempt to discredit Bingham's views as unclear or misguided statements of original intent and understanding is not supported by a fair and accurate reading of the evidence. Rather, in his attacks on Bingham, Fairman "misread critical sources, relied on information taken out of context, ignored important contemporary materials, and buttressed his argument with a flawed legal theory. As a result * * * Fairman's portrait of John Bingham is distorted and unfaithful to the historical evidence." *Id.* at 61. And once such efforts to discredit Bingham are themselves discredited, it is exceedingly difficult to overcome such direct evidence that the Fourteenth Amendment was intended and understood to incorporate the Bill of Rights, necessarily including the Second Amendment.

II. Unwarranted Inferences from Potential Conflict with State Statutes and Constitutions and the Lack of Discussion During Ratification Debates.

A further argument used by Fairman to discount the expressed intent of the Framers to incorporate the Bill of Rights is the suggestion such incorporation would have conflicted with certain state laws and constitutions, some of which did not provide for indictment by grand jury or the use of civil juries in certain cases, as required by the Fifth and Seventh Amendments. *See* Fairman, 2 STAN. L. REV. at 137-38. Fairman expressed incredulity that Congress could have intended to impose such constitutional procedures upon the States, marveled at the lack of discussion regarding incorporation and such potential conflicts during the ratification period, and thus concluded that the Fourteenth Amendment could not have been intended or understood as fully incorporating the Bill of Rights. *Id.*

There are several flaws with this argument, the first and not the least of which is that the record from the ratification period is not so silent on incorporation as Fairman suggests. Amar, THE BILL OF RIGHTS, at 197 ("Fairman argues that virtually no one during the ratification debates explicitly reaffirmed incorporation, but Michael Kent Curtis has shown that here, too, Fairman overlooks a great deal of affirmative evidence for incorporation."); Curtis, NO STATE SHALL ABRIDGE 131-53 (describing discussions of the Amendment in the States); Pet. Br. at 35-40 (noting discussions of incorporation during the ratification period). Acknowledgement of incorporation as a general matter would seem to be a more meaningful indication of public understanding than the absence of a detailed parsing of the varying consequences of each individual right so incorporated.[6]

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[6] And merely because there was little discussion of certain potential objections does not mean there was not concern that may have prevented some votes for ratification. California, for ex-

And, of course, Fairman offered no evidence of any person *denying* the explicit views of Bingham and Howard on incorporation as expressed in Congress and reported in the press. Any lack of comment or objection thus as easily supports acquiescence in Bingham's and Howard's views as it does non-incorporation based on potential conflicts with existing state procedure.

Second, contrary to Fairman's assertions, there is little reason to believe that the Framers or Congress would have recoiled from overriding unconstitutional state procedures. Bingham unambiguously told Congress in 1866 "'that many of the States – I might say, in some sense, all the States of the Union – have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens.[]'" Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 95 (footnote omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 158 (Jan. 9, 1866)). Bingham thus made no secret of the fact that his intent to incorporate the Bill of Rights would, in "many" or "all" States override such violations. And in welcoming the passage of the Fifteenth Amendment, Bingham showed no concern that it would overcome Ohio's denial of voting rights to blacks. *Id.* (citing CONG. GLOBE, 41st Cong., 2d Sess. 3503 (May 10, 1870)). "No evidence suggests that Bingham was less willing [than he was with the Fifteenth Amendment] for the Fourteenth

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ample, did not ratify the Fourteenth Amendment until 1959, http://www.gpoaccess.gov/constitution/html/conamt.html, based on any number of objections all of which may not have been comprehensively expressed.

Amendment to overrule state practices contrary to the Bill of Rights." *Id.*

Third, Fairman's argument from silence regarding conflicts with state procedures depends on the doubtful assumptions that Congress and others *would have been aware* of such potential conflicts and *would have objected* to overriding any conflicting state procedural law. Neither assumption withstands scrutiny. Indeed, Fairman's acknowledgement that Senator Howard understood the Bill of Rights to be incorporated, and his recognition that Howard had been Attorney General of Michigan when the Michigan legislature enacted a statute dispensing with indictment by grand jury as required by the Fifth Amendment, readily disproves Fairman's assumptions:

> If Howard knew of this conflict, then he likely believed that, if ratified, the Fourteenth Amendment would render the Michigan statute unconstitutional. If, however, he was unaware of the conflict, then its existence cannot have affected his understanding of the Amendment's purpose."

Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 95-96. That a Congressman and former state Attorney General was unaware of or did not object to the potential conflict with state procedures makes it difficult to accept Fairman's assumptions regarding the silence of others. As Professor Amar has summarized, "Fairman builds his argument on the assumption that the implications of section I's key sentence were carefully considered during the ratification period. * * * Yet as Fairman's own evidence shows, his assumption is false. Amar, THE BILL OF RIGHTS 198.

It is far more likely that Bingham and his contemporaries, while aware of the contents of the Bill of Rights, and desiring its enforcement, "did not know the contents of every state statute and constitution. Indeed, Judge Paschal evidenced no knowledge of state constitutional provisions that conflicted with the Bill of Rights.[]" Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 94-95 (footnote omitted).

Fourth, even assuming Fairman's claimed conflicts, they tell us nothing regarding the intent or meaning of the Privileges or Immunities Clause given the additional presence of the Due Process Clause. The silence Fairman identifies would only have been relevant had his hypothesis been that section I was meaningless and that no incorporation whatsoever was intended (and hence there would be no possible conflicts to discuss). But Fairman "wisely avoided this outlandish claim" and instead argued for selective incorporation. Amar, THE BILL OF RIGHTS 199. In attempting to decide between selective and full incorporation, however, "the silence that Fairman trumpets becomes background noise with no resolving power whatsoever" because there was similarly silence regarding the same potential conflicts between existing state laws and the imposition of due process requirements which quite naturally would have been understood at the time to encompass many of the procedural guarantees in the Bill of Rights. *Id.* at 199-201.

The conclusion to be drawn from silence regarding potential conflicts with state procedures, if known, is that the Framers were at worst indifferent to such results or in fact saw nothing objectionable about imposing the Bill of Rights' uniform procedural safeguards on the States. And in the ratification debates, Republicans certainly had little interest in discussing such matters while Democrats either may not have wanted to be seen arguing against the content of the Bill of Rights or had bigger fish to fry in the other provisions of the Fourteenth Amendment. *Id.* at 203 ("Although twentieth-century readers rarely look past the key sentence of section I, politicians of the day who did the proposing and ratifying saw other provisions as more important."); *id.* at 204 ("during the ratification debates, many Republicans again kept silent in public deliberations, content that they had the votes to pass the amendment and fearful that any statement might give the Democrats political ammunition"); *id.* at 205 ("Democratic critics of the amendment also had much easier targets than section I. Who wants to campaign against the Bill of Rights?").[7]

Whatever the cause for the limited discussion of incorporation and potential conflicts arising therefrom, however, it says virtually nothing about the scope of the Privileges or Immunities Clause and hardly rebuts the direct and public expressions by the

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[7] That States could ratify the Fourteenth Amendment despite potential conflicts with state law is demonstrated by the example of Oregon, whose constitution discriminated against blacks until 1926, but which voted to ratify the Fourteenth Amendment. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 96. "The Republican majority [in Oregon] did so even though the state constitution violated the Equal Protection Clause a portion of the Fourteenth Amendment that explicitly applied against the state regardless whether Section One also incorporated the Bill of Rights." *Id.*

Framers of an intent to enforce the Bill of Rights against the States.

III. Inaccurate Description of and Inferences from Early Treatment of the Fourteenth Amendment in the Courts.

A further line of argument used by Fairman to avoid the publicly expressed intent of the Framers of the Fourteenth Amendment is the suggestion that early post-ratification interpretations of the Fourteenth Amendment did not adopt or apply Bingham's incorporation views, and hence such views could not have been part of the original understanding of that Amendment. Fairman, 2 STAN. L. REV. at 132-33, 139. Post-ratification arguments and cases regarding the scope of the Fourteenth Amendment are questionable bases for rejecting more direct evidence from the Framers themselves and the public reports of their views prior to passage and ratification. Indeed, Fairman himself suggests as much in rejecting Bingham's unambiguous 1871 statements regarding incorporation of the Bill of Rights, which were entirely consistent with his earlier statements on incorporation. *Id.* at 136-37. It is especially odd, therefore, for Fairman to rely on after-the-fact decisions or inferences from the absence of arguments by litigants that were *inconsistent* with the Framers' earlier public expressions of intent.

In any event, even assuming the relevance of close-in-time but subsequent interpretations, there is much evidence that respected jurists, including Justice Bradley, understood the Fourteenth Amendment to incorporate the Bill of Rights. Aynes, *On Misreading*

John Bingham, 103 Yale L.J. at 96-103 (discussing early cases supporting Bingham's original intent, including *Live-Stock Dealers' & Butchers' Ass'n* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (opinion of Bradley and Woods, JJ.) and *United States* v. *Hall*, 26 F. Cas. 79 (S.D.Ala.1871) (Woods, J.)). While Fairman's later work mentioned Justice Bradley's opinion in the lower court in the *Slaughter-House Cases*, he did not "acknowledge that it supported Bingham's theory of the Fourteenth Amendment." Aynes, *On Misreading John Bingham*, 103 Yale L.J. at 97 n. 255 (citations omitted).

As for subsequent decisions of this Court rejecting incorporation, the "decisions in the *Slaughter-House Cases* and *Cruikshank* reflected the changed political climate and the retreat from Reconstruction idealism." *Id.* at 102. Indeed, at the time such decisions were widely recognized (with praise or regret) to have abandoned the original intent of the Framers. *Id.* at 99-102. Furthermore, given the universally acknowledged weaknesses of Justice Miller's decision in the *Slaughter-House Cases*, it is difficult to imagine relying upon it for its supposed insight into intent, regardless whether it remains extant precedent. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) ("'everyone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause"); Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement.").[8] "The obvious inadequacy of Miller's opinion – on virtually any reading of the Fourteenth Amendment – powerfully reminds us that interpretations offered in 1873 can be highly unreliable evidence of what was in fact agreed to in 1866-68. * * * By 1873 some of the justices were ignoring some of the core commitments of the Fourteenth Amendment ratified only five years earlier." Amar, THE BILL OF RIGHTS 213 n. *.

In contrast to the early decisions from this Court, "it was *Hall* and the lower court decision in the *Slaughter-House Cases* which best illustrate the judiciary's initial view of the true purpose of the Fourteenth Amendment. And that purpose was the one John Bingham had repeatedly espoused: to enforce the Bill of Rights against the states." Aynes, *On Misreading John Bingham*, 103 Yale L.J. at 102-03; *see also id.* at 96 ("An analysis of the initial judicial interpretations concerning the Fourteenth Amendment reveals that several judges also believed that the Fourteenth Amendment applied the Bill of Rights against the states.").

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[8] *See also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1121, 1297 n. 247 (1995) ("[T]he *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause"); Amar, THE BILL OF RIGHTS, at 212-13 ("If read conventionally, the majority opinion [in *Slaughter-House*] rejects not just Black's incorporation but Frankfurter's and Fairman's ordered liberty, Berger's terms of art, and indeed every theory of section 1 that gives Bingham's key clause any independent bite.[]") (footnote omitted).

In a related vein, both Fairman and Berger cite to the lack of even a mention of the Fourteenth Amendment in *Twitchell* v. *Pennsylvania*, 74 U.S. (7 Wall.) 321 (1869), as demonstrating that nobody understood the Bill of Rights to be incorporated into the Fourteenth Amendment. *See* Fairman, 2 STAN. L. REV. at 132-33; Berger, GOVERNMENT BY JUDICIARY 153. In *Twitchell*, this Court rejected claims that the State had violated the Fifth and Sixth Amendments. Neither counsel nor this Court cited the Fourteenth Amendment. Amar, THE BILL OF RIGHTS 206-07.

But, as with the ratification debates, the silence proves too much and hence tells us nothing about incorporation. As Amar notes, counsel in *Twitchell* specifically argued that the state had violated "due process of law" but cited only to the Fifth Amendment, which this Court disposed of by citing to *Barron*. *Id.* at 207.

> If *Twitchell*'s silence is evidence that the Fourteenth Amendment does not incorporate earlier amendments, it is equally strong evidence that the Fourteenth Amendment does not require state due process. But in light of the plain words of the Fourteenth Amendment, this latter claim is absurd. *Twitchell*'s silence thus proves too much – and therefore nothing at all. Or more precisely, it proves that, contrary to Berger and Fairman's glib assumptions, only "oversight will [] account for the ommission[.]"

Id.

IV. False Theory of Perfect Congruence between the Fourteenth Amendment and the Civil Rights Act, and Erroneously Narrow Readings of Both.

A final argument made most strenuously by Berger is that the Fourteenth Amendment was intended to have no greater scope than the Civil Rights Act, and that such Act merely forbade *discrimination* in the rights of citizens, but left it to the States to define what those rights would be for all citizens. Berger, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 22, 115-19; Amar, THE BILL OF RIGHTS 193-94 (describing Berger's argument). That far more extreme position – rejecting even the selective incorporation adopted by Fairman – ignores the text of the Fourteenth Amendment, reads both the Amendment and the Act too narrowly, and mischaracterizes the relationship between the two. *Id.* at 194-95 (no support for limiting the Fourteenth Amendment to what was contained in the Civil Rights Act, as opposed to an intent that the Amendment include, but go beyond, providing authority to Congress that would encompass the Civil Rights Act).

Additionally, even were one to accept Berger's claimed limitation of the Fourteenth Amendment to the scope of the Civil Rights Act, he reads the Act and its history too narrowly in order to disclaim the notion that the Civil Rights Act sought to prevent substantive violations of the Bill of Rights, not merely to require nondiscrimination in such violations. Thus, while Berger claims that there was no reference to the Bill of Rights in the history of the Civil Rights Bill and no provision for protection of the right to assemble or bear arms, Berger, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 24 n. 21, 73, Amar identifies numerous such references contradicting Berger's claims, which he describes as being in "gross error" and two of the "especially egregious" examples of the "legion" of Berger's "misstatements, distortions, and non-sequiturs." Amar, THE BILL OF RIGHTS 197 n. *.

Furthermore, the presence of the Due Process Clause in the Fourteenth Amendment turns Berger's argument on its head and supports a broader reading of the Civil Rights Act and hence the Fourteenth Amendment as well: "[I]f section I and the act were indeed intended identical in their substantive scope, as [Berger] insists, then the act must go beyond nondiscrimination to require states to provide all persons with due process." *Id.* at 195.

But the language in the Civil Rights Act that can be read to protect due process is likewise broad enough to protect the remainder of the Bill of Rights as well, and hence any argument of equivalence would then support, rather than refute, full incorporation. *Id.* at 195-96 & n. * (describing the Act's last clause protecting the "'full * * * benefit of all laws and proceedings for the security of person and property'" as being a phrase encompassing more than just nondiscrimination and historically used to describe the rights in the Bill of Rights); Curtis, NO STATE SHALL ABRIDGE 71-83, 119-20 (discussing scope of the Civil Rights Act).

> Berger's argument thus self-destructs. To save his first step, we must read the act to go beyond nondiscrimination (for due process has

> bite against even nondiscriminatory laws); but in so doing, we undermine Berger's second step, which tries to neuter the incorporationist language of the act."

Amar, THE BILL OF RIGHTS 196.

V. Generally Flawed Approaches and Perspectives on History and the Fourteenth Amendment.

Having canvassed a number of the oft-cited arguments of Fairman and Berger against incorporation, it is hopefully apparent that they lack the weight to justify the reliance that has been placed upon them over the years, and are in fact deeply flawed. Fairman and Berger make other arguments as well, but the constraints of an *amicus* brief preclude any comprehensive rebuttal of each and every one. In general, however, it is worth observing that the scholarship of both Fairman and Berger suffers from systemic flaws in their approaches that counsel caution in relying upon their claims, whether in the arguments discussed herein, or in other of their arguments that might be cited to this Court.

For example, both Fairman and Berger approach what should be a genuine attempt to understand and fairly interpret the Framers and ratifiers of the Fourteenth Amendment instead from a perspective of seeming contempt for those actors and their goals. That perspective seems to derive from a once popular, but now questionable, view of the Reconstruction referred to as the "Dunning" School of history. Amar, THE BILL OF RIGHTS 302-03 ("Early in this century, the reigning historical narrative, exemplified by the work of William Dunning and his disciples, viewed Reconstruction as a tragic era in American history.[] Republican Reconstructors on this account were knaves and fools.").

"The work of Charles Fairman and Raoul Berger was very much in the grip of this [Dunning School] view." *Id.* at 303; see also Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1204 (1995) (Coming from the perspective of the so-called "Dunning" school of history, Fairman "had a jaundiced view of Reconstruction and of the framers of the Fourteenth Amendment.").[9] Such a distorted perspective casts doubt on how Fairman and Berger select and read the historical evidence and many, if not all, of the inferences they draw from such evidence.[10]

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[9] Fairman's and Berger's hostile perspective is reflected in their sharp and ad hominem attacks on Bingham as well as in other of their writings. *See* Michael Kent Curtis, *The Bill of Rights After* Heller, 60 HASTINGS L.J. 1445, 1483 (2009) (quoting Fairman's earlier comments that because of the downfall of the Reconstruction-era " 'carpet bag government'[]" – the result of the Colfax Massacre in which hundreds of blacks were killed – " 'self government was restored in Louisiana'[] "; quoting Berger's attempt to discredit Sen. Howard by quoting a hostile historian who disdained Howard as " ' "consistently in the vanguard of extreme negrophiles" '[] ") (footnotes omitted).

[10] Such hostility to the views of the time may have caused Fairman to impute his own views to the various actors in the Reconstruction era, rather than genuinely searching for their contemporaneous views. *See, e.g.*, Amar, THE BILL OF RIGHTS 191 (because Fairman, "in 1949, deemed various parts of the Bill [of Rights] to be optional or outdated, he tended to attribute similar views to the 1866 Congress."). That approach is simply anachronism and undercuts the historical credibility of Fairman's arguments and inferences.

What is surprising, then, is that "Fairman's and Berger's "work continues to exert * * * influence in legal circles long after many of its intellectual foundations have been undermined by decades of serious and sustained scholarship of professional historians." Amar, THE BILL OF RIGHTS 303.

Another concern at play, at least with Fairman's work, is that he seems to have assumed the role of an advocate defending his mentor – Frankfurter – rather than the role of a scholar looking for an accurate understanding of the Fourteenth Amendment. After an extensive review of Fairman's writings and his relationship with Justice Frankfurter, Aynes concluded that

> Fairman's entry into the adversary process with his 1949 Stanford article causes considerable pause as to whether he was then the disinterested scholar or the self-appointed surrogate of Justice Frankfurter in combating the views of Justice Black. However one may resolve that question, the evolution of Fairman's position by 1954 of treating the question of the intent of the framer's of the Fourteenth Amendment not as a matter of history or of law, but a "public relations" effort to ensure that the view he wanted to prevail would prevail, is a sad chapter in the history of academia.

Aynes, *Fairman and Frankfurter*, 70 Chi.-Kent L. Rev. at 1272.

Ultimately one of the ways such biases played out was in unfair and misleading attacks on Justice Black and John Bingham. Amar, THE BILL OF RIGHTS

188 n. * ("in my view, Professor Fairman was unfair to Justice Black, and his unfair substance and tone put almost an entire generation of lawyers, judges, and law professors off track."); Aynes, *Fairman and Frankfurter*, 70 Chi.-Kent L. Rev. at 1231-32 ("One telling aspect of Fairman's approach was a lack of even-handedness toward the framers."). Indeed, many of both Fairman's and Berger's attempts to discount Bingham's views are best described as *ad hominem* attacks on Bingham himself rather than as meaningful attempts to interpret his statements or to discern how they were understood at the time.

Such biases may also account for their failure to thoroughly explore the historical record for evidence contradicting their claims or to fairly cite what evidence was available. *See* Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 81 (while Fairman quoted portions of speeches by various other congressmen, he "failed to acknowledge that these statements coincided with Bingham's" legal theory); *id.* at 85 (Fairman "did not mention" Farrar [a respected contemporary writer of a widely used legal treatise] in his 1949 article, and in Fairman's later writings disparaged Farrar on other matters but "ignored entirely Farrar's view that the Fourteenth Amendment applied the bill of rights to the states, a view contrary to Fairman's own"); *id.* at 87 (discussing a respected legal treatise written by Judge Paschal and mirroring Bingham's views on incorporation, noting that Fairman was aware of, cited, and praised Paschal in other contexts, but made no reference to Paschal's treatise in his Fourteenth Amendment writings); *id.* at 90-91 (similar regarding a nationally known treatise by

Dean Pomeroy); Amar, THE BILL OF RIGHTS 197 n. * (noting that "Berger's misstatements, distortions, and non-sequiturs are legion").

CONCLUSION

While the writings of Charles Fairman and Raoul Berger have long shaped the views of lawyers and jurists regarding the history and meaning of the Fourteenth Amendment and this Court's approach to incorporation, more recent scholarship has thoroughly exposed the historical and logical errors of those writings and thoroughly debunked the orthodox view that the Fourteenth Amendment was not intended or understood to incorporate the Bill of Rights.

The preceding discussion necessarily gives only a limited taste of such later scholarship, and the original works are far more comprehensive and compelling than can be expressed in an *amicus* brief. In considering the incorporation issue, and the scope of the Privileges or Immunities Clause in particular, this Court should eschew reliance on either Fairman or Berger – notwithstanding their past prominence – and instead look to the more accurate and compelling historical analyses by subsequent writers.

In particular, this Court's consideration of incorporation would be valuably informed by reviewing the incisive synthesis of Akhil Amar in THE BILL OF RIGHTS, the detailed rebuttals of Richard Aynes in *On Misreading John Bingham and the Fourteenth Amendment*, and the comprehensive historical review of Michael Kent Curtis in NO STATE SHALL ABRIDGE. While the list of meaningful scholarship is far longer, Professor Amar has aptly noted that "serious lawyers should begin with the works of [Michael Kent Curtis and Richard Aynes] and not with the work of Fairman and Berger." Amar, THE BILL OF RIGHTS 303.

For the reasons above, this Court should reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
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OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO,
ILLINOIS, et al.,

Respondents.

◆

**On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

◆

BRIEF AMICUS CURIAE OF CATO INSTITUTE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Cato Institute and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of Petitioners. Written consent was granted by all parties and lodged with the Clerk of this Court.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. This case is of central concern to Cato because the "incorporation" question implicates not only the right to keep and bear arms but larger issues regarding the origin, nature, and extent of all our natural rights and how the Constitution protects them.

PLF was founded more than 35 years ago and is the largest nonprofit legal foundation devoted to defending property rights and economic freedom. As part of its mission to protect the freedom of economic choice, PLF has set as one of its institutional missions the overruling of *Slaughter-House Cases*, 83 U.S. (16

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[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of the Court. Counsel for all parties received 10 days notice.

Pursuant to Rule 37.6, Amici affirm that no counsel or party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amici, their members, or counsel made a monetary contribution to its preparation or submission.

Wall.) 36 (1873). PLF attorneys routinely seek redress on behalf of clients for violations of the Privileges or Immunities Clause, *see, e.g., Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). Both Cato and PLF attorneys have published scholarly articles addressing the doctrinal infirmities of *Slaughter-House*. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003); Kimberly C. Shankman, & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1 (1998)

SUMMARY OF ARGUMENT

Resolving the question presented requires the Court to reconsider the decision in the *Slaughter-House Cases*. Amici will therefore focus on explaining why that decision was wrong and why this Court should overrule it to restore force to the Privileges or Immunities Clause of the Fourteenth Amendment.

Slaughter-House was wrongly decided in 1873 and ought to be overruled now. That decision narrowly circumscribed the list of rights protected by the Privileges or Immunities Clause, contrary to the intentions of the Amendment's framers, and in direct contradiction to the developments in legal theory that underlay its adoption.

The Amendment was intended to constitutionalize the anti-slavery legal theory of "paramount national citizenship" shared by the political leaders of the victorious Union, and thereby to provide federal protection for a broad list of individual rights in the wake of the Civil War. But the *Slaughter-House* Court ignored the Amendment's constitutionalization of this view of federalism.

That refusal to recognize and protect federal rights also flouted the legislative history behind the drafting of the Fourteenth Amendment, and basic canons of legal interpretation. *Slaughter-House* handicapped efforts to protect former slaves and their descendants, led to significant distortions in subsequent cases, and essentially erased the Fourteenth Amendment's most important guarantee for individual rights. This case offers a crucial opportunity for the Court to restore the Privileges or Immunities Clause to its rightful and intended role as guardian of individual rights against state encroachment.

There is no reason for the Court to let the opportunity pass it by. Indeed, in the years since *Slaughter-House*, and particularly since the publication of Michael Kent Curtis' *No State Shall Abridge* (1986), legal scholars from diverse backgrounds have forged a consensus that *Slaughter-House* was wrong and ought to be overruled. Indeed, most of the members of this Court appear to have already taken that position in *Saenz v. Roe*, 526 U.S. 489 (1999). When it is clear, as it is with *Slaughter-House*, that a case is and has always been wrongly decided, *stare decisis* must give way.

It is true that *Slaughter-House*'s virtual negation of the Privileges or Immunities Clause contributed to the subsequent rise of the theory of substantive due process. But restoring the Privileges or Immunities Clause to its original scope would not result in the demise of substantive due process. The idea at the core of that doctrine—that the Due Process Clause imposes more than merely procedural limits on government power—was widely accepted when the Fourteenth

Amendment was enacted. Its authors rightly believed that the Due Process and the Privileges or Immunities Clauses would both provide meaningful protection for individual rights. The protections afforded by a reinvigorated Privileges or Immunities Clause might at times overlap with the Due Process Clause's substantive dimension, but overruling *Slaughter-House* would not warrant abandoning the long-standing recognition that due process of law "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

ARGUMENT

I

SLAUGHTER-HOUSE IGNORED THE DOCTRINE OF PARAMOUNT NATIONAL CITIZENSHIP THAT THE FOURTEENTH AMENDMENT'S AUTHORS INTENDED TO CONSTITUTIONALIZE

Scholars have identified a number of flaws in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36,[2] but its central error is that the Court ignored the Amendment's underlying premise: namely, a revolution in federalism that placed national authority over state autonomy and protected a wide array of national rights against state governments. The Amendment's authors sought to constitutionalize a particular doctrine of federal and state relations, called "paramount national citizenship," developed in the decades prior to the Civil War. Jacobus tenBroek, *The*

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[2] *See Saenz*, 526 U.S. at 522 n.1 (Thomas, J., dissenting) (citing sources).

Antislavery Origins of the Fourteenth Amendment 71 (1951); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 719-39 (2003).

In the antebellum period, two parties formed with competing visions of the nature of federal-state relations and of the rights that accompanied federal citizenship. These parties coalesced into the secessionist states' rights party, and the Free Soil party that became the Republican party. Following the Union victory in the Civil War, Republican leaders amended the Constitution, through the Fourteenth Amendment in particular, to ensure that their constitutional doctrine of nationality and individual rights would be permanently preserved as part of this nation's supreme law. To understand what was at stake in *Slaughter-House*, and why that decision erred, it is necessary to review the Republican constitutional theory of "paramount national citizenship."

A. The Theory of Paramount National Citizenship

The theory of paramount national citizenship had two components. First, the Republican authors of the Fourteenth Amendment believed that the whole people of the United States made up a single, sovereign nation. *See* Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 Ark. L. Rev. 347, 367 (1995) (opponents of slavery "argued that national citizenship was not dependent upon state citizenship, but was paramount to it"). States' rights advocates, by contrast, held that sovereignty lay primarily with each individual state and that federal authority was delegated by the states. *See, e.g.*, John C. Calhoun, *Speech on the Force Bill*, in *Union and Liberty: The Political Philosophy of John C. Calhoun* 443-44 (Ross M. Lence ed., 1992).

Second, Republicans believed that natural and traditional common law rights appertained to Americans' *federal*, and not their *state* citizenship, while states' rights partisans held that states enjoyed almost limitless power to define, protect, and limit individual rights. *Compare* Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 610, 658-59 ("[A]bolitionist[s] . . . evolve[d] . . . the concept of a paramount national citizenship" under which "[t]he federal government . . . had not only the *power*, but the *duty* to protect the fundamental rights of life, liberty, and property."), *with* Calhoun, *Speech on the Oregon Bill*, in Lence, *supra*, at 568 ("[I]ndividual liberty, or freedom, must be subordinate to whatever power may be necessary to protect society against anarchy within or destruction from without.").

The Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses represent the Republicans' attempt to constitutionalize, respectively, (1) the primacy of federal citizenship and (2) federal protection for the broad array of individual rights attendant upon that citizenship. *See* Zietlow, *supra*, at 720 ("Bingham and other antislavery constitutionalists believed that the federal Constitution authorized northern states to bestow citizenship upon free blacks, and provided for those rights to be protected by the federal government."). *Slaughter-House*'s primary flaw lay in failing to give effect to this overriding purpose, thereby sabotaging the most important constitutional aspect of Union victory in the Civil War.

1. The Authors of the Fourteenth Amendment Believed That American Citizenship Was Primary and State Citizenship Secondary

The authors of the Fourteenth Amendment were guided by a belief that either the Declaration of Independence or the Constitution itself made the people of the United States into a single unified nation. This unified nationality, they believed, distinguished the Constitution from the Articles of Confederation, which had operated more like a treaty binding otherwise sovereign states. *See generally* Akhil Reed Amar, *America's Constitution: A Biography* 5-53 (2005); Daniel Farber, *Lincoln's Constitution* 26-91 (2003).

The framers of the Constitution left a long trail of evidence that they indeed meant for the Constitution to create a new national identity. Alexander Hamilton observed in *The Federalist* that the "great and radical vice" of the Articles of Confederation was that it only allowed Congress to legislate "for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES," *The Federalist* No. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and was therefore "a mere treaty . . . and not a government, which is only another word for POLITICAL POWER AND SUPREMACY." *Id.* No. 33 at 204. The 1787 Constitution represented, by contrast, a direct act by the people of the United States, acting as a unified, sovereign whole.

James Madison echoed this point when he explained that while under the Articles of

Confederation, Congress's power proceeded from "the dependent derivative authority of the legislatures of the states," while under the Constitution it would come "from the superior power of the people." 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 94 (Jonathan Elliot ed., 1836). Likewise, Pennsylvania delegate James Wilson explained that the new federal government was not a league of sovereign states, but a union of the whole American people. *See, e.g.*, 2 *id.* at 456 ("I consider the people of the United States as forming one great community."). Indeed, Wilson took the view that the American Union predated the Articles of Confederation, and that pursuant to the Declaration of Independence, "the *United Colonies* were declared to be free and independent states . . . . [T]hey were independent, not *individually*, but *unitedly*, and that they were confederated, as they were independent states." 5 *Debates on the Adoption of the Federal Constitution* 213 (Jonathan Elliot ed., 1845).

Thus where the Articles of Confederation created only "a league" of independent "sovereigns," the Constitution "converted their league into a government," causing "the whole character in which the States appear" to "under[go] a change." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824); *see also Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793) (opn. of Jay, C.J.) ("[T]he people, in their collective and national capacity, established the present Constitution."); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-04 (1819) (The Constitution "proceeds directly from the people . . . and bound the state sovereignties.").

This nationalist conception of the Constitution was widely accepted at the time of ratification, but beginning in 1798 with the Virginia and Kentucky Resolutions, and again during the Nullification Crisis of the 1830s, southern political leaders began to formulate a competing, states' rights theory of the Constitution. *See generally* William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina* 164-73 (1965).[3] According to that theory, the states were "distinct, independent, and sovereign communities" each of which had obtained a separate independence from the British crown. *See* Calhoun, *A Discourse on the Constitution and Government of the United States*, in Lence, *supra*, at 86. Upon declaring independence,

> sovereignty was transferred from the king to each of the thirteen [colonies] . . . . As an agent for the states, the Continental Congress conducted the war, but the states retained the sovereign power. Then, the sovereign peoples of the thirteen states entered into a mutual agreement to create a federal government, all the while retaining their separate sovereignty.

Farber, *supra*, at 34. States therefore were empowered to define and limit citizenship, *see* Calhoun, *Speech on*

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[3] Although Madison authored the Virginia Resolutions, he repudiated the states' rights theory, believing that it "would convert the federal government into a mere league which would quickly throw the states back into a chaos out of which not order a second time but lasting disorders of the worst kind could not fail to come." James Madison, Letter from James Madison to Richard Rush, Jan. 17, 1829, *quoted in* Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 134 (1989).

the Force Bill, *supra*, at 443-44, and with it, the sphere of individual liberty.

Calhoun and his states' rights allies considered it "a great and dangerous error to suppose that all people are equally entitled to liberty." Calhoun, *A Disquisition on Government*, in Lence, *supra*, at 42. Instead, states gave people liberty as "a reward reserved for the intelligent, the patriotic, the virtuous and deserving." *Id.*

In this view, states were the principals of which the federal government was the agent; states possessed ultimate sovereignty, and the rights of citizens were protected by virtue of their *state* citizenship. The conflict between the nationalist and states' rights interpretations was obviously one of the leading causes of the Civil War, because if states retained their essentially sovereign character, and were superior to the Union, they must also be free to dictate the nature of citizenship, expand or contract rights, and secede from the Union to defend that autonomy. Freehling, *supra*, at 165-66; Amar, *America's Constitution*, *supra*, at 38-53.

2. Republicans Held That Protections for Individual Rights Flow from National, Not State, Citizenship

Just as Republicans and states' rights advocates clashed over the *location* of sovereignty, so they also disputed the *nature and limits* of that sovereignty. If, as Republicans believed, Americans were federal citizens first and citizens of states only secondarily, then it also followed that American citizenship entitled them to federal protection for their individual rights, regardless of their state of residence. *See* Zietlow, *supra*, at 729.

Perhaps the most important advocate of this view was former President John Quincy Adams, whose 1839 pamphlet *The Jubilee of the Constitution*[4] emphasized that Americans' rights were protected not because they were citizens of states as such, but because they were Americans. Because the colonies declared independence collectively, Adams contended, *id.* at 20, whatever legitimate authority Parliament formerly possessed over American subjects—and whatever responsibility it had for protecting their common law and natural rights—was transferred to the *Union*, not to individual states:

> Independence was declared. The colonies were transformed into States. Their inhabitants were proclaimed to be *one people*, renouncing all allegiance to the British crown . . . [and] all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. Their rights, the natural rights of mankind. Their government, such as should be instituted by themselves, *under the solemn mutual pledges of perpetual union*, founded on the self-evident truths proclaimed in the Declaration.

Id. at 9. Thus American national identity was indivisible from protections for the individual rights articulated in the Declaration and the common law.

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[4] *The Jubilee of the Constitution* was one of the most popular publications of the era, selling more than 8,000 copies in a matter of weeks. *See* Paul C. Nagel, *John Quincy Adams: A Public Life, A Private Life* 372 (1997).

Many political and legal leaders influenced by Adams would later form the Republican party.[5] Like him, they believed that the Declaration of Independence had created the American nation, and that this national citizenship entitled all Americans to protection for their common law and natural rights. *See* Zietlow, *supra*, at 722.

The states' rights view, by contrast, held that states were both the locus of American sovereignty and the entities responsible for defining and guaranteeing individual rights. One chief advocate of this position was Jeremiah Sullivan Black, who after serving as Chief Justice of Pennsylvania, United States Attorney General and Secretary of State under President James Buchanan, and advisor to President Andrew Johnson, represented the State of Louisiana in the *Slaughter-House Cases*. *See* William Norwood Brigance, *Jeremiah Sullivan Black* 200-01 (1934).

Black's state's rights views were reflected in his decision in *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853). The Declaration of Independence, wrote Black, transferred "[t]he transcendant [*sic*] powers of Parliament" to the states, who therefore enjoyed "supreme and unlimited" power. *Id.* at 160. Thus "[i]f the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat." *Id.* Although Black conceded that Pennsylvanians had "delegated a portion" of their allegedly limitless power to the federal government, *id.*, he concluded that states retained "a vast field of power . . . full and uncontrolled," and that "[t]heir use of [that power] can be limited only by their own discretion." *Id.* at 161.

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[5] Adams exerted a powerful influence over the rising generation of anti-slavery politicians, particularly William Seward—who published the first biography of Adams, *see* John M. Taylor, *William Henry Seward: Lincoln's Right Hand* 69-70 (1991)—Charles Sumner—Adams' closest protégé, *see* David Donald, *Charles Sumner and the Coming of the Civil War* 152-53 (1960)—and Abraham Lincoln, who served with Adams in Congress and was an enthusiast for Adams' constitutional doctrines; *see* William Lee Miller, *Arguing About Slavery* 148-49 (1995).

Black's interpretation of state power is the opposite of the Republican view of limited state power and paramount national citizenship. According to that view, the principles of the Declaration of Independence prohibited states from exercising "full and uncontrolled power" over any individuals. Indeed, according to Adams, "sovereignty, thus defined, is in direct contradiction to the Declaration of Independence, and incompatible with the nature of our institutions." John Quincy Adams, *An Oration Addressed to the Citizens of the Town of Quincy on the Fourth of July, 1831*, at 35 (1831).

B. The Fourteenth Amendment Was Intended to Constitutionalize the Republicans' National Rights Views

The Fourteenth Amendment's authors sought to insert into the Constitution what they believed had always been constitutional law. In their eyes, "United States citizenship was created by or evidenced in the Constitution," and this citizenship "was panoplied with indestructible privileges and immunities" which "consisted of the natural and inalienable rights of men to 'the enjoyment of personal security, personal liberty, and private property.'" tenBroek, *supra*, at 90. They believed all Americans were entitled to the protection of natural and civil rights due to their participation in the federal body politic, and that states had no legitimate power to abridge those rights. Finally, they expected the Amendment to provide all Americans with protections for their rights—including, but not limited to, those specified in the Bill of Rights—against infringement by their own states. Zietlow, *supra*, at 722. As Congressman John Bingham explained, the Fourteenth Amendment would permit

> the speedy restoration to their constitutional relations of the late insurrectionary States, under such perpetual guarantees as will guard the future of the Republic by the united voice of a united people . . . . [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy . . . . [M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever.

Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).

During the debate over the Amendment's ratification, one Ohio Congressman explained to his constituents that "citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected." *Quoted in* Curtis, *supra*, at 138-39 (citation omitted). Likewise, Bingham contended that it would give the federal government "power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Cong. Globe*, 39th Cong., 1st Sess. 2542 (1866).

Perhaps no figure was more eloquent in explaining the Republican doctrine of the indivisibility of federal citizenship and individual rights than Charles Sumner, who told the Senate in 1875,

> No longer an African, [the emancipated slave] is an American; no longer a slave, he is a common part of the Republic, owing to it patriotic allegiance in return for the protection of equal laws. By incorporation within the body-politic he becomes a partner in that transcendant unity, so that there can be no injury to him without injury to all. Insult to him is insult to an American citizen. Dishonor to him is dishonor to the Republic itself . . . . Our rights are his rights; our equality is his equality; *our*

> *privileges and immunities are his great freehold.*

Charles Sumner, *Equality Before the Law Protected by National Statute*, *in* 14 Charles Sumner, *The Works of Charles Sumner* 407 (1883) (emphasis added).

These quotations indicate what recent scholars have called "the basic tenets of Republican thought with their roots in the Declaration of Independence," namely, "a commitment to natural rights based on a premise of equality as the foundation of civil liberty; an appreciation for the limits of democratic government and for the need to protect minority rights." Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1, 24 (1998). Civil War era Republicans took literally Webster's famous injunction, "Liberty and Union . . . one and inseparable!"—to them, political union and individual liberty were inseparable. *The Webster-Hayne Debate on the Nature of the Union* 136 (Herman Belz ed., 2000).

Unsurprisingly, Bingham and other Republicans rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). As Professor Akhil Amar notes, these "*Barron* contrarians" believed that the federal Bill of Rights referred to rights that all Americans possessed, and that "[a]n honest state court would be bound . . . to respect [this] declaration[]." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 148-49 (1998).

It is now widely recognized—thanks largely to the evidence mustered by Professor Curtis and other scholars—that the Fourteenth Amendment's authors intended to overturn *Barron* and provide federal protection against state actions that deprived individuals of their natural and civil rights. *See* Curtis, *supra*, at 83; Zietlow, *supra*, at 737. Because antebellum Republicans believed that Americans were Americans first and citizens of states second, they also believed that, just as the Revolution transferred sovereignty from the crown to the nation as a whole, so citizens' rights were also vested by virtue of their *national* and not their *state* citizenship. This theory was hotly disputed throughout the early nineteenth century, but Republicans expected the Fourteenth Amendment to settle that dispute. *Id.* at 719-20.

The structure of the Amendment's first section testifies to this intent. It begins by defining American citizenship, a matter on which the original Constitution was silent, *see* Amar, *America's Constitution*, *supra*, at 381, and then proclaims that national citizenship is primary, and state citizenship secondary and derivative; persons to whom it applies "are citizens of the United States and of the State wherein they reside." The next clause then asserts that states may not abridge the rights appertaining to federal citizenship.

In 1867, leading antislavery lawyer Joel Tiffany explained that the original Privileges and Immunities Clause in Article IV barred states from violating natural rights: "the constitutional rights of every citizen of the nation are supremely binding" on the states. "Every citizen of a state being also a citizen of the nation, has national rights," and because "national authority extend[s] . . . over every member of the national family," each person may "inhabit whatever state he pleases and to enjoy all privileges and immunities of a citizen therein." *A Treatise on Government* 372 (1867). But Republicans believed the original Privileges or Immunities Clause was unenforceable against states, in the same way that the Taney Court had ruled the Fugitive Slave Clause to be unenforceable. Curtis, *supra*, at 63-64 (citing *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860)). Thus Republicans believed a new amendment was necessary make a ban on state abridgement of rights effective.

The new Privileges or Immunities Clause was therefore "the primary vehicle through which [the Amendment's framers] intended to force the states to obey the commands of the Bill of Rights." Curtis, *supra*, at 130. *See also* Shankman & Pilon, *supra*, at 25 (The Amendment's authors "said repeatedly that the purpose of the amendment was not simply to define United States citizenship but to include under that privilege, for blacks and whites alike, a broad array of rights against state interference."). The premise on which the Amendment's authors based that effort was their belief that the American Revolution had transferred sovereign power, and with it, responsibility for protections of individual rights, from Parliament to the American *nation* and *not* to the individual states.

The Fourteenth Amendment "extend[s] the protection of the National government over the common rights of *all* citizens of the United States," and "recognize[s], if it did not create, a National citizenship." *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 140 (1873) (Field, J., concurring). This national citizenship "is primary, and not secondary," and the Amendment protects national privileges or immunities, "which embrace the fundamental rights belonging to citizens of all free governments" from abridgement by state laws. *Id.* at 140-41.

C. The *Slaughter-House* Majority Ignored the Fourteenth Amendment's Fundamental Shift in the Understanding of Sovereignty and Thus the Nature of the Rights the Amendment Protects

Once the political philosophy underlying the Fourteenth Amendment is clear, the fundamental error in the *Slaughter-House Cases* becomes manifest: the decision embraced the overthrown states' rights view rather than the national citizenship perspective that the Fourteenth Amendment was crafted to constitutionalize. In short, the *Slaughter-House* majority denied that the Amendment was meant to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," 83 U.S. (16 Wall.) at 78. Yet, as we have seen, that was *precisely* the Amendment's purpose: to constitutionalize the Republican theory of paramount national citizenship and the rights attendant on that citizenship.

In its *Slaughter-House* brief, coauthored by Jeremiah Black, author of the *Sharpless* decision, Louisiana argued that for the Court to rule that states could not infringe nationally recognized rights of individual liberty "would break down the whole system of confederated State government" by curtailing state autonomy. Brief of Defendants in Error at 15, *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House*, 1872 WL 15119 (U.S. 1872) (Nos. 60, 61, 62). This argument was, of course, the same argument rejected by the authors of the Fourteenth Amendment, who intended the Amendment as "a sweeping mandate to invalidate future state misconduct." Amar, *America's Constitution, supra*, at 390.

The *Slaughter-House* majority worried that enforcing paramount national citizenship would "degrade the State governments by subjecting them to the control of Congress." 83 U.S. (16 Wall.) at 78. Yet this was not a valid argument against enforcing the Amendment's clear mandate. As one contemporaneous critic of the decision noted, those worries "ought to have been addressed to Congress when the amendment was proposed . . . . If such was to be the effect of the amendment, it was so because the American people had so decreed, and it was not the province of the court to defeat their will." William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S.L. Rev. 558, 579-80 (n.s. 1879).

Moreover, the Court's federalism concerns were exaggerated. While the "fundamental reordering would have changed federalism, it would not have destroyed it." Shankman & Pilon, *supra*, at 40. States would still retain most of the machinery of government power, including the police power. "[T]hey simply had to exercise [power] in ways that respected the rights of individuals—their rights as Americans." *Id.* at 40-41.

Slaughter-House's refusal to acknowledge that the Fourteenth Amendment constitutionalized the theory of paramount national citizenship influenced it to make the critical error of narrowly defining the realm of rights protected by the Amendment. The *Slaughter-House* majority correctly observed that "there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such," and that the Privileges or Immunities Clause protected "only the former," 83 U.S. (16 Wall.) at 74-75. But it refused to give this understanding any practical meaning because it narrowly construed the rights that make up the "privileges or immunities of citizens of the United States."

According to the majority, the rights attaching to federal citizenship included the rights to travel to the seat of government; to demand federal protection on the high seas; to peaceably assemble for redress of grievances; to use navigable waters; to change one's state of residence; and "the rights secured by the thirteenth and fifteenth articles of amendment." *Id.* at 80. This list left off a number of fundamental national rights, including most prominently the common law right to pursue a gainful occupation free from the interference of state-imposed monopolies. Incredibly, the *Slaughter-House* majority ignored this right while simultaneously acknowledging its existence at common law, *see id.* at 65-66 (citing *The Case of Monopolies*, (1602) 77 Eng. Rep. 1260 (K.B.)). But it did so because it regarded this right as one "belong[ing] to citizens of the States as such, and . . . left to the State governments for security and protection." *Id.* at 78.

In general, the majority's list of rights was vastly underinclusive because it refused to recognize that the Amendment's authors considered federal citizenship to include unenumerated individual rights, including rights inherited from the English common law, as well as natural rights. Senator John Sherman, for example, explained that the Privileges or Immunities Clause would protect

> the ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States, such as are recognized by the common law, such as are ingrafted in the great charters of England, some of them ingrafted in the Constitution of the United States, some of them in the constitutions of the different States, and some of them in the Declaration of Independence.

Cong. Globe, 42d Cong., 2d Sess 844 (1872). Sherman explained that Courts interpreting the Clause would consult not only the Constitution, but also "the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England." *Id.* In these sources, courts would "find the fountain and reservoir of the rights of American as well as of English citizens." *Id. See also* Zietlow, *supra*, at 738-39 (Authors of the Privileges or Immunities Clause "intended to incorporate the bill of Rights . . . [and] encompass a 'natural rights' theory of the fundamental rights of citizenship.").

Sherman's explanation could be traced to *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823). That decision defined the privileges and immunities of citizens in broad terms of natural and common law rights belonging "of right, to the citizens of all free governments." *Id.* at 551. Throughout the period of writing and ratification, the Amendment's authors frequently cited Justice Bushrod Washington's decision in *Corfield*, in defining the phrase "privileges or immunities." David R. Upham, *Note: Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 Tex. L. Rev. 1483, 1530 (2005); Curtis, *supra*, at 168; Amar, *Bill of Rights*, *supra*, at 176-80.

Senator Jacob Howard quoted from *Corfield* when he explained that the new Privileges or Immunities Clause would provide for "'protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety'" as well as "the personal rights guarantied and secured by the first eight amendments of the Constitution." *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F. Cas. at 551-52). The *Corfield* understanding of federal rights gave the Amendment's Privileges or Immunities Clause far more power as a protection against state oppression. Yet, it was ignored by *Slaughter-House*'s cramped reading.[6]

The *Slaughter-House* Court's desire to protect "the traditional antebellum balance of state and federal powers," led it "to continue interpreting the Fourteenth

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[6] In light of Professor Amar's conception of the Privileges or Immunities Clause as applying both 'more and less' of the freedoms in the Bill of Rights to the state, it is misleading to view the Privileges or Immunities Clause as a mechanical device that injects the amendments of the Bill of Rights into state law. In fact, the term incorporation is anachronistic. Rather, the Privileges or Immunities Clause places a limitation on what liberties the states could infringe. Josh Blackman & Ilya Shapiro, *Opening Pandora's Box? Privileges or Immunities, The Constitution in 2020, and Properly Incorporating the Second Amendment*, 8 Geo. J.L. & Pub. Pol'y ___ (Forthcoming 2010), *available at* http://papers.ssrn.com/abstract_id=1503583 (last visited Nov. 18, 2009).

Amendment narrowly—and thus to refrain from limiting the autonomy of state legislatures in exercising police powers—throughout the 1870s, 1880s, and early 1890s." David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 Mercer L. Rev. 563, 615 (2009). One consequence was to undermine the legal foundation of the federal government's commitment to racial equality in southern Reconstruction. Eric Foner, *A Short History of Reconstruction* 223-25 (1990).

For instance, in *United States v. Cruikshank*, 92 U.S. 542, 551 (1875), the Court relied on *Slaughter-House* in rejecting the argument that state officials who led a white mob to murder more than 100 black Louisianans had deprived the victims of their rights of federal citizenship. *See generally* Charles Lane, *The Day Freedom Died* (2008). Although the victims had been peaceably assembling to protest grievances, as well as bearing arms and exercising other Bill of Rights freedoms, the Court relied on *Slaughter-House* to conclude that protection of these rights "remain[ed] . . . subject to State jurisdiction." 92 U.S. at 551.

The result in *Cruikshank* was directly contrary to the intention of the Fourteenth Amendment's framers; Senator Howard, for example, specifically identified "the right of the people peaceably to assemble and petition the Government for a redress of grievances" and "the right to keep and to bear arms" as rights protected under the Privileges or Immunities Clause. *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1866). By narrowly defining the federal rights protected from state encroachment under the concept of "privileges and immunities," the *Slaughter-House* decision "had a devastating effect on human rights under the Constitution. Our basic liberties were placed at the mercy of state laws and state officials." Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 Akron L. Rev. 1051, 1079 (2009).

Jeremiah Black's biographer observed afterward that with the success of his states' rights argument in *Slaughter-House*, the Privileges or Immunities Clause "was severed from the Constitution," thus restoring "State sovereignty" and "leav[ing] Louisiana free to deal with Carpetbaggers in her own way." Brigance, *supra*, at 201-02. This is true: the decision's most profound flaw lay in its undermining of the Fourteenth Amendment's primary purpose: namely, to constitutionalize the Republican theory that every American possesses a paramount national citizenship that brings with it a broad list of individual rights, privileges, and immunities, protected against infringement by states.

II

IN ADDITION TO IGNORING THE LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT, THE *SLAUGHTER-HOUSE* MAJORITY VIOLATED BASIC RULES OF CONSTITUTIONAL INTERPRETATION

The *Slaughter-House* Court's decision to narrowly define the realm of national rights protected by the Privileges or Immunities Clause is particularly disturbing because it occurred without any reference to the legislative history of the Fourteenth Amendment. In dissent, Justice Field cited the debates in the

Congressional Globe and discussed the doctrine of paramount national citizenship, *see* 83 U.S. (16 Wall.) at 92-95, but the majority ignored this history. Instead, it resorted to a rhetorical question: "Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" *Id.* at 77. The Court answered by alleging that extreme consequences would result from such a purpose, and concluded that "no such results were intended." *Id.* at 78.

In addition, the approach in *Slaughter-House* violated two other, related rules of constitutional interpretation. First, courts must avoid construing a constitutional amendment so that it merely replicates another constitutional provision, *cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (courts should not interpret statutes so as to make them redundant). Second, constitutional interpretations must give effect to every word in the provision at issue. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

The *Slaughter-House* decision is irreconcilable with both canons. After all, if the Privileges or Immunities Clause protects only the narrow list of previously recognized federal constitutional rights, then it has no more effect than the Supremacy Clause. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 636 (1994). The Supremacy Clause already deprived states of any power to interfere with the right to travel to the capital, the right to protection on the high seas, or other federal citizenship rights. Thus the majority's interpretation rendered the clause "a vain and idle enactment." *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

The majority's interpretation also failed to give effect to every provision of the Amendment. This is made clear by the later decision in *Cruikshank*, where the Court held that the Privileges or Immunities Clause "adds nothing" to the rights of citizens, 92 U.S. at 554, but merely protects the preexisting First Amendment right to petition Congress. *Id.* at 552. The right of peaceable assembly for any *other* purpose, the Court continued, is *not* guaranteed by the First Amendment—and therefore is not a privilege or immunity of federal citizenship protected from state interference. Thus "the people must look to the States" for protection of this right. *Id.* Yet if the Amendment provided no protection beyond the right to petition *Congress*, then the Amendment had no effect beyond what the First Amendment already provided. Sadly, this meant that citizens were abandoned with the disingenuous advice to seek redress from the very state governments that were oppressing them.

III

OVERRULING *SLAUGHTER-HOUSE* WOULD NOT THREATEN THE VITALITY OF SUBSTANTIVE DUE PROCESS

In the years following *Slaughter-House*, federal courts often turned to the Due Process Clause to protect substantive rights against state interference. But it is *not* true that the theory of substantive due process only worked as a substitute for the lifeless Privileges or Immunities Clause. The theory of substantive due process was well understood and generally accepted at the time of the Amendment's ratification. Although the two clauses overlap in some ways, and although some cases decided on due process grounds would have been more properly decided as privileges or immunities cases, a revival of meaningful protection for individual rights under the Privileges or Immunities Clause should augment, and not displace, the theory of substantive due process.[7]

The legal theory now called "substantive due process" was given that name only in the 1940s. G. Edward White, *The Constitution and the New Deal* 241-68 (2000). For more than a century before that, however, the theory was widely accepted by state and federal courts. *See Washington v. Glucksberg*, 521 U.S. 702, 756-58 (1997) (Souter, J., concurring) (citing cases); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process*, 58 Emory L.J. 585, 669 (2009) ("[O]ne widespread understanding of the due process clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of unenumerated natural and customary rights against congressional action."); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 946 ("[T]he 'procedure only' interpretation of the [Due Process Clause] cannot be sustained by the historical facts.").

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[7] The constitutional avoidance canon cannot warrant incorporating the Second Amendment through the Due Process Clause instead. Any decision might utilize due process as a substitute for the Privileges or Immunities Clause, but this can only delay, and not avoid, the need to reassess *Slaughter-House*. Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would ground the Supreme Court's rights-protecting jurisprudence in a textually and historically sound foundation without rejecting the doctrine of substantive due process. Indeed, substantive rights would instead be properly grounded in the text, history, and original public meaning of the Constitution. This would provide greater clarity and credibility in the context of rights jurisprudence.

Contrary to the claims of some legal scholars, *see, e.g.*, Robert H. Bork, *The Tempting of America* 31 (1990), the initial appearance of substantive due process in this Court was not *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), but Daniel Webster's oral argument in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), almost a half century earlier. Webster explained that the terms "law of the land" or "due process of law"[8] meant that

> every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land . . . . The administration of justice would be an empty form, an idle ceremony.

Id. at 581-82.

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[8] The two phrases were understood as synonymous since before the founding era. *See* Riggs, *supra*, at 950.

The theory of substantive due process simply holds that when a lawmaker acts in excess of constitutional authority, those acts do not qualify as "law," but only as force, usurpation, or arbitrary action; enforcing such a non-law against an individual would therefore deprive that individual of life, liberty, or property without due process *of law*.

Thus in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874), decided only one year after *Slaughter-House*, this Court explained that legislative action that exceeds constitutional authority is "not legislation" even though done "under the forms of law." Instead, it is "a decree under legislative forms," and as such deprives persons of their rights without due process *of law*. *Accord, Davidson v. New Orleans*, 96 U.S. 97, 102 (1877) ("[C]an a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail."); *Hurtado v. California*, 110 U.S. 516, 536 (1884) ("Arbitrary power . . . is not law . . . . The enforcement of [constitutional] limitations by judicial process is the device of self-governing communities to protect the rights of individuals . . . against the violence of public agents transcending the limits of lawful authority."). The term "substantive due process" is thus misleading, because the focus in such cases is not on the *process*, but on whether or not the deprivation of rights was in accordance with an exercise of legislative authority that qualifies as *a "law."*

This doctrine does not depend in any way on the outcome of *Slaughter-House*. Instead, the Due Process Clause independently prohibits the legislature from acting arbitrarily—and certain legislative acts are so inherently unfair or arbitrary that, notwithstanding their *formal* legislative enactment, they do not *substantively* conform to the definition of law. Professor Cass R. Sunstein has written that the Due Process Clause, along with other constitutional provisions, prohibits legislatures from "distributi[ng] . . . resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). This ban on arbitrary legislative action has both procedural and substantive dimensions, and although it sometimes overlaps with the protections provided by the Privileges or Immunities Clause, that prohibition has its own constitutional source and validity.

In addition to its theoretical independence from the Privileges or Immunities Clause, substantive due process also has its own historical pedigree, which cannot be accounted for on the theory that substantive due process was devised simply to patch the hole that *Slaughter-House* tore in the Fourteenth Amendment. Indeed, the same year that the Amendment was ratified, and four years *before* the *Slaughter-House* decision, Thomas M. Cooley quoted Daniel Webster's definition of the term "due process of law," concluding that the Due Process Clause protected substantive rights against unprincipled or arbitrary legislation. *A Treatise on Constitutional Limitations* 353 (1868). In subsequent decades, this Court often quoted Cooley and Webster when applying the Due Process Clause. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Hovey v. Elliott*, 167 U.S. 409, 418 (1897); *Hurtado*, 110 U.S. at 535-36; *Ex parte Wall*, 107 U.S. 265, 289 (1883); *Beckwith v. Bean*, 98 U.S. 266, 295 (1878).

The Fourteenth Amendment's framers were familiar with the concept of substantive due process, and mentioned it during the ratification debates. Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 Drake L. Rev. 911, 934 (2008) (Leading Republicans "read the Due Process Clause as protecting substantive rights."). Congressman Bingham, for example, explained that "due process of law" referred to "law in its highest sense, that law which . . . is impartial, equal, exact justice; that justice which requires that every man shall have his right." *Cong. Globe*, 39th Cong., 1st Sess. 1094 (1866). *See also id.* at 2459 (Rep. Stevens) (Due Process Clause prevents states from "*unlawfully* depriving [persons] of life, liberty, or property" (emphasis added)); *id.* at 340 (Sen. Cowan) (due process of law meant that "the rights of no free man, no man not a slave, can be infringed in so far as regards any of the great principles of English and American liberty"); *id.* at 1294 (Rep. Wilson) (due process included the "great civil rights" referred to in the Civil Rights Act of 1866); *id.* at 1833 (Rep. Lawrence) (due process means that "there are [] rights . . . which are inherent, and of which a State cannot constitutionally deprive him").

When asked to define "due process of law," Congressmen John Bingham and William Lawrence responded by pointing to established case law, *id.* at 1089 (Rep. Bingham), 1833 (Rep. Lawrence). By that time, substantive due process was a well established legal principle. *See Glucksberg*, 521 U.S. at 756-58 (Souter, J., concurring) (citing cases).

Indeed, Congressman Lawrence cited *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829), *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), *People v. Morris*, 13 Wend. 325, 328 (N.Y. Sup. Ct. 1835), *Taylor v. Porter & Ford*, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), for the proposition that "every citizen has [] 'absolute rights'" that legislatures may not violate. *Cong. Globe*, 39th Cong., 1st Sess. at 1833.

Although Reconstruction-era Republicans intended the Privileges or Immunities Clause as the "substantive heart of the amendment," Shankman & Pilon, *supra*, at 26, they correctly understood that the "due process of law" clause would *also* forbid the government from arbitrary actions that violate individuals' natural and civil rights. By overruling *Slaughter-House* to restore the Privileges or Immunities Clause, the Court will not endanger due process precedent, but will simply reestablish the original understanding that both clauses protect the constitutional, natural, and common law rights of federal citizens against state interference.

◆

CONCLUSION

The *Slaughter-House Cases* was wrong when it was decided. It ignored the fundamental change in constitutional order represented by the Union victory in the Civil War and subsequent amendment to the Constitution. It ignored all relevant legislative history, rendered the Privileges or Immunities Clause redundant of the Supremacy Clause, and failed to give effect to all provisions of the Fourteenth Amendment. Considerations of *stare decisis* do not counsel in favor of retraining this plain error in constitutional law. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). The *Slaughter-House Cases* should be overruled and the judgment below *reversed*.

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AMICUS
CURIAE
BRIEF

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Supreme Court of the United States

OTIS McDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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QUESTION PRESENTED

Is the individual right of citizens to keep and bear arms among the "privileges or immunities" that the Fourteenth Amendment protects from state deprivation?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the proposition that governments are established to secure unalienable rights, including the right to keep and bear arms in self-defense and as a check against government tyranny. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this court is one of special importance to the plan of the Constitution. Article IV, section 2, was the original protection for fundamental liberties, including the right to keep and bear arms. The Second

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[1] Pursuant to this Court's Rule 37.3(a), all parties have filed consents to amicus briefs with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Amendment was enacted to more explicitly guarantee that right—considered essential to the preservation and protection of liberty and safety—against federal deprivation. The Fourteenth Amendment was enacted to require the states to recognize just such rights for all citizens. To permit the states to encroach upon the right to keep and bear arms would be to ignore the significance of not only the fundamental nature of this right itself, but also the purpose of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

A careful consideration of "the historical events that culminated in the Fourteenth Amendment"[2] reveals that the "privileges or immunities" clause of the Fourteenth Amendment protects against state infringement on the individual right of citizens to keep and bear arms.

The terms "privileges" and "immunities" have held a constant meaning from the Founding era through the debates and ratification of the Fourteenth Amendment and the Civil Rights Act of 1866. Indeed, a review of the writings of the political and legal thinkers who inspired our republic reveals an understanding that the terms "privileges" and "immunities" refer to fundamental, natural entitlements or rights essential to the preservation of life, liberty, and other necessary aspects of existence—political or individual. The generation which enacted the Constitution intended the "privileges and immunities" clause of Article IV to refer to well-understood, fundamental rights. This understanding of the scope of the "privileges and immunities" clause of Article IV was recognized and adopted by those who came after the Framers. Subsequently, the authors of the Fourteenth Amendment created a "privileges or immunities" clause which they intended to codify the protection of these fundamental rights[3] against the states—in response to efforts by states to deprive freed Americans of African descent of these well-understood, fundamental rights.[4]

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[2] *Adamson v. California*, 332 U.S. 46, 71 (1947) (Black, J., dissenting).

In addition, the Congress which drafted and the states that ratified the Fourteenth Amendment intended the "privileges or immunities" clause to extend to the right to keep and bear arms—a fundamental, individual right long recognized as essential to the preservation of liberty and personal safety. The conclusion that the right to keep and bear arms is a well-understood, fundamental right demanding protection against governmental encroachment finds support from those who came before American Independence and upon whom the Framers of the Constitution relied. Unsurprisingly, it was also asserted by the Framers themselves and those who came after the Framers—and was a significant influence on the Fourteenth Amendment. Finally, the authors of the Fourteenth Amendment explicitly stated their intention that the amendment protects well-understood, fundamental rights—including the right to keep and bear arms.

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[3] Even modern legal thought and language recognizes that the terms "privileges" and "immunities" refer to fundamental rights. As Professor Akhil Reed Amar of Yale Law School has pointed out, we speak of a "'privilege' against compelled self-incrimination, or the 'immunity' from double prosecution[.]" Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1221 (1992). *See, also*, OXFORD ENGLISH REFERENCE DICTIONARY 1151 (2d ed., rev. 2002) (defining "privilege" as "a right, advantage, or immunity"). The Fourteenth Amendment's "privileges or immunities" clause does not refer to mere licenses or grants, but something far more fundamental. Importantly, the Second Amendment was seen as a privilege "that the Thirty-ninth Congress meant to protect and that the States understood and accepted when they ratified the amendment." Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 12-13 (2007).

[4] This was especially necessary in light of *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833), which rejected the claim that the Bill of Rights protected citizens from state action.

ARGUMENT

I

THE RIGHT TO KEEP AND BEAR ARMS, RECOGNIZED IN THE SECOND AMENDMENT, IS AMONG THE PRIVILEGES OR IMMUNITIES THAT THE FOURTEENTH AMENDMENT PROTECTS FROM STATE DEPRIVATION

A. The Authors of the Fourteenth Amendment Recognized and Adopted the Widely-Held Historical Consensus That the Terms "Privileges" and "Immunities" Embrace Well-Understood, Fundamental Rights

1. Political Theorists Who Preceded the Framing of the Constitution Understood the Terms "Privileges" and "Immunities" to Refer to Well-Understood, Fundamental Rights

"Privileges" and "immunities"—terms used in Article IV of the United States Constitution and, later, in the Fourteenth Amendment[5]—historically had an established meaning, namely, well-understood, fundamental rights essential to the preservation of life and liberty. When colonists left England, the Crown promised that they and their families would always have the rights of citizens under English law.[6] These promises were memorialized in many American colony charters which prefigured the language of Article IV's "privileges and immunities" clause.[7]

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[5] These terms, however, existed well before the founding of America. David Skillen Bogen, PRIVILEGES AND IMMUNITIES xvii (2003) (stating that the concept of "privileges" and "immunities" "has been a part of English and American history from feudal England to modern America.").

William Blackstone, the preeminent authority on English law at the time of the Founding,[8] used the terms "privileges" and "immunities" to describe numerous rights deemed so fundamental by the English people as to be included in the Magna Charta's "Charters of liberty," the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1700.[9] As Professor Amar has noted, these documents constituted "the fountainhead of the common law, and the widely understood source of many particular rights that later appeared in the federal Bill, sometimes in identical language."[10] The Founders

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[6] *Id.* at 1-3; *Saenz v. Roe*, 526 U.S. 489, 522-23 (1999) (Thomas, J., dissenting) ("At least in American law, [the Article IV "privileges and immunities clause"] (or its close approximation) appears to stem from the 1606 Charter of Virginia, which provided that 'all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of *England*.'").

[7] Bogen, *supra*, note 5, at 1-2.

[8] *Alden v. Maine*, 527 U.S. 706, 715 (1999).

[9] William Blackstone, 1 COMMENTARIES *127-45.

[10] Amar, *supra*, note 3, at 1221. *See, also*, Bogen, *supra*, note 5, at 10 ("The First Continental Congress issued a Declaration and resolves . . . asserting their rights to 'all the immunities

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used "the words *rights*, *liberties*, *privileges*, and *immunities* . . . interchangeably."[11]

2. The Framers of the Constitution Intended the "Privileges and Immunities" Clause of Article IV to Extend to Well-Understood, Fundamental Rights

The Founders of America sought to establish a nation "conceived in liberty."[12] They believed that the purpose of government was to secure inalienable rights, including the rights to "life, liberty, and the pursuit of happiness."[13] Hence, the Framers wrote the "Privileges and Immunities" clause into the fourth article of the Constitution to provide a means to accomplish these natural ends.[14] States were presumed interested in protecting the essential liberties of their own citizens. Article IV, section 2,

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and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.'").

[11] Michael Kent Curtis, NO STATE SHALL ABRIDGE 64-65 (1986).

[12] Abraham Lincoln, Gettysburg Address.

[13] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure [the unalienable Rights with which all men are endowed by their Creator], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed").

[14] Bogen, *supra*, note 5, at 10-11 (finding that the phrases "*liberties*, *franchises*, *privileges*, and *immunities* . . . were identified with the basic principles the colonists found in English government— privileges of protection by governments of life, liberty, and property through the civil and criminal law and immunities from government found in documents like the Magna Carta.").

required protection of those same rights for citizens of other states.

Of course, the Framers did not intend the clause to encompass everything which might fall under the appellation "right." Rather, the Framers were primarily concerned with the protection of those fundamental, natural rights which they understood to be essential to the achievement of life, liberty, and the pursuit of happiness. For example, Jefferson concluded that the right to earn a living at a lawful occupation, free from unreasonable governmental intrusion, was central to individual liberty and hence fell directly within the purview of the "Privileges and Immunities" clause.[15] Similarly, this Court, in *Meyer v. Nebraska*, recognized that "the right of the individual to contract" was among "those *privileges* long recognized at common law as essential to the orderly pursuit of happiness by free men."[16] Also the terms "privileges" and "immunities" were used to refer to fundamental rights in the 1775 Declaration of the Causes and Necessity of Taking Up Arms which described the fundamental right to a jury as the "inestimable privilege of trial by jury."[17]

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[15] John C. Eastman, *Re-evaluating the Privileges or Immunities Clause*, 6 Chap. L. Rev. 123, 126-27 (2003).

[16] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

[17] Second Continental Congress, *Declaration of the Causes and Necessity of Taking Up Arms* para. 3 (1775), *reprinted in* 1 GREAT ISSUES IN AMERICAN HISTORY 46, 49 (Richard B. Hofstadter ed., 1958).

As Justice Clarence Thomas recognized when considering the original meaning of the "privileges or immunities" clause,

> [t]he colonists' repeated assertions that they maintained the rights, privileges, and immunities of persons 'born within the realm of England' and 'natural born' persons suggests that, at the time of the founding, the terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.[18]

Thus, the Framers intended the "Privileges and Immunities" clause to include well-understood, fundamental rights essential to the preservation of life and the protection of liberty.

3. Those Who Came After the Framers Recognized and Accepted That the Terms "Privileges" and "Immunities" Embrace Well-Understood, Fundamental Rights

That the terms "privileges" and "immunities," especially as used in Article IV, included well-understood, fundamental rights enjoyed recognition and acceptance in the years after the Constitution was adopted. For example, Supreme Court Justice Washington in *Corfield v. Coryell* stated that the "Privileges and Immunities" clause extends to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[19]

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[18] *Saenz*, 526 U.S. at 524 (Thomas, J., dissenting).

Justice Washington's views were widely shared by his contemporaries. As Justice Clarence Thomas recently recognized, "[d]uring the first half of the 19th century, a number of legal scholars and state courts endorsed Washington's conclusion that the [Privileges and Immunities] Clause protected only fundamental rights."[20] Further, Circuit Justice William Johnson, described a bill which listed rights such as "'freedom of religious opinions;' 'the benefit of the writ of habeas corpus;' and protections against 'excessive bail,' 'cruel and unusual punishments,' and confiscation without 'just compensation'" as "in nature of a bill of rights, and of privileges, and immunities."[21] Those who came after the Founders

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[19] *Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Pa. 1823).

[20] *Saenz*, 526 U.S. at 526 n.4 (Thomas, J., dissenting) (citing, inter alia, "Douglass v. Stephens, 1 Del.Ch. 465, 470 (1821) (Clause protects the 'absolute rights' that 'all men by nature have')" and "2 J. Kent, Commentaries on American Law 71-72 (1836) (Clause 'confined to those [rights] which were, in their nature, fundamental')").

[21] Amar, *supra*, note 3, at 1221-22 (1992) (Also discussing how "[a]fter invoking Blackstone and the above-listed landmarks, Chief Justice Lumpkin's opinion in *Campbell* unsurprisingly described various rights in the federal Bill as 'privileges'—including the right at issue in *Campbell* itself, the right to be confronted with witnesses[,]" and observing that "Lumpkin's ideas about *Barron* may have been unorthodox in 1852, but his

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continued to use the terms "Privileges" and "Immunities" to refer to well-understood, fundamental rights.

4. The Authors of the Fourteenth Amendment Intended the "Privileges or Immunities" Clause to Extend to Well-Understood, Fundamental Rights

Prior to the Fourteenth Amendment, the terms "privileges" and "immunities" were consistently understood to include well-understood, fundamental rights. This Court has recognized that this continuity of thought regarding the legal significance of the terms "privileges" and "immunities" influenced those who ratified the Fourteenth amendment.[22]

Justice Washington's opinion, discussed above, was the authority to which "[w]hen Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed . . . arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion."[23] An

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language was utterly conventional; that same decade, the Supreme Court in *Dred Scott* labeled the entitlements in the federal Bill 'rights and privileges of the citizen.'").

[22] *Saenz*, 526 U.S. at 502 n.15 (1999) ("The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV."); *Id.* at 526 (Thomas, J., dissenting) ("Justice Washington's opinion in *Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment.").

[23] *Id.* at 526. *See, also*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1418

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instructive example referenced by Justice Clarence Thomas is Senator Jacob M. Howard of Michigan, who discussed in detail the Fourteenth Amendment to the Constitution.[24] Although Senator Howard recognized that the terms "privileges" and "immunities" "cannot be fully defined in their entire extent and precise nature," still he asserted without contradiction[25] that the terms included "the personal rights guarantied and secured by the first eight amendments of the Constitution."[26]

Senator Lyman Trumbull waxed eloquent in support of the Civil Rights Act of 1866 and stated clearly that the "privileges and immunities of citizens in the several states" are "such fundamental rights as belong to every free person."[27] Upon a thorough review of the Congressional debates around the Civil Rights Act and the Fourteenth Amendment,

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(1992) (referring to a Member's "obligatory quotation from *Corfield*").

[24] *Saenz*, 526 U.S. at 526. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Senator Howard cited Justice Washington's *Corfield* opinion for the proposition that "the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution" are those which are "fundamental, which belong of right to the citizens of all free Governments.").

[25] *Saenz*, 526 U.S. at 526 ("Furthermore, it appears that no Member of Congress refuted the notion that Washington's analysis in *Corfield* undergirded the meaning of the Privileges or Immunities Clause.").

[26] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Of course, this includes the right to keep and to bear arms.

[27] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

one is inescapably led to the conclusion that the terms "privileges" and "immunities" as used by the authors of the Fourteenth Amendment extended to fundamental, natural rights. In light of such a history, it is not surprising that Justice Hugo Black said,

> [m]y study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.[28]

B. The Right to Keep and Bear Arms—Also Recognized in the Second Amendment—Is Among the Well-Understood, Fundamental Rights Within the Scope of the Terms "Privileges" and "Immunities"

1. History Demonstrated to the Framers of the Constitution That the Right to Keep and Bear Arms Is Essential to Liberty and Safety

History is replete with examples, from which the Framers took their lessons about human governance, that reveal the fundamental nature of the individual right of to keep and bear arms. For example, Aristotle tells the story of how the tyrant

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[28] *Adamson*, 332 U.S. at 71-72 (Black, J., dissenting).

Pisistratus took over Athens in the sixth century B.C. by disarming the people through trickery.[29] Indeed, Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role.[30] Similar events took place in Seventeenth Century England. This Court noted that "[b]etween the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents."[31]

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[29] Aristotle, THE ATHENIAN CONSTITUTION ch. 15 (Sir Frederic G. Kenyon trans., 1901). Aristotle explains

> [a]fter his victory in the battle at Pallene he captured Athens, and when he had disarmed the people he at last had his tyranny securely established, and was able to take Naxos (a Greek island) and set up Lygdamis as ruler there. He effected the disarmament of the people in the following manner. He ordered a parade in full armour in the Theseum (a temple), and began to make a speech to the people. He spoke for a short time, until the people called out that they could not hear him, whereupon he bade them come up to the entrance of the Acropolis, in order that his voice might be better heard. Then, while he continued to speak to them at great length, men whom he had appointed for the purpose collected the arms and locked them up in the chambers of the Theseum hard by, and came and made a signal to him that it was done. Pisistratus accordingly, when he had finished the rest of what he had to say, told the people also what had happened to their arms; adding that they were not to be surprised or alarmed, but go home and attend to their private affairs, while he would himself for the future manage all the business of the state.

[30] Stephen P. Halbrook, THAT EVERY MAN BE ARMED 11 (1994).

Those thinkers who most influenced the Framers understood that the right to keep and bear arms is essential for the preservation of liberty. John Locke noted the "fundamental, sacred, and unalterable law of self-preservation."[32] Locke wrote of a righteous resistance that ultimately depended on the use of force.[33] In addition to the right to keep

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[31] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008). This Court also discussed the 1671 Game Act wherein "the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies." *Id.*

[32] John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690).

[33] John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 155.

> It may be demanded here, what if the executive power, being possessed of the force of the commonwealth, shall make use of that force to hinder the meeting and acting of the legislative, when the original constitution or the public exigencies require it? I say, using force upon the people without authority, and contrary to the trust put in him that dose so, is a state of war with the people, who have a right to reinstate their legislative in the exercise of their power: for having erected a legislative, with an intent they should exercise the power of making laws, either at certain set times, or when there is need of it; when they are hindered by any force from what is so necessary to the society, and wherein the safety and preservation of the people consists, the people have a right to remove it by force. In all states and conditions, the true remedy of force without authority is to oppose force to it. The use of force without authority always puts him that uses it into

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and bear arms to protect against private acts,[34] Locke considered the right to use force in self-defense to be a necessity.[35] Of course, other thinkers such as William Blackstone, Algernon Sydney, Thomas Hobbes, and Hugo Grotius—to name a few—also agreed that the right to keep and bear arms is an

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> a state of war, as the aggressor, and renders him liable to be treated accordingly.

[34] *Heller*, 128 S. Ct. at 2817 (finding that "the inherent right of self-defense has been central to the Second Amendment right.").

[35] John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 207.

> A man with a sword in his hand demands my purse in the highway, when perhaps I have not 12d. in my pocket; This Man I may lawfully kill. To another I deliver £100 to hold only whilst I alight, which he refuses to restore me, when I am got up again, but draws his sword to defend the possession of it by force. I endeavour to retake it. This mischief this man does me, is a hundred, or possibly a thousand times more than the other perhaps intended me, (whom I killed before he really did me any); and yet I might lawfully kill the one and cannot so much as hurt the other lawfully. The reason whereof is plain; because the one using force which threatened my life, I could not have time to appeal to the law to secure it, and when it was gone it was too late to appeal. The law could not restore life to my dead carcass. The loss was irreparable; which to prevent the law of Nature gave me a right to destroy him who had put himself into a state of war with me and threatened my destruction. But in the other case, my life not being in danger, I might have the benefit of appealing to the law, and have reparation for my £100 that way.

essential right.[36] These thinkers merely repeated a doctrine recognized, at least, from the time of the first republic.[37]

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[36] William Blackstone, 1 COMMENTARIES *139 (recognizing the right of the subject to have arms for their defense as following from the natural right of resistance and self-preservation); Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991)

> [a] covenant not to defend my selfe from force, by force, is always voyd. For . . . no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment . . . and therefore the promise of not resisting force, in no Covenant transferreth any right; nor is obliging.

Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C. Campbell trans., 1901).

> When our lives are threatened with immediate danger, it is lawful to kill the aggressor, if the danger cannot otherwise be avoided . . . . [T]his kind of defense derives its origin from the principle of self-preservation, which nature has given to every living creature . . . . For I am not bound to submit to the danger or mischief intended, any more than to expose myself to the attacks of a wild beast . . . when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. What has been already said of the right of defending our persons and property . . . may nevertheless be applied to public hostilities . . . . [S]overeign powers have a right not only to avert, but to punish wrongs. From whence they are authorized to prevent a remote as well as an immediate aggression.

[37] Marcus Tullius Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. & trans., 1969).

> There exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by

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Plainly, the great weight of those authorities upon which the Framers relied, led inevitably to the conclusion that the citizens' right to keep and bear arms is a fundamental, natural right that is included within the rights recognized as "privileges" and "immunities." This Court has long recognized this fact, stating that the Second Amendment "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[38]

> training or custom or reading by be derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too, and meanwhile they must suffer injustice first. Indeed, even the wisdom of a law itself, by sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with and starts to consider motive, a man who has used arms in self-defense is not regard is having carried with a homicidal aim . . . . Civilized people are taught by logic, barbarians by necessity, communities by tradition; and the lesson is inculcated even in wild beasts by nature itself. They learn that they have to defend their own bodies and persons and lives from violence of any every kind by all the means within their power.

[38] *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *accord. Heller*, 128 S.Ct. at 2797.

2. The Framers of the Constitution Held That the Right to Bear Arms Is a Well-Understood, Fundamental Right

The generation which enacted the Constitution held that the right to keep and bear arms is necessary both for the assurance of personal safety—a sine qua non for the preservation of the ends discussed in the Declaration of Independence[39]—and as the final barrier between an over-reaching government and the liberties of the citizenry. So important is the capacity to preserve one's safety, that many of the states included a right of self-defense within their declarations of inalienable rights. For example, Massachusetts's Declaration of Rights stated that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and *defending their lives and liberties*; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[40] The use of the term "defending"

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[39] If one is unable to protect and ensure one's safety, then one is at constant peril of the loss of life and liberty and one is unable to achieve the orderly pursuit of happiness. Thus, citizens always retain the natural right of revolution. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[40] MASS. CONST. of 1780, pt. I, art. I (emphasis added). *See, also,* Va. DECLARATION OF RIGHTS § 1

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing

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emphasizes the personal nature of the "individual right to possess and carry weapons in case of confrontation."[41]

James Madison praised the Constitution for preserving "the advantage of being armed, which Americans possess over the people of almost every other nation ... [where] the governments are afraid to trust the people with arms."[42] Alexander Hamilton lent support to this conclusion by his recognition that "to model our political system upon speculations of lasting tranquility would be to calculate on the weaker springs of the human character."[43] Similarly, Thomas Jefferson stated that "[n]o freeman shall ever be debarred the use of arms."[44] Noting that "all power is inherent in the people," Thomas Jefferson even asserted that "it is

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> property, and pursuing and obtaining happiness and *safety*.

(emphasis added); N.H. CONST. of 1784, pt. I, art. II ("All men have certain natural, essential, and inherent rights; among which are—the enjoying and *defending life and liberty*—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.") (emphasis added); N.H. CONST. of 1792, pt. I, art. II (same).

[41] *Heller*, 128 S. Ct. at 2797 (finding an "individual right to possess and carry weapons in case of confrontation").

[42] THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

[43] THE FEDERALIST NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[44] Thomas Jefferson, *Proposal to Virginia Constitution* (June 1776) *in* PAPERS OF THOMAS JEFFERSON 334 (C.J. Boyd ed., 1950).

their right and duty to be at all times armed."[45] Of course, these quotations reflect a sentiment which pervaded throughout the entire nation.[46]

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[45] Letter from Thomas Jefferson to John Cartwright, 1824, *in* 16 THE WRITINGS OF THOMAS JEFFERSON 45 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903-04). This position was shared by others who signed the Declaration of Independence. *See, e.g.*, James Wilson, *Of the Law of Nations, Lectures on Law* (1791) *reprinted in* 1 THE WORKS OF JAMES WILSON 148-67 (Robert G. McCloskey ed., 1967) ("But yet, between the duty of self-preservation required from a state, and the duty of self-preservation required from a man, there is a most material difference; and this difference is founded on the law of nature itself.").

[46] *See, also*, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86–87 (Pierce & Hale eds., 1850) ("the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms"); 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 646 (2nd ed. 1836) (quoting Zachariah Johnson who said "[t]he people are not to be disarmed of their weapons. They are left in full possession of them."); Thomas Paine, THOUGHTS ON DEFENSIVE WAR, PHILADELPHIA, July 1775 ("The balance of power is the scale of peace . . . . Horrid mischief would ensue were one half the world deprived of the use of [arms] . . . the weak will become prey to the strong."); Trench Coxe, THE PENNSYLVANIA GAZETTE, Feb. 20, 1788 ("the unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people."); Richard Henry Lee, THE PENNSYLVANIA GAZETTE, Feb. 20, 1788 ("[W]hereas, to preserve liberty, it is essential that the whole body of the people always possess arms.").

Hence, it is apparent that the Founders recognized that that the right to keep and bear arms is a well-understood, fundamental right of individual citizens and thus belonging to that category of rights included in the terms "privileges" and "immunities."[47]

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[47] *See, also,* 14 DEBATES IN THE HOUSE OF REPRESENTATIVES 92-93 (Linda G. De Pauw ed., 1972)

> [C]onceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made. The particular states, like private citizens, have a right to be armed, and to defend, by force of arms, their rights, when invaded.

James Madison, 1 ANNALS OF CONGRESS 434, June 8, 1789 ("The right of the people to keep and bear arms shall not be infringed. A well regulated militia, composed of the body of the people, trained to arms, is the best and most natural defense of a free country."); Elliot, *supra*, at 386 (quoting Patrick Henry who said "[t]he great object is, that every man be armed . . . . Every one who is able may have a gun." and

> Are we at last brought to such humiliating and debasing degradation that we cannot be trusted with arms for our defense? Where is the difference between having our arms in possession and under our direction, and having them under the management of Congress? If our defense be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?

Letter from Thomas Jefferson to William Stephens Smith, 1787, *in* 6 THE WRITINGS OF THOMAS JEFFERSON 373 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903-04) ("What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? Let

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3. Those Who Came After the Framers Understood That the Right to Keep and Bear Arms Was Among the Privileges and Immunities Protected by the Constitution

Those who succeeded the Framers recognized that the right to keep and bear arms is fundamental to the assurance of liberty and protection against violence. Touching on both issues, St. George Tucker stated that "the right to self-defense is" not just the "first law of nature" but also "the true palladium of liberty."[48] Justice Story of the United States Supreme Court found the Bill of Rights, and therefore the Second Amendment right to keep and bear arms, to contain the "fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness."[49] These and the writings

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them take arms."); Elliot, *supra*, at 380 (quoting George Mason who said that "to disarm the people—that was the best and most effectual way to enslave them."); *Heller*, 128 S. Ct. at 2817 ("the inherent right of self-defense has been central to the Second Amendment right").

[48] William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 238-39 (2nd ed., 1829).

[49] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 301 (1833). This does not mean that individual citizens have a right to tanks, nuclear weapons, or the latest and deadliest weaponry available to the military. As Justice Story cogently observed, "The right of the citizens to keep and bear arms . . . offers a strong *moral check* against the usurpation and arbitrary power of rulers[.]" *Id.* § 1890 (emphasis added). Even if citizens are not able to acquire those advanced weapon systems which would permit them to successfully resist a modernized military, still the right to keep

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from other thinkers at the time reveal a consensus as to the fundamental nature of the citizenry's right to keep and bear arms in order to protect their life and liberty.[50]

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and bear arms constitutes a compelling moral check on tyranny since a people who feel capable of defending themselves are quite unlikely to be enticed into subjective tyranny. Of course, where the entire nation has the right to keep and bear arms, this right will also constitute a considerable physical check on tyranny.

[50] *See, e.g.*, Rawle, *supra*, at 125-26 ("No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people."); Cassius Clay, THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (Horace Greeley ed., 1848)

> We say, that when society fails to protect us, we are authorized by the laws of God and Nature to defend ourselves; based upon the right, 'the pistol and the bowie knife' are to us as sacred as the gown and the pulpit; and the Omnipresent God of battles is our hope and trust for victorious vindication.

2 James Kent, COMMENTARIES ON AMERICAN LAW pt. 4, lect. 24 (1826-30)

> The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable. The history of our colonial governments bears constant mars of vigilance of a free and intelligent people; who understood the best securities for political happiness.

Albert Gallatin, *The New York Historical Society* (Oct. 7, 1789) ("The whole of the Bill (of Rights) is a declaration of the right of the people at large or considered as individuals . . . . It

- *continued* -

The North Carolina Supreme Court found that "[t]he maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions."[51] Indeed, Justice Washington, although he was unwilling to give a comprehensive list of rights contained within the "Privileges and Immunities" clause, concluded that "[t]hey may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[52] Of course, the right to keep and bear arms is the ultimate means to assure the protection of these noble ends.

Finally, even in the infamous case of *Dred Scott v. Sandford*, the Court recognized that the right to keep and bear arms is a fundamental right enjoyed by all citizens. The Court relied on this recognition to justify its erroneous conclusion that African-Americans could not be considered citizens. Chief Justice Taney, writing the majority opinion, recognized that if African-Americans were "entitled to *the privileges and immunities* of citizens"[53] they could rightfully claim fundamental rights such as

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establishes some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of.").

[51] *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921).

[52] *Corfield*, 6 F. Cas. at 551-52.

[53] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1856) (emphasis added).

> the right to enter every other State whenever they pleased . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and *to keep and carry arms* wherever they went.[54]

Furthermore, the Chief Justice stated that Congress cannot "deny to the people the right to keep and bear arms" because this power, "in relation to rights of person . . . are, in express and positive terms, denied to the General Government."[55] In sum, "Taney's logic was clear: if blacks were citizens, they would have a right to bear arms, and state laws prohibiting their possession of firearms would be void."[56] Significantly, a dissenting justice agreed with Taney's logic. Justice Curtis concluded that, under Article IV of the Constitution, "free persons of color might be entitled to the *privileges* of general citizenship . . . is clear."[57] The Fourteenth Amendment overturned this decision and extended the protections of equal privileges and immunities to all citizens of the nation, including freed slaves.

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[54] *Id.* at 417 (emphasis added).

[55] *Id.* at 450.

[56] Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 38 (1998).

[57] *Dred Scott*, 60 U.S. (19 How.) at 585 (Curtis, J., dissenting) (emphasis added).

4. The Authors of the Fourteenth Amendment Intended It to Extend Its Protections to the Fundamental, Natural Right to Keep and Bear Arms

The foregoing demonstrates that, from before the Founding era until the enactment of Civil Rights Act of 1866 and the Fourteenth Amendment, the right to keep and bear arms was consistently recognized as fundamental to ensuring the liberty and personal safety of the citizenry. Certainly, this common understanding influenced the authors of the Fourteenth Amendment who intended the "privileges or immunities" clause to extend to the right to keep and bear arms.

The Fourteenth Amendment's "privileges or immunities" clause was enacted, in part, to protect the rights of recently-freed slaves. Article IV, section 2 protected citizens of "other states." African-Americans quickly learned, however, that they required protection from their home state. With the end of the Civil War, it became apparent that the defeated South was not about to allow newly freed slaves access to all rights and privileges held by whites.[58] *Barron v. City of Baltimore* could be used

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[58] Amar, *supra*, note 3, at 1217.

> When the Thirty-ninth Congress convened in December 1865, various unrepentant Southern governments were in the process of resurrecting slavery de facto through the infamous Black Codes. As with the slavery system itself, the new codes would invariably require systematic state abridgments of the core rights and freedoms in the Bill of Rights. These abridgments would of course hit blacks the hardest, but the resurrection of a

- *continued* -

by southern states to deny the protections of the Bill of Rights to former slaves just as *Dred Scott* denied African-Americans the fundamental rights of citizenship.[59] Southern states began reintroducing, through "black codes," the limitations previously found in "slave codes"[60] curtailing the fundamental rights fundamental to free government.[61] Of course, this extended to the right to keep and bear arms.[62]

Widespread racist state action occurred with the purpose of limiting African-American's access to guns.[63] Disturbingly, "firearms confiscated would

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> caste system would also require repression of any whites who might question the codes or harbor sympathy for blacks.

[59] *Barron*, 32 U.S. at 250-51 (holding the Fifth Amendment is not applicable to the States); *Dred Scott*, 60 U.S. 393.

[60] Halbrook, *supra*, note 56, at 1 (finding that "slave codes, which limited access to blacks to land, firearms, and the courts, began to reappear as 'black codes.'").

[61] Lawrence, *supra*, note 3, at 19.

[62] Clayton E. Cramer, *The Racist Roots of Gun Control*, 4-WTR KAN. J.L. & PUB. POL'Y 17, 20 (1995) ("The former states of the Confederacy, many of which had recognized the right to carry arms openly before the Civil War, developed a greater willingness to qualify that right after the passage of the Fourteenth Amendment."); Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1309 n.7 (1995) (finding that throughout the South, there had been a "historical desire to disarm the black population").

[63] Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 71 (1991) ("The Special Report of the Anti-Slavery Conference of 1867 noted with particular

- *continued* -

often be turned over to the Klan, the local (white) militia or law enforcement authorities which would then, safe in their monopoly of arms and under color of the Black Codes, further oppress and violate the civil rights of the disarmed freedmen."[64]

In response, Congress passed the Civil Rights Bill of 1866, over President Johnson's veto, to declare all persons born in the United States, and not subject to foreign powers or untaxed Indians, to be United States Citizens. This Act granted "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property," and "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[65] Later that year, the Senate proposed the Fourteenth Amendment out of a fear that the Civil Rights Act would be later repealed or invalidated by the courts.[66] Because both the Civil Rights Act of 1866 and the Fourteenth

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emphasis that under these Black Codes blacks were 'forbidden to own or bear firearms, and thus were rendered defenseless against assaults.'").

[64] *Id.*

[65] 1866 CIVIL RIGHTS ACT, 14 STAT. 27-30, Apr. 9, 1866 A.D., Ch. XXXI.

[66] Chester James Antieau, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 115 (1997).

Amendment are similar in substance and purpose, a consideration of Senatorial debates surrounding each is instructive.

A purview of the Congressional Record for the Thirty-Ninth Congress reveals that the members of that Congress considered the right to keep and bear arms among the well-understood, fundamental rights to be protected by the Fourteenth Amendment. Representative James Wilson noted that the fundamental rights which may not be alienated from citizens included the right to *personal security*, liberty, and property.[67] Of course, the right to bear arms is often a necessary, or even the sole means, by which an individual citizen ensures his or her personal safety.[68] Even more explicitly, Senator Samuel Pomeroy noted that among the three "indispensible" safeguards of liberty "under our Constitution" that "[e]very man should have" there falls the "right to bear arms for the defense of himself and family and his homestead."[69] Other senators who opposed the Civil Rights Act and the Fourteenth Amendment recognized that these protections would grant African-Americans the right to keep and bear arms.[70]

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[67] CONG. GLOBE, 39th Cong., 1st Sess. 1118-19 (1866).

[68] Locke, *supra*, note 32.

[69] CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866). The Senator noted that a "well-loaded musket" in the hands of individual citizens is a right necessary to "liberty under our form of Government." *Id.*

[70] CONG. GLOBE, 39th Cong., 1st Sess. 476-78 (1866) (Senator Willard Salsbury of Delaware opposed the Civil Rights Act because he believed that if it passed it would invalidate the

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Senator Jacob Howard, who brought forward in the Senate the proposed Fourteenth Amendment,[71] explained that the terms "privileges" and "immunities," as used in the amendment, incorporated the personal rights protected by the Bill of Rights.[72] Further, Representative John Bingham "who authored Section 1 of the Fourteenth Amendment . . . made it clear that the Amendment would apply the Bill of Rights against the States."[73] Senator Howard and Representative Bingham's

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Delaware laws which prohibited African-Americans from possessing guns); CONG. GLOBE, 39th Cong., 1st Sess. 266-67 (1866) (Representative Henry S. Raymond from New York said that it would give an African-American "a right to defend himself, to bear arms."); CONG. GLOBE, 39th Cong., 1st Sess. 1121-22 (1866) (Senator Rogers—who resisted what he called "so odious a bill" because it would prevent the states from making laws which "provide that the punishment of death shall be inflicted upon a negro who shall commit a rape upon a white woman, which is not imposed upon a white man for the same offense"—recognized a fundamental "the right of self-defense, the right to protect our lives from invasion by others."); CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866) (Representative Henry Dawes of Massachusetts recognized that the Fourteenth Amendment "secured the right to keep arms in [any person's] defense.").

[71] Antieau, *supra*, note 66, at 115.

[72] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) ("the personal rights guaranteed and secured by the first eight amendments to the United States Constitution such as . . . the right to keep and bear arms.").

[73] Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1995).

understanding was shared by numerous congressmen.[74]

Now, the first section of the Fourteenth Amendment "is a general prohibition upon all States, as such, from abridging the privileges and immunities of the Citizens of the United States."[75] Thus, the authors of that amendment clearly understood its protections against state encroachment to extend to the well-understood, fundamental right to keep and bear arms codified in the Second Amendment.[76] The clear intent of those who authored the "privileges or immunities" clause of the Fourteenth Amendment stands in direct opposition to the holdings of the *Slaughter-House Cases*[77] and *United States v. Cruikshank*,[78] and the Court should overturn those decisions.[79]

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[74] *Id.* (finding that "[a]ll the leading figures in the House and Senate—Jacob Howard, James Wilson, and Thaddeus Stevens, for example—shared similar concerns. By my count there were about thirty speeches in the House and Senate sharing Bingham's concern.").

[75] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

[76] *See, e.g.*, Cottrol & Diamond, *supra*, note 62, at 1309 n.7 ("The intent of many of the Framers of the Fourteenth Amendment was to make the Second Amendment's right to keep and bear arms apply to the states through the privileges or immunities clause of the Fourteenth Amendment.").

[77] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

[78] *Cruikshank*, 92 U.S. at 553.

[79] John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW 462 (7th ed.) (*Slaughter-House Cases* "decision had the effect of eliminating the provision which was both historically and logically the one most likely to have intended to include within

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CONCLUSION

From the Founding era to the ratification of the Fourteenth Amendment, the terms "privileges" and "immunities" were consistently understood to extend to well-understood, fundamental rights, including the right to keep and bear arms. Article IV, section 2, was designed to protect this right from infringement by states against citizens of other states. The Second Amendment was written to protect this individual right from infringement by the federal government. The "Privileges or Immunities" clause of the Fourteenth Amendment protects this right for all citizens against the states. It is time for this Court to once again give effect to the privileges and immunities that the Framers sought to protect in the original Constitution, and

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its protections the guarantees of the Bill of Rights."); CURTIS, *supra*, note 11, at 175. Similarly, the court in *Cruikshank* tethered its holding on the *Slaughter-House Cases* and "utterly ignored the possibility that the Fourteenth Amendment" was meant to incorporate the Bill of Rights. *See Cruikshank*, 92 U.S. at 549; Lawrence, *supra*, note 3, at 38.

that the authors and ratifiers sought to protect in the Fourteenth Amendment.

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AMICUS CURIAE BRIEF

No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the Fourteenth Amendment prohibits state and local governments from exercising their police powers to prohibit the possession of handguns based on a judgment that these firearms are unreasonably likely to be misused by criminals.

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IN THE

Supreme Court of the United States

No. 08-1521

OTIS MCDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The United States Conference of Mayors is the official non-partisan organization of all United States cities with populations of 30,000 or more. Its members suffer a disproportionate share of gun violence in the United States and have a common interest in maintaining the flexibility to address this problem in the manner local officials determine to be most effective and appropriate.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and

SUMMARY OF ARGUMENT

The violent crime surge of the late 1980s and the early 1990s was largely a product of violent competition in urban drug markets. Intensive stop-and-frisk tactics targeting "hot spots" of crime proved to be critical in the fight against urban crime. Stringent gun control laws facilitate aggressive stop-and-frisk tactics by granting police authority to conduct a stop-and-frisk when they reasonably believe that a suspect is violating a gun control law. These tactics make it difficult for gang members and drug dealers to go about while armed, and constrict firearms markets as well. When gang members and drug dealers cannot obtain and carry firearms with impunity, in turn, their ability to use violence as a means of competing for control of drug markets is sharply circumscribed. The eighteenth-century version of the right to bear arms codified in the Second Amendment, however, imperils law-enforcement strategies with enormous promise in the fight against violent crime.

The first eight amendments are properly applied against state and local governments by virtue of the Fourteenth Amendment when they secure rights implicit in the concept of ordered liberty. The available historical evidence suggests that the eighteenth-century conception of the right to bear arms has given way to a more vigorous conception of state and local police powers. Moreover, in high-crime, gang-ridden neighborhoods, it may be effectively impossible to grant a right to bear arms while preserving ordered liberty. The Second Amendment's right to bear arms

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no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

accordingly is not enforceable against state and local governments by virtue of the Fourteenth Amendment.

ARGUMENT

I. GUN CONTROL LAWS PLAY CENTRAL ROLE IN FIGHTING VIOLENT CRIME.

A strong case can be made that stringent regulation of concealable weapons is critical to the ability of cities to control violent crime.

A. The Rise and Fall of Crime in Cities

The story of violent crime over the past few decades is one of a dramatic rise and fall:

> Over the past 20 years, the United States has seen dramatic swings in violent crime. Its path can be broken into three periods: a rise, a drop, and a flattening. The rise period began in 1985 when a five-year national decline from 1980 was reversed almost entirely by a sharp spike in violence by adolescent and young adult males. This spike outweighed an ongoing downtrend in violence among the much larger older population that began at least as early as 1980. The rise period ended around 1993 with the beginning of a pronounced and much discussed crime drop in which the murder rate declined by 42% and robbery by 44%, resulting in levels not seen since the 1960s. The drop was succeeded by a third period, a flattening of violent crime rates beginning around 2000.

Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 Am. Rev. Soc. Sci. 125, 125.

This crime spike was limited to major cities; during this period, homicide rates were essentially flat in cities with populations below 250,000, and the rise and subsequent fall in homicide was concentrated in cities with populations exceeding 1,000,000. *See* James Alan Fox, Jack Levin & Kenna Quinet, The Will to Kill: Making Sense of Senseless Murder 44-45 & fig. 3.2 (rev. 2008). Moreover, virtually all of the increase in homicide during this period was a consequence of an increase in handgun-related killings. *See* Comm. To Improve Res. Inf. & Data on Firearms, Nat'l Res. Council, Firearms and Violence: A Critical Review 61 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005) [hereafter "Firearms and Violence"].

B. The Crime Rise

There is something of a consensus among criminologists that the violent crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into cities and the violent competition that ensued. *See, e.g.*, Alfred Blumstein & Jacqueline Cohen, Diffusion Processes in Homicide 6-9 (Nat'l Crim. Just. Ref. Serv. July 17, 1999); Fox, Levin & Quinet, *supra* at 87-88; Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States, in* Crime & Justice: A Review of Research 1, 21-31 (Michael Tonry ed., 2002); Blumstein & Wallman, *supra* at 131.

Probably the best study of this issue—an examination of homicides in New York City during an eight-month period in 1988—found that 52.7% of homicides were drug-related, of those 60% involved crack, and 74% of drug-related homicides were classified as "systematic" or involving "the normally aggressive patterns of interactions within the systems of drug use and distribution" as opposed to homicides that were a function of the pharmacological effects of drugs or the economic compulsion to commit crimes to finance drug use. *See* Paul J. Goldstein *et al.*, *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 Contemp. Drug Probs. 651, 655-56, 681-82 (1989).

One type of criminal organization is particularly well suited to the violent competition typical of the drug trade—the criminal street gang. A persistent observation in the scholarly literature about gangs is their heavy involvement in drug distribution. *See, e.g.*, Herbert C. Covey, Scott Menard & Robert J. Franzese, Juvenile Gangs 51-54 (2d ed. 1997); James C. Howell & Scott H. Decker, U.S. Dep't of Justice, The Youth Gangs, Drugs, and Violence Connection 2-5, 7 (Jan. 1999). Ethnographic research indicates that gangs endeavor to organize drug markets in order to maximize the economic benefits of drug dealing while using the threat of violence to suppress competition. *See, e.g.*, Scott H. Decker & Barrick Van Winkle, Life in the Gang: Family, Friends and Violence 163-64 (1996); Martin Sanchez Jankowski, Islands in the Street: Gangs and American Urban Society 126-29 (1991); Felix M. Padilla, The Gang as an American Enterprise 129-66 (1993); Irving A. Spergel, The Youth Gang Problem: A Community Approach 47-49 (1995); Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 Contemp. Drug Probs. 31, 61-63 (1990).

Given the violent world of gang members, it should come as no surprise that they carry firearms at elevated rates. *See, e.g.*, Joseph F. Sheley & James D. Wright, In the Line of Fire: Youths, Guns, and Violence in Urban America 95-103 (1995); Terence P.

Thornberry et al., Gangs and Delinquency in Developmental Perspective 123-55 (2003). The same is true of drug traffickers. *See, e.g.*, Sheley & Wright, *supra* at 75-76, 83-93; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10, 29-31 (1995). A U.S. Department of Justice study of six large cities in the early 1990s, for example, found that "70% of the people who report using crack and selling drugs also report carrying a firearm, compared to 62% who use marijuana and sell drugs, 67% who use heroin and sell drugs, and 64% who use power cocaine and sell drugs." K. Jack Riley, *Homicide and Drugs: A Tale of Six Cities*, 2 Homicide Stud. 176, 199 (1998).

C. The Crime Drop

The explanation most frequently offered for the crime decline is that it was produced by a decrease in crack-related violence and a stabilization of drug markets. *See, e.g.*, Fox, Levin & Quinet, *supra* at 92-96; Blumstein & Wallman, *supra* at 130-31; Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Drop and Six that Do Not*, 18 J. Econ. Persp. 163, 179-81 (2004). Still, it is critical to understand why crack markets acquired a less violent character during the crime-decline period.

There is little evidence that a drop in the demand for crack cocaine explains the crime decline. Cocaine-related emergency room admissions, for example, actually rose from 1994 to 2001, as did the proportion that involved crack. *See* Substance Abuse & Mental Health Admin., Dep't of Health & Hum. Servs., Emergency Department Trends from the Drug Abuse Warning Network: Final Estimates 1994-2001, at 50, 53 fig. 3 (Aug. 2002). Trends in the price of crack were also not noticeably different during the crime-rise and crime-decline periods. *See* Off. of Nat'l Drug Control Pol'y, Executive Off. of the President, The Price and Purity of Illicit Drugs: 1981 through the Second Quarter of 2003, at 9-10, 29 fig. 10 (Nov. 2004). Indeed, the United States Department of Justice estimates that cocaine abuse and cocaine-related crime remain at levels exceeding any other drug. *See* Nat'l Drug Intelligence Center, U.S. Dep't of Justice, National Drug Threat Assessment: 2009, at 1-2 (Dec. 2008).

In contrast, the evidence that law enforcement played an important role in the crime drop is abundant. There was, for example, a statistically significant relationship between increasing numbers of police officers and decreases in violent crime during the crime-decline period. *See* Levitt, *supra* at 176-77.

As it happens, the 1990s saw alterations in the tactics employed by a great many local police departments that moved from reactive systems of patrol to proactive and aggressive patrol targeting specific high-crime areas. *See, e.g.*, John E. Eck & Edward G. McGuire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, *in* The Crime Drop in America 207, 228-45 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006) [hereafter "The Crime Drop in America"]; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 572-84 (1997). The experience of New York is illuminating.

Homicide in New York City rose from a rate of 4.7 per 100,000 in 1960 to a 1991 peak of 31.0 in waves that roughly corresponded to drug epidemics, with the increases concentrated in firearms-related homicide. *See* Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence, in* The Cambridge Handbook of Violent Behavior 688, 694-99 (Daniel J. Flannery *et al.* eds., 2007). New York was no outlier; in 1990, its homicide rate was at the average for large cities. *See* Franklin E. Zimring, The Great American Crime Decline 139 (2006). Yet, over the 1990s, the decline in New York in each of the seven categories of "index" crime tracked by the Federal Bureau of Investigation was approximately double of the decline in the rest of the country. *See* Andrew Karmen, New York Murder Mystery: The True Story Behind the Crime Crash of the 1990s 54 graph 2.2 (2000). By 2000, when compared to the other nine of the ten largest cities, New York had the lowest rates for five of the seven index crimes, and for murder, its rate in 2000 of 8.7 per 100,000 population was nearly half of the nine-city average of 16.3. *See Zimring, supra* at 139-41 & fig. 6.3. Since then, homicide in New York City has continued to decline to rates not seen in more than forty years. *See* Al Baker, *Homicide Near Record Low Rate in New York City*, N.Y. Times, Dec. 29, 2009, at A1.[2]

There were substantial increases in the size of New York City's police force during the crime-decline period, and a leading study found a statistically significant relationship between increases in the size of the force and crime reductions. *See* Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 Am. Econ. Rev. 584 (2000). Moreover, reductions in violent crime were concentrated in visible crimes committed in public places, suggesting that offenders were responding to the tactics of officers on patrol. *See* Zimring, *supra* at 141-42. Crime reductions were also concentrated in crimes involving handguns, suggesting that patrol tactics directed at handguns were responsible. *See* Steven F. Roth, *Decreasing Violent Crime in New York City: A Result of Vigorous Law Enforcement Efforts, Other, or Both?*, *in* Proceedings of the Homicide Research Working Group Meetings, 1997 and 1998, at 179, 179-83 (1999).

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[2] One paper has suggested that the crime decline in New York could reflect no more than a regression to the mean. *See* Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271, 287-97 (2006). The magnitude and duration of New York's homicide decline, however, does not exhibit the characteristics of a regression to the mean. *See, e.g.*, Karmen, *supra* at 17; Zimring, *supra* at 136-41; Michael D. Maltz, *Which Homicides Decreased? Why?*, 88 J. Crim. L. & Criminology 1489, 1490-96 (1998).

There were important changes in policing tactics in New York that corresponded to the crime drop. In 1991, not only did the size of New York's police force begin to increase, but it also adopted a community policing model that employed an increased emphasis on foot patrols and low-level disorder. *See* Civil Rights Bur., Off. of the Att'y Gen. of the St. of N.Y., The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of New York from the Office of the Attorney General 47-52 (Dec. 1, 1999) [hereafter "Stop and Frisk Report"]. In 1994, after the appointment of a new police chief, the department placed greater emphasis on aggressive stop-and-frisk tactics, misdemeanor arrests for drug and public-order offenses, and it adopted a system of statistical analysis that directed enforcement efforts at statistical "hot spots" of criminal activity and imposed greater managerial accountability. *See id.* at 52-56. Stop-and-frisk was ubiquitous in New York during the crime-decline period; the New York

Attorney General's review of the reports covering stops during 1998 and the first three months of 1999 disclosed 126,753 stops. *See id.* at tbl. I.A.5. By 2006, there were 506,491 reported stops. *See* Greg Ridgeway, RAND Corp., Technical Report: Analysis of Racial Disparities in the New York City Police Department's Stop, Question and Frisk Practices 7 (2007).

The conclusion that policing tactics were responsible for the crime drop is powerfully suggested by studies finding statistically significant relationships between decreases in crime and available proxies for the rate of search and seizure. *See, e.g.*, Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 Geo. J. L. & Pol'y 415, 442-53 (2006) (intensive patrols near public housing in New York resulted in substantial reductions in violent crime in nearby areas); Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. Law & Econ. 235 (2005) (citywide felony arrest rates had a statistically significant effect in reducing all seven index crimes, and misdemeanor arrests had a statistically significant effect on robbery, motor vehicle theft, and grand larceny); George L. Kelling & William H. Sousa, Jr., The Manhattan Inst., Do Police Matter?: An Analysis of New York City's Police Reforms 6-10 (1999) (finding an inverse relationship between New York precinct's misdemeanor arrests between 1989 and 1998 and the rate of violent crime).

Ethnographic evidence supports this view of the efficacy of New York's aggressive stop-and-frisk tactics. One study of Brooklyn neighborhoods concluded that after police crackdowns beginning in 1992, gang drug dealing was largely driven indoors, producing a decline in violent crime. *See* Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. Crim. L. & Criminology 1233, 1267-74 (1998). Another concluded that aggressive policing in the 1990s, in particular stop-and-frisk tactics that focused on discovering concealed handguns, reduced crime by disrupting open-air drug sales. *See* Bruce D. Johnson, Andrew Golub & Eloise Dunlop, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, *in* The Crime Drop in America, *supra* at 164, 185-89. An ethnographic study of the Bushwick neighborhood similarly concluded that aggressive police tactics employed since 1992 pushed drug dealing indoors. *See* Terry Furst *et al.*, *The Rise of the Street Middleman/Woman in a Declining Drug Market*, 7 Addiction Res. 103, 108-09, 126-27 (1999). Another researcher concluded: "The shift indoors reduced the risk of being 'ripped off', including murderously . . . . The effects of this shift can be directly related to the reduction in homicide. As one police officer put it: 'There are no more drive-by shootings. There's no one on the corner to drive by and shoot.'" *See* Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 Brit. J. Criminology 531, 54 (1999).

The 1994 management reforms stressed the role of weapons searches in the new policing strategy. *See* Stop and Frisk Report, *supra* at 53. Moreover, "the result of persistent stop, frisk, and arrests meant that young men thought twice before carrying their guns . . . . That guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-

1990s." *Bowling, supra* at 546.[3] The evidence on this point is not limited to New York. An impressive number of studies throughout the nation have found that aggressive policing at hot spots with an emphasis on finding guns reduces levels of violent crime. *See* Firearms and Violence, *supra* at 230-35; Blumstein & Wallman, *supra* at 136-37; Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn't, What's Promising*, *in* Perspectives on Crime and Justice: 1999-2000 Lecture Series 69, 78-79 (Nat'l Inst. of Justice, U.S. Dep't of Justice 2001); Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention*, *in* Evidence-Based Crime Prevention 295, 308-10 (Lawrence W. Sherman et al. eds., rev. 2006).[4]

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[3] Jeffrey Fagan and Garth Davies, examining the stop-and-frisk data obtained by the New York Attorney General, found that the rate of stops in a precinct in 1998 did not predict homicide rates in the first three months of 1999. *See* Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, *in Guns*, Crime, and Punishment in America 191, 205-06 (Bernard E. Harcourt ed., 2003). This data, however, came relatively late in New York's crime drop, and given the short span of time and the small number of homicides in any given precinct, this finding is not particularly probative.

[4] Some architects of the New York policing strategy of the 1990s single out as responsible for the crime drop the use of "Broken Windows" policing tactics that focus on reducing signs of physical and social disorder in the streetscape. *See* William Bratton & Peter Knobler, Turnaround: How America's Top Cop Reversed the Crime Epidemic 152-56, 228-29, 233-39 (1998); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 Fordham Urb. L.J. 567, 573-79 (2000). The Broken Windows thesis, however, is not a promising explanation for the crime drop; most studies to date of the theory have failed to provide it with convincing support. *See* Comm. To Review Res. On Police Pol'y and Practices, Nat'l Res. Council, Fairness and Effectiveness in Policing: The Evidence 229-30 (Wesley Skogan & Kathleen Frydl eds., 2005).

With stop-and-frisk at high levels at targeted "hot spots," outdoor drug markets could be expected to go into decline as suspects perceive elevated risks in carrying guns or drugs, or in attempting to purchase the latter. If gang members and drug sellers cannot go about armed, in turn, their ability to defend their turf against rival gang or drug dealers, or simply to walk about with the confidence that they can defend themselves if they encounter a rival, will be substantially reduced. In short, high rates of stop-and-frisk may make gang and drug crime more risky and less lucrative by increasing the threat of arrest and the difficulty of establishing stable drug-market monopolies.

D. The Importance of Gun Control Laws to the Crime Decline

As we explain above, there is ample evidence that aggressive stop-and-frisk tactics played an important role in the crime decline. Gun control laws, in turn, play an important role in the ability of police departments to utilize these tactics.

Stop-and-frisk tactics are regulated by the Fourth Amendment's prohibition on "unreasonable search and seizure." U.S. Const. amend. IV. A forcible stop and brief detention is considered constitutionally reasonable when the officer reasonably suspects that criminal activity is afoot. *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 269-74 (2000); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989). A frisk during such a stop is considered reasonable when an officer reasonably suspects that the subject may be armed and dangerous. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993); *Michigan v. Long*, 463 U.S. 1032, 1046-50 (1983).

Firearms regulation plays a central role in enhancing police authority to engage in stop-and-frisk tactics. When applicable law bans the possession or carrying of firearms, a stop and frisk conducted by an officer who reasonably suspects that an individual is illegally carrying a firearm—such as a suspicious bulge in a waistband—is considered constitutionally reasonable. *See, e.g.*, *United States v. Black*, 525 F.3d 359, 364 (4th Cir. 2004); *United States v. Mayo*, 361 F.3d 802, 807-08 (4th Cir. 2004); *United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996). When applicable law generally permits individuals to carry firearms, however, the Fourth Amendment does not permit a stop-and-frisk even when there is reason to believe that a suspect is armed or dangerous because there is no indication of a violation of law. *See, e.g.*, *United States v. Burton*, 228 F.3d 524, 528-30 (4th Cir. 2000); *United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000). *See generally* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.6(a) (4th ed. 2004).

In New York, state law prohibits possession of a handgun without a license and generally requires that handguns be kept within the licensee's home or place of business except for those engaged in law enforcement. *See* N.Y. Penal Laws § 400.2 (McKinney 2007). In New York City, an additional permit must be obtained to possess or carry a handgun. *See id.* § 400.0(6). The issuance of these permits is highly discretionary and generally requires an applicant to demonstrate some extraordinary danger. *See* Rules of the City of N.Y. tit. 38, §§ 5-01 to -04 (2007). The New York authorities sparingly exercise their discretion to issue permits, creating what amount to an effective handgun ban. *See, e.g.*, Jesse Matthew Ruhl, Arthur L. Rizer III & Mikel J. Wier, *Gun Control: Targeting Rationality in a Loaded Debate*, 13 Kan. J. L & Pub. Pol'y 413, 449-50 (2004).[5] Because individuals are rarely permitted to carry guns in New York, a stop-and-frisk is permissible when an officer reasonably suspects that an individual is carrying a firearm. *See* Stop and Frisk Report, *supra* at 36-40.

The data makes evident the importance of weapons searches to New York's regime of stop-and frisk:

Suspected Charge	Stops	% of Stops
Violent Crime	23,587	18.6
Weapon	56,499	44.6
Property Crime	14,822	11.7
Drug Sale/Possession	10,684	8.4
Misdemeanor/ Quality of Life	9,731	7.7
Other	3,818	3.0
Missing Charge	7,612	6.0

Stop and Frisk Report, *supra* at App. tbl. I.A.5. Thus, weapons searches were central to the New York stop-and-frisk strategy. New York's restrictive gun control laws, in turn, facilitated this strategy; without such restrictive laws, the most important legal basis for stop-and-frisk would have disappeared. Moreover, although some have questioned whether New York's stop-and-frisk practices reflect racial profiling, the most thorough study to date found no evidence of racial discrimination. *See* Ridgeway, *supra* at 13-19.

Increasing the authority of the police to engage in stop-and-frisk tactics may not be the only means by which New York's gun control laws contribute to the success of its policing tactics. Because it is difficult to purchase a handgun legally in New York, it may be the case that stop-and-frisk tactics are especially effective because of the difficulty in replacing handguns that are seized by the police. *See* Zimring, *supra* at 157-58. Although there is no study of New York gun markets on this point, a study of Chicago found "the existence of substantial transaction costs in the underground gun market," and that "the most likely explanation for these transaction costs is that the gun market is both illegal and 'thin,' that is, has few buyers and sellers. The illegality of the gun market increases search costs for prospective trading partners." Philip J. Cook *et al.*, *Underground Gun Markets*, 117 Econ. J. F588, F589 (2007).[6]

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[5] As petitioners' *amici* acknowledge, only some 18,000 permits have issued, ILEETA Br. 28, in a city of over 8,000,000.

Thus, it is reasonable to believe that when a jurisdiction generally bans the possession and sale of handguns, authorizing search for and seizure of illegal guns and raising the cost and difficulty of replacing handguns once seized, offenders become less likely to carry them in places where they are vulnerable to stop-and-frisk tactics. Similarly, when it is illegal to carry rifles and other non-concealable firearms in public, the risk that violent public confrontations will turn deadly is reduced. And, as we have seen, when firearms disappear from public places, levels of violence are likely to subside.

Some of petitioners' *amici* attack the efficacy of Chicago's gun-control laws by observing that its crime rate exceeds national averages. *See* Heartland Inst. Br. 6-8; ILEETA Br. 17-22. In fact, studies on the efficacy of handgun bans have reached conflicting results. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2857-61 (2008) (Breyer, J., dissenting). More fundamentally, *amici* confuse cause and effect. It was a rising crime rate that produced the political will to enact Chicago's handgun ban; the persistence of violent crime produced the political will to retain it. In fact, high levels of violent crime in Chicago are attributable to the high levels of gang membership and intergang competition in Chicago. *See* Ill. Crim. Just. Inf. Auth., Street Gangs and Crime: Patterns and Trends in Chicago 10-12, 14-16, 19-22 (Sep. 1996). Accordingly, the relevant consideration is not Chicago's absolute crime rate, but whether the rate would be higher without its handgun ban. On this point, the data we discuss above suggests an affirmative answer. In any event, even petitioners and their *amici* do not question the role that New York's gun control laws have played in reducing violent crime in that city.

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[6] Some of petitioners' *amici* seriously distort this study by taking isolated sentences out of context. *See* ILEETA Br. 25.

II. THE FOURTEENTH AMENDMENT DOES NOT PROTECT THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

This Court has used varying formulations in describing its approach to incorporating into the Fourteenth Amendment the rights enumerated in the first eight amendments. When it incorporated the right to a jury in criminal cases and the protection against Double Jeopardy, the Court considered whether the right at stake was "fundamental to the American scheme of justice." *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). When it incorporated the rights to counsel, to confront adverse witnesses, and to compulsory process, the Court asked whether these rights were "fundamental and essential to a fair trial." *Washington v. Texas*, 388 U.S. 14, 17 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). When it incorporated the Fifth Amendment right against compelled self-incrimination, the Court wrote that "the American system of justice is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

These decisions dealt with the rights of an accused in the adjudicative process; hence the references to rights considered fundamental to the administration of justice are natural. The Second Amendment, in contrast, addresses conduct outside the courtroom. Accordingly, the Court's decisions regarding constitutional rights directed at primary conduct are more instructive, such as the decision to incorporate the Fourth Amendment's protection against unreasonable search and seizure against the States because "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.'" *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (internal quotations omitted)). Similarly, the incorporation of the First Amendment rights of free speech, freedom of the press, free exercise of religion and the right to peaceably assemble was premised upon these rights being "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Even the cases involving trial rights have been attentive to question whether a given right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

Whatever the formulation, it is essential to characterize the right at stake in order to determine whether it merits incorporation. To be sure, the right to bear arms was thought sufficiently fundamental warrant inclusion in the first set of constitutional amendments, but if that were sufficient for incorporation, the Court would have adopted a regime of total incorporation rather than the approach we describe above. Thus, a more discriminating analysis is required.

A. The Second Amendment Protects A Largely Obsolete Eighteenth-Century Right.

In *Heller*, this Court, adopting what it characterized as "the original understanding of the Second Amendment," invalidated the District of Columbia's prohibition on the possession of handguns. 128 S. Ct. at 2788, 2817-22. The Court defined the right to "keep" arms as the right to possess them, *id*. at 2792, and it defined the right to "bear" arms as the right to "carry[] for a particular purpose—confrontation." *Id*. at 2793. The Court added that the term includes "the carrying of the weapon . . . for the purpose of 'offensive or defensive action,'" *id*. at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). The Court considered only the application of the Second Amendment to the federal government; it expressly reserved decision on whether the Second Amendment is applicable to state and local governments by virtue of the Fourteenth Amendment. *Id*. at 2813 n.23.

The scope of Second Amendment rights recognized in *Heller* is not unlimited. For example, the Court wrote that the Second Amendment "does not protect those weapons not typically possessed by law-abiding for lawful purposes, such as short-barreled shotguns," 128 S. Ct. at 2816, or otherwise "dangerous and unusual weapons." *Id.* at 2783, 2817. The Court also noted that "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or its state analogues," *id.* at 2816, and added that "nothing in our opinion should be taken to cast doubt on prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings," *id.* at 2816-17. The Court also assumed that cities can require that handguns be licensed. *Id.* at 2819. Still, *Heller* creates the alarming possibility that gang members have a Second Amendment right to carry firearms, at least if visible. Distressingly, the Court noted that early nineteenth-century cases had understood the Second Amendment to secure a right to carry firearms openly in public. *See id.* at 2809.

Accordingly, if applicable to state and local governments and confined to framing-era understandings, the eighteenth-century conception of the right to bear arms would imperil the use of stop-and-frisk tactics against drug dealers and gang members, at least as long as they carry firearms openly and have not been previously convicted of a felony or otherwise fall within the scope of the regulatory authority acknowledged in *Heller.*[7] This would facilitate violent competition in the drug trade, terrorizing law-abiding citizens, with police left helpless as long as gang members or drug dealers do not sell drugs or otherwise breach the peace in the view of officers on patrol. Cities could license firearms, but in the context of vehicles, this Court has held that the Fourth Amendment forbids investigative stops to check the driver's license and registration of a vehicle absent particularized reason to believe that there has been a violation of a licensing or other law. *See Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979). *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 40-48 (2000) (invalidating roadblocks to check vehicles for guns and drugs in high-crime areas).

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[7] Notably, petitioners' counsel has filed suit challenging under the Second Amendment the District of Columbia's prohibition on carrying handguns in public places. *See Palmer v. District of Columbia*, No. 1-09-cv-01482 (D.D.C. filed Aug. 6, 2009).

Equally alarming, police-power justifications for limiting the right to carry firearms are given all too little sway under the Second Amendment's eighteenth-century conception of the right to bear arms. In *Heller*, the Court rejected Justice Breyer's view that reasonable gun-control regulations should be upheld, 128 S. Ct. at 2817 n. 27, 2821, as well as a balancing test that would weigh the right to bear arms against police-power justifications for regulation not rooted in framing-era understandings: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 2821.

Accordingly, if incorporated within the Fourteenth Amendment, there is a serious risk that the eighteenth-century conception of the right to bear arms could become a critical obstacle to the cities' efforts to combat violent crime. History, however, suggests that this conception is far from a fundamental characteristic of our nation's approach to ordered liberty.

As early as the 1820s, American law began to retreat from the notion of a right to carry firearms in case of confrontation, as states adopted prohibitions on carrying concealed weapons unknown in the framing era in response to a surge in violent crime. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 138-44 (2000). By the framing of the Fourteenth Amendment, police-power justifications for reasonable regulation of the right to keep and bear arms were well accepted. For example, shortly after it approved what became the Fourteenth Amendment, the Thirty-Ninth Congress abolished the militia in most southern states and prohibited any effort to arm militias in those states. *See* Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487 (1866). The measure's sponsors dismissed Second Amendment objections, arguing that the prohibition was justified by armed groups "dangerous to the public peace and to the security of Union citizens in those states." Cong. Globe, 39th Cong., 1st Sess. 1849 (1866) (Sen. Lane). *Accord id.* at 1848-49 (Sen. Wilson).[8] This legislation was one of a series of gun control measures undertaken at the time in an effort to suppress violence in the then-turbulent south. *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621-23 (2006).

Since the Fourteenth Amendment's ratification, reasonable police-power regulation of firearms has been the rule, not the exception. As Adam Winkler has demonstrated, although forty-four states afford constitutional protection for the right to bear arms, over the past century, state courts have reached consensus on a reasonable regulation standard that carefully weighs the justification for the regulation at issue against the extent of the burden it creates on the right to bear arms. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87, 711-12, 716-17 (2007).

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[8] The lone concession that the sponsors made was to delete language requiring that militias be "disarmed." *See* David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 417-20 (2008).

Thus, history has not been kind to the eighteenth-century conception of the right to bear arms explicated in *Heller*. To the contrary, the reasonableness test rejected in *Heller* has been the rule, not the exception, throughout most of our nation's history. There is accordingly ample reason to doubt that Second Amendment rights are sufficiently fundamental to warrant incorporation within the Fourteenth Amendment.

Petitioners have a different view of the relevant history. For example, they note that in the wake of the Civil War, there was concern about efforts to disarm the newly-freed slaves which produced statutory protection for the right to bear arms in the Freedmen's Bureau Act. *See* Pet. Br. 11-12. The Act provided:

> *[I]n every State or district where the ordinary course of judicial proceedings has been interrupted by rebellion, and until the same shall be fully restored* . . . the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real, and personal, including the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district *without respect to race or color, or previous condition of slavery.*

Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866) (emphasis supplied). The first italicized passage, however, indicates that this legislation was not an effort to articulate the fundamental rights of citizens but an emergency measure applicable only in areas where rebellion persisted. The second indicates this provision was an antidiscrimination provision—if the statute were read to recognize a substantive right, the second italicized passage becomes surplusage. Indeed, many of the statements in the Thirty-Ninth Congress about the right to bear arms are, at best, ambiguous; it is unclear whether the concern is about substantive rights or selective and discriminatory treatment of freedmen. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 3210 (1866) (Rep. Julian) ("Florida makes it a misdemeanor for colored men to carry weapons without a license . . . . South Carolina has the same enactments . . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.").

Beyond this, petitioners argue that the Fourteenth Amendment's framers considered the first eight amendments to the Constitution to be protected against the states by virtue of the Amendment's "Privileges or Immunities" Clause, U.S. Const. amend. XIV, § 1. This claim, however, founders on the proposition "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 128 S. Ct. at 2788 (internal quotations omitted). The critical inquiry accordingly involves "the *public understanding* of a legal text," *id.* at 2805 (emphasis in original).

Although petitioners and their *amici* scour the legislative history of the Fourteenth Amendment, they can identify only two legislators—Senator Howard and Representative Bingham—who expressly stated that the Privileges or Immunities Clause incorporated the first eight amendments. *See* Pet. Br. 24-25, 29-30. Others denied that the phrase had any settled meaning. *See* Cong. Globe, 39th Cong., 1st Sess. 2466 (1866) (Rep. Boyer); *id.* at 3039 (Sen. Hendricks); *id.* at 3041 (Sen. Johnson). Indeed, one eminent scholar found "some support in the legislative history for no fewer than four interpretations of the . . . Privileges and Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the States." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008). It is far from clear what the public made of this cacophony.

The Fourteenth Amendment's Privileges or Immunities Clause was sufficiently similar to Article IV's Privileges and Immunities Clause, *see* U.S. Const. art. IV, § 2, cl. 1, that the public might have thought the new clause echoed its Article IV predecessor; even Bingham and Howard looked to Article IV as a model for the new amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (Rep. Bingham); *id.* at 2765 (Sen. Howard). Yet, the opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), was, as petitioners acknowledge, the "most-influential early definition of these 'privileges and immunities,'" Pet. Br. 16, and it did not identify the Second Amendment, or indeed any of the first eight amendments, as among the privileges and immunities of citizenship. *See* 6 Fed. Cas. at 551-52. The leading legal treatises of the day, citing *Corfield*, characterized the Article

IV protection for the privileges and immunities of citizenship as a protection for citizens of one state when traveling to another against discrimination with respect to common-law rights regarded as fundamental. *See, e.g.*, Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 15-16 (1868).

Accordingly, the public could have understood the new Privileges or Immunities Clause as extending the Article IV nondiscrimination obligation to all citizens, even when in their state of residence. Indeed, some scholars have argued that the Fourteenth Amendment's Privileges or Immunities Clause should was originally understood as an antidiscrimination provision, while the Fourteenth Amendment's Equal Protection Clause provided specific recognition of a right to nondiscriminatory protection from private lawbreakers. *See* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 342-51 (1985); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 Yale L.J. 1385, 1397-432 (1992). Thus, statements in the congressional debates suggesting that the Fourteenth Amendment would permit enforcement of existing constitutional rights identified by petitioners and their *amici*, *e.g.*, Pet. Br. 32, may reflect no more than an understanding that the new amendment would broaden the scope and enhance the enforceability of the Article IV nondiscrimination requirement. *See* Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 Am. J. Leg. Hist. 41, 50-61 (1996).

The ratification debates also provide important evidence of the public's understanding. Although petitioners and their *amici* discuss the handful of incorporationist statements made during ratification, more evenhanded inquiries have concluded that in the main, the ratification debates characterized the Fourteenth Amendment as embodying the nondiscrimination principle of the recently-enacted Civil Rights Act of 1866 rather than extending the Bill of Rights to the states. *See, e.g.*, James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111, 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55 (1997); James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 445-54 (1985); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 84-126 (1949); George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know about Section 1?*, 18 J. Contemp. Legal Issues_(forthcoming 2009), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392961*. Indeed, even a leading incorporation advocate acknowledges that when the *New York Times* gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the States . . . there was no mention of incorporation." Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in* 1866-67, 68 Ohio St. L.J. 1509, 1595 (2007). At best, "the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights." *Id.* at 1601.

Significantly, the Fourteenth Amendment's ratification produced little evidence of an incorporationist understanding. Ratification, for example, produced no movement in the states toward bringing their laws into compliance with the first eight amendments; to the contrary, soon after ratification, five states modified their grand jury requirements in ways inconsistent with the Fifth Amendment's Grand Jury Clause. *See* George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1654-55 (2007).

Leading legal scholars of the era also failed to perceive that the Fourteenth Amendment had made the first eight amendments applicable to the states. *See, e.g.*, 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §§ 99, 145, 891-92, 946, 981 (2d ed. Rev. 1872); 2 Joseph Story, Commentaries on the Constitution of the United States §§ 1934-37 (4th ed. Thomas L. Cooley rev. 1873); 1 Francis Wharton, A Treatise on the Criminal Law of the United States: Principles, Pleading and Evidence §§ 213, 573 (7th ed. 1874); 3 *id.* § 3405; *The Right to Keep and Bear Arms for Public and Private Defense* (Part 3), 1 Cent. L.J. 295 (John F. Dillon ed., 1874). *See also* Donald A. Dripps, About Guilt and Innocence: The Origins, Development, and Future of Constitutional Criminal Procedure 30-34 (2003) (surveying framing-era legal scholarship). Similarly, in the wake of ratification, this Court wrote: "The second amendment declares that it shall not be infringed; but this, as we have seen, means no more than that it shall not be infringed by Congress." *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 553 (1875). Of the Fourteenth Amendment, the Court observed: "The equality of the rights of citizens is a principle of republicanism . . . . This the amendment guarantees, but no more." *Id.* at 555.

If there had been a widely-shared public understanding that the Fourteenth Amendment had rendered the first eight amendments applicable to the states, it is passing strange that the states themselves, so many leading scholars of the era, and even this Court failed to get the message. The available historical evidence is, at best, in deep conflict. It supplies no firm basis for incorporation.[9]

B. Second Amendment Rights Are Not an Aspect of Ordered Liberty.

As we explain above, the historical evidence reflects no consistent acceptance of the eighteenth-century conception of the right to bear arms. By the time of the Fourteenth Amendment, police-power justifications for reasonable restriction of the right to keep and bear arms unknown during the framing era had gained widespread acceptance. Beyond that, the consequences for recognizing an eighteenth-century right poorly suited to the conditions found in our nation's cities are also relevant to the incorporation inquiry.

As it incorporated the Sixth Amendment right to jury trial in criminal cases in *Duncan*, this Court noted "the long debate . . . as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings," but distinguished the unincorporated Seventh Amendment right to a civil jury by noting that "most of the controversy has centered on the jury in civil cases." 391 U.S. at 156-57, 157. *Heller*, for its part, acknowledged as "debatable" the question whether "the Second Amendment is outmoded in a society in which our standing army is the pride of the Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem." 128 S. Ct. at 2822. The potential obsolescence of the eighteenth-century conception of the right to bear arms accordingly counsels against incorporation of the Second Amendment within the Fourteenth.

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[9] For a more elaborate argument on this point, *see* Lawrence Rosenthal, *Second Amendment Plumbing after* Heller: *Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 48-78 (2009).

Indeed, in high-crime neighborhoods, the Second Amendment is something of a non sequitur. The Second Amendment states that "[a] well-regulated militia," that is, a populace subject to "proper discipline and training," *Heller*, 128 S. Ct. at 2800, is "necessary to the security of a free state," and for that reason "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The preamble and the operative clause may have been easy to reconcile in eighteenth-century America, but in contemporary cities, they will often be at odds. In high-crime drug and gang-ridden communities, gang members and drug dealers are all too likely to exploit a right to bear arms to terrorize the community and engage in a violent competition for the spoils of the drug trade; this is not a world in which one can speak of "proper discipline and training" of a "well-regulated" urban "militia." Contemporary street gangs likely bear greater resemblance to the violent militias that led the Reconstruction Congress to effectively suspend the right to bear arms than to any eighteenth century conception of a "well-regulated militia." In all too many cities, it may be effectively impossible to grant a right to bear arms while preserving the "security of a free state."

Under a reasonableness test of the type that has prevailed in the nineteenth and twentieth centuries, a ban on handguns in a high-crime, gang-ridden area could readily be sustained; whatever the marginal benefits of handguns for self-defense and other legitimate purposes as compared to rifles and other weapons more difficult to conceal, *see Heller*, 128 S. Ct. at 2818, handguns are far more prone to unlawful use as concealed weapons, and as we have seen, there is reason to believe that a handgun ban will increase the cost and difficulties facing gang members seeking to compete in the violent drug trade. Indeed, as *Heller* acknowledged, there is a serious case to be made for the wisdom of handgun bans in urban areas. *See* 128 S. Ct. at 2822.[10]

To be sure, the problems posed by recognition of a right to carry firearms in case of confrontation can exist in jurisdictions of all sizes. Still, our jurisprudence reflects a conception of federalism in which state and local governments "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v.*

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[10] Some of the petitioners' *amici* argue that handguns yield substantial benefits since they are frequently used for purposes of self-defense. *See* ILEETA Br. 3-11. If so, it is unclear that long guns cannot provide equivalent benefits; when they criticize the efficacy of long guns, *amici* are conspicuously unable to supply supporting data. *See id.* at 40-44. In any event, the reliability of studies that depend on self-reports of defensive gun use is doubtful. *See, e.g.*, Philip J. Cook & Jens Ludwig, U.S. Dep't of Justice, Guns in America: National Survey on Private Ownership and the Use of Firearms 8-11 (May 1997); David Hemenway, Private Guns, Public Health 66-69, 239-40 (2004).

Florida, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *Accord, e.g., United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973). Cities facing especially difficult law-enforcement problems should be able to devise innovative solutions. It is hardly a fundamental aspect of our jurisprudence that an eighteenth-century conception having limited relevance to contemporary America must control contemporary law enforcement policy.[11]

This conclusion does not mean that the Fourteenth Amendment holds nothing for a right of defense. If the eighteenth-century version of the right to bear arms is not sufficiently fundamental to merit incorporation, a more limited right of defense may nevertheless qualify for constitutional protection under the Fourteenth Amendment. *Heller* concluded that Second Amendment embodied what was widely thought to be a natural right of defense. *See* 128 S. Ct. at 2793-94, 2798-99, 2805, 2807. Given its historical grounding, the right to defend oneself, one's family, and one's property may well be one of the unenumerated rights that qualifies for Fourteenth Amendment protection. If so, a complete prohibition on the possession in one's home of any type of weapon reasonably useful for defense could impose an impermissible burden on this right. Such a right of defense, however, need not go so far as a "right to possess and carry weapons in case of confrontation," *Heller*, 128 S. Ct. at 2797, which, as we explain above, could wreak havoc in high-crime communities. A right carefully calibrated to balance the competing interests is consistent with the longstanding approach used to assess firearms rights, rather than the eighteenth-century version of the right to bear arms at issue in *Heller*.

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[11] For a more elaborate defense of this submission, *see* Rosenthal, *supra* at 84-92.

There is doubtless appeal to the notion that the populace should be able to defend itself from lawbreakers. There is less appeal to the notion that in a contemporary city of a type utterly alien to the eighteenth-century Framers, everyone should have a right to carry firearms in case of confrontation. In a community defined by conflict over street gang territorial prerogatives, a right to bear arms seems more likely to imperil ordered liberty than secure it.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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OTIS MCDONALD, ADAM ORLOV, COLLEEN LAWSON,
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AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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INTEREST OF *AMICI CURIAE*[1]

Each of the *amici curiae* is a law professor who has published a book or law review article on the Fourteenth Amendment and the Bill of Rights. *Amici* teach courses on constitutional law and have devoted significant attention—in some cases, for several decades—to studying the Fourteenth Amendment.

Amici submit this brief to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case.

Amici do not, in this brief, take a position on whether the particular regulation challenged in this case is constitutional in light of the individual privilege to bear arms, which, as the Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008), may be regulated to a certain extent.

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[1] Counsel for all parties received notice of *amici*'s intent to file this brief at least ten days prior to the due date; all parties have consented to this filing. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

The question in this case is whether the individual right to keep and bear arms recently recognized in *District of Columbia v. Heller*, and held applicable to the federal government, must also be protected against state infringement. The textually and historically accurate way to determine if the states must respect an individual right to keep and bear arms is to examine the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.

Amici submit to the Court that the original meaning of the Privileges or Immunities Clause protected substantive, fundamental rights against state infringement, including the constitutional right of an individual to keep and bear arms. Indeed, the framers of this Clause specifically desired to protect the right to bear arms so that newly freed slaves and unionists would have the means to protect themselves, their families and their property against well-armed former rebels and chose language whose meaning would accomplish this end.

Precedent does not preclude the Court from adopting this faithful interpretation. The *Slaughter-House Cases* and its progeny, which held that the Fourteenth Amendment does not apply the Bill of Rights to the states, have been completely undermined by subsequent Supreme Court decisions.

Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court's jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause. *Slaughter-House* read the Privileges or Immunities Clause so narrowly as to essentially read it out of the Amendment, but "[v]irtually no serious modern scholar—left, right, and center—

thinks that this is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

ARGUMENT

I. THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS SUBSTANTIVE FUNDAMENTAL RIGHTS AGAINST STATE INFRINGEMENT.

The Privileges or Immunities Clause was written and ratified to secure the substantive liberties protected by the Bill of Rights, as well as other fundamental rights. By 1866, the words "privileges" and "immunities" were commonly used to refer to core, inalienable rights, including those set out in the Bill of Rights. History shows that leading proponents and opponents alike of the Fourteenth Amendment understood the words of the Clause to protect substantive fundamental rights, including the rights enumerated in the Constitution and Bill of Rights.

A. Crafted Against A Backdrop Of Rights-Suppression In The South, The Privileges Or Immunities Clause Was Written To Protect Substantive Fundamental Rights.

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make former slaves into full and equal citizens in the new republic and secure for the nation the "new birth of freedom" President Lincoln promised at Gettysburg. 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed. 1953). The opening words of the Fourteenth Amendment marked a dramatic shift from pre-war conceptions of federalism, declaring federal citizenship paramount rather than derivative of state citizenship, and overruled the Supreme Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), which held that a former slave was not a U.S. citizen under the Constitution because of his race.

In addition to declaring equal, birthright citizenship, the Amendment guaranteed federal protection of substantive fundamental rights. The framers of the Fourteenth Amendment were keenly aware that southern states had been suppressing some of the most precious constitutional rights of both slaves and their allies. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998) ("The structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women too.").

Starting around 1830, southern states enacted laws restricting freedom of speech and press to suppress anti-slavery speech, even criminalizing such expression; in at least one state, writing or publishing abolitionist literature was punishable by death. These laws applied broadly, forbidding any person—whether slave or free—from engaging in expression critical of slavery. *Id.* at 160-61; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30, 40 (1986); MICHAEL KENT CURTIS, FREE SPEECH: THE PEOPLE'S DARLING PRIVILEGE 295-96 (2000). Political speech was repressed as well, and Republicans could not campaign for their candidates in the South. CURTIS, NO STATE SHALL ABRIDGE, at 31.

Flagrant denials of freedom of speech were most often cited, but they were hardly the only violations of fundamental rights that the Fourteenth Amendment was designed to prevent. Slaves could not freely practice their chosen religion, possess arms, or own property. Fundamental aspects of personal liberty and personal security were denied to the slaves on a daily basis. Whippings, forced separation of husbands and wives and of parents and children, rape and compulsory childbearing, were all a central part of the lives the slaves led. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 504 (1866) ("He had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.") (Sen. Howard); RANDALL KENNEDY, RACE, CRIME AND THE LAW 77 (1998) ("Long after maiming, branding, ear cropping, whipping, [and] castration...had waned as an approved method of chastising whites, they remained available for the correction of slaves.").

To prevent these sorts of abuses, and new ones arising after the Civil War, the framers of Section One of the Fourteenth Amendment chose language specifically intended to protect the full panoply of fundamental rights:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[2]

The "privileges or immunities" language was chosen after an exhaustive investigation of the abuses of freedmen and Unionists by the Joint Committee on Reconstruction, composed of members of both the House and Senate (including Sen. Howard and Rep. Bingham). The Committee issued their findings in a June 1866 report, 150,000 copies of which were distributed widely throughout the country. *See* KENDRICK, at 265. The report confirmed the systematic violation of fundamental rights by southern states, demanding "changes of the organic law" to secure the "civil rights and privileges of all citizens in all parts of the republic." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xxi (1866).

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[2] U.S. CONST. amend. XIV, § 1. This sentence of Section One was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. On April 21, 1866, fellow committee member Thaddeus Stevens proposed an amendment with the following as its first section: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 83-84 (1914). The fifth section of Rep. Stevens' proposal empowered Congress to enforce the amendment. Later the same day, Rep. Bingham successfully moved that the language that would eventually become the second sentence of Section One be added. *Id.* at 87. Thus, for a time, Rep. Bingham's language coexisted with Rep. Stevens' exclusively nondiscrimination provision, suggesting that their meanings were not identical. Eventually, on April 28, the Committee approved and sent to the full Congress the amendment with Rep. Bingham's Section One, *id.* at 106-07; the Citizenship Clause was added later in the Senate.

The problems motivating the framers of the Privileges or Immunities Clause—for example, deprivations of the right to free speech, the right to bear arms, and other denials of liberty and personal security in the southern states—are strong evidence that the Clause was drafted to protect fundamental rights against state infringement. As discussed in the next sections, the public meaning of the words "privileges" and "immunities" and the floor debates over the Amendment confirm the intent to use the Clause to protect substantive rights in the States.

B. By 1866, The Public Meaning Of "Privileges" And "Immunities" Included Fundamental Rights.

The words Bingham chose—"privileges or immunities"—to protect fundamental rights against state infringement carried established public meaning. By 1866, the privileges or immunities of citizenship were understood to include the rights and liberties already protected by the Constitution, such as the right to keep and bear arms, as well as other rights inherent in full and equal citizenship. In addition to providing the textual basis for protection of the liberties in the Bill of Rights, the Clause is "the natural textual home for...unenumerated fundamental rights." Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990). It mimics the Ninth Amendment, which provides that there are individual rights protected by the Constitution not spelled out in the text. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

From our very beginnings, Americans used the words "privileges" and "immunities" interchangeably with words like "rights" or "liberties." *See* AMAR, at 166-69; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094-1136 (2000). The earliest charters of the American colonies referred to "Liberties, Franchises, and Immunities," as in Virginia's 1606 charter, or "[L]iberties Immunities and priveledges," as in Massachusetts' 1641 charter.[3]

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[3] The First Charter of Virginia (1606), *reprinted in* SOURCES OF OUR LIBERTIES 39, 44 (Richard L. Perry ed. 1978) [hereinafter SOURCES], and Massachusetts Body of Liberties, pmbl. (1641), *reprinted in* SOURCES, at 148; *see also* The Charter of Maryland, art. XVI (1632), *reprinted in* SOURCES,

When James Madison proposed the Bill of Rights in Congress, he spoke of the "freedom of the press" and "rights of conscience" as the "choicest privileges of the people," and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because "State governments are as liable to attack these invaluable privileges as the General Government is...." 1 Annals of Congress 453, 458 (1789); *see also id.* at 766 (discussing the proposed Bill of Rights as "securing the rights and privileges of the people of America").

The phrase "privileges and immunities" appears in the original Constitution in Article IV, § 2: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), Justice Bushrod Washington—a nephew of George Washington who advocated for ratification of the Constitution in Virginia before serving for several decades on the Supreme Court—explained the meaning of this phrase in a lengthy

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at 105, 111 ("Rights, Jurisdictions, Liberties, and Privileges...."); The Charter of Massachusetts Bay (1629), *reprinted in* SOURCES, at 82, 93 ("[L]iberties and Immunities...."); Pennsylvania Charter of Privileges (1701) ("Liberties, Franchises and Privileges...."), *reprinted in* SOURCES, at 255–56; Concessions and Agreements of West New Jersey (1677) ("[T]he common law or fundamental rights and privileges...."), *reprinted in* SOURCES, at 184. For further discussion, see Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1296 & n.6 (2009).

passage that would repeatedly be quoted in its entirety by members of the Thirty-ninth Congress:[4]

> What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: *protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety*, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.

6 F. Cas. at 551-52 (emphasis added). *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 62-65 (2004) (describing the repeated reliance on *Corfield*).

Justice Washington's canonical definition of the Constitution's term "privileges and immunities" drew on the framing-era understanding that the words "privileges" or "immunities" were associated with broad protection of substantive liberty. Indeed, Washington's formulation was little more than a restatement of the Declaration of Independence's recognition that "all men are created equal" and "endowed by their Creator with certain unalienable rights," and that "among these are life, liberty, and the pursuit of happiness." *See* CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 50 (1997) ("It was natural...that the famous words of the Declaration should be taken as supremely suitable to fill out and explain the words 'privileges and immunities of citizens'.").

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[4] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull) (invoking *Corfield*); *id.* at 1117-18 (Rep. Wilson) (same); *id.* at 1835 (Rep. Lawrence) (same); *id.* at 2765 (Sen. Howard).

Corfield was not alone in looking to the words of the Declaration of Independence for guidance. By 1868, when the Fourteenth Amendment was ratified, twenty-seven states (of the thirty-seven states then in the Union) had inserted into their own state constitutions provisions that guaranteed the protection of fundamental, inalienable rights, many tracking the words of the Declaration. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in History and Tradition?*, 87 TEX. L. REV. 7, 88 (2008). The Indiana, New York, and Wisconsin constitutions, for example, hewed to the wording of the Declaration,[5] while many others used a formulation virtually identical to *Corfield*'s.[6]

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[5] IND. CONST. art. 1, § 1 ("WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."); N.Y. CONST. of 1777 pmbl. ("We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness."); WISC. CONST. art. I, § 1 (amended 1982) ("All men are born equally free and

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independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness....").

[6] *E.g.*, ILL. CONST. of 1818 art. VIII, § 1 ("[A]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."); IOWA CONST. art. I, § 1 (amended 1998) ("All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursing and obtaining safety and happiness."); MASS. CONST. pt. I, art. I (amended 1976) ("All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."); N.H. CONST. pt. 1, art. II (amended 1974) ("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and ...seeking and obtaining happiness."); OHIO CONST. art. I, § 1 ("All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety...."); PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); VT. CONST. ch. 1, art. I (amended 1924) ("[A]ll men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety....").

Thus, when Justice Washington in *Corfield* described some of the privileges and immunities of Article IV, § 2, as "protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety," he was describing what were commonly understood to be core fundamental rights. Justice Washington's interpretation informed the public meaning of the text of the Privileges or Immunities Clause in the Fourteenth Amendment.

C. The Congressional Debates Over The Fourteenth Amendment Show That The Privileges Or Immunities Clause Encompassed Substantive Fundamental Rights, Including The Personal Rights In The Bill Of Rights.

In line with the public meaning identifying "privileges" or "immunities" with broad protections for substantive liberty, the debates in Congress over the adoption of the Fourteenth Amendment affirm that the Privileges or Immunities Clause was understood and described to the ratifying public as securing substantive fundamental rights, including the right to keep and bear arms and other fundamental rights enumerated in the Bill of Rights.

Indeed, it was precisely because the words "privileges" and "immunities" were so closely associated with the Declaration of Independence's protection of fundamental rights that the Fourteenth Amendment's framers turned to these words in drafting the Privileges or Immunities Clause. The Declaration's promises—invoked by Lincoln at Gettysburg in his call for a "new birth of freedom"—were at the heart of the Fourteenth Amendment's constitutional design. In the words of Rep. Schuyler Colfax, Speaker of the House in 1866, the Fourteenth Amendment would be "the gem of the Constitution...because it is the Declaration of Independence placed immutably and forever in our Constitution." *See* CINCINNATI COMMERCIAL, Aug. 9, 1866, at p.2, col. 3.

In the Senate debates on the Amendment, the clearest description of the Privileges or Immunities Clause was provided by Sen. Jacob Howard, who spoke on behalf of the Joint Committee. Sen. Howard distinguished between two categories of "privileges or immunities of citizens of the United States as such." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). The first were those "privileges and immunities of the citizens of each State in the several states," *id.*, to which Article IV, § 2, refers. Sen. Howard quoted in its entirety the relevant passage of the "very learned and excellent," *id.*, Justice Washington's opinion in *Corfield*, including its invocation of the canonical formulation of fundamental, inalienable rights drawn from the Declaration: "protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole." *Id.* (quoting *Corfield*, 6 F. Cas. at 551-52).

Second, after observing that the "privileges and immunities spoken of in the second section of the fourth article...are not and cannot be fully defined in their entire extent and precise nature," Sen. Howard offered another source of privileges or immunities:

> [T]o these should be added the *personal rights* guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right pertaining to each and all of the people; *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (emphases added). *See also* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1562-63 (2007) (discussing Sen. Howard's speech and noting that it refutes any claim that the privileges or immunities of Section One were unrelated to the protections in the Bill of Rights).[7] Sen. Howard omitted from his list the "due process of law," which was expressly extended to all "persons" in Section One.

With respect to this "mass of privileges, immunities, and rights, some of them secured by" Article IV, § 2, and "some by the first eight amendments," Sen. Howard noted judicial decisions holding that neither set of rights "operate in the slightest degree as a restraint or prohibition upon State legislation" infringing the rights of the state's own citizens. Cong. Globe, 39th Cong., 1st Sess. at 2765. For example, "it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon

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[7] This speech by Sen. Howard, explaining that the Privileges or Immunities Clause included at least the rights guaranteed by the first eight amendments in the Bill of Rights, "was reprinted as front page news the next day in the New York Times." Wildenthal, 68 OHIO ST. L.J. at 1564. In addition, "[a]t least four other major papers apparently covered the relevant parts of Sen. Howard's speech: the Philadelphia Inquirer, the Washington, D.C. National Intelligencer, the front page of the New York Herald, and, with only slight ambiguity, the front page of the Boston Daily Advertiser." *Id.* The coverage of the debates—in particular, speeches by Rep. Bingham and Sen. Howard—"provides substantial evidence that the national body politic, during 1866-68, was placed on fair notice about the incorporationist design of the Amendment." *Id.* at 1590.

State legislation, but applies only to the legislation of Congress." *Id.* Nor are such rights enforceable under "the sweeping clause of the Constitution...." *Id.* at 2766. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*

In the House, Thaddeus Stevens, a member of the Joint Committee, made it abundantly clear that the substantive privileges and immunities of citizens encompassed the liberties set forth in the Bill of Rights. He explained that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect...." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). James Wilson, Chairman of the House Judiciary Committee, similarly stated, prior to the drafting of the Amendment, that "the people of the free States should insist on ample protection to their rights, privileges and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike." Cong. Globe, 38th Cong., 1st Sess. 1203 (1864).

Rep. Bingham, too, emphasized that the Privileges or Immunities Clause protected the fundamental rights of citizens, noting that the Clause provided a remedy against "State injustice and oppression...in the State legislation of the Union, of flagrant violations of the guarantied privileges of citizens of the United States...." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Rep. Bingham saw in the words "privileges" or "immunities" a broad constitutional mandate for protection of "life, liberty, and property," *id.*, a view dating back at least to 1859, when Bingham had objected that a provision of the Oregon Constitution that denied free blacks the right to reside or hold property in the State violated Article IV's Privileges and Immunities Clause.[8]

Rep. Bingham reiterated his long-held view that Congress should have the power to enforce the Bill of Rights against the States. Before the Fourteenth Amendment was introduced, he had explained to the House that a constitutional amendment was needed to empower Congress to protect the privileges or immunities of citizens because of the Supreme Court's opinions in *Barron v. Baltimore*, 32 U.S. 243 (1833), and *Livingston v. Moore*, 32 U.S. 469 (1833), both of which held that the Bill of Rights did not apply to the states. Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866). Rep. Bingham viewed the Fourteenth Amendment as correcting this "want," and ensuring national protection of "the privileges and immunities of all the citizens of the Republic and all the inborn rights of every person...whenever the same shall be abridged or denied by the unconstitutional acts of any State." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).[9]

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[8] As in the 1866 debates, in 1859, Rep. Bingham had argued that constitutionally-protected privileges and immunities included "rights of life and liberty and property, and their due protection in the enjoyment thereof," specifically including freedoms such as "the right to know; to argue and to utter according to...conscience; [and] to work and enjoy the product of [one's] toil." Cong. Globe, 35th Cong., 2nd Sess. 984, 985 (1859).

Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that Section One of the Fourteenth Amendment—and, in most instances, the Privileges or Immunities Clause specifically—protected against state infringement of fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single senator or representative disputed this understanding of the privileges and immunities of citizenship or Section One. *See, e.g.*, AMAR, at 187; CURTIS, NO STATE SHALL ABRIDGE, at 91; Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 932 (1986). To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, Republicans in Congress affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the

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[9] After ratification, Rep. Bingham maintained that "the privileges or immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871). After reading the first eight amendments word for word, he continued: "These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment." *Id.* *See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 74 (1993).

Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.

D. The Wording Of The Privileges Or Immunities Clause Is Broader Than The Privileges And Immunities Clause Of Article IV.

While the Privileges or Immunities Clause in the Fourteenth Amendment draws on the public meaning of "privileges" and "immunities" in Article IV, discussed, *supra*, in Section I.B, its wording is more expansive in at least two respects.

First, unlike Article IV, which forbids a state from discriminating against outsiders by denying them the "Privileges And Immunities" protected by the Clause, *see* THE FEDERALIST No. 80 (Alexander Hamilton) 476-77 (Clinton Rossiter ed. 1999) (describing Article IV as the "basis of the Union" because it demands "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled"), the Privileges or Immunities Clause is not limited to discrimination. Instead, it prohibits the making or enforcement of any state law that "abridges the privileges or immunities" of any or all citizens of the United States. It concerns the substantive fundamental rights that all states must respect. To make out a violation of the Privileges or Immunities Clause, a citizen need not show that she has been subject to discrimination, only that governmental action has violated her fundamental rights.

Second, unlike Article IV's reference to "citizens *of each state*," Section One of the Fourteenth Amendment protects all the "privileges or immunities of citizens *of the United States*." Citizens of the United States not only possessed the privileges and immunities identified in *Corfield*, they also possessed the privileges and immunities enumerated in the Bill of Rights and elsewhere in the Constitution. By enforcing all such rights against the states, Section One thereby reversed *Barron v. Baltimore*, 32 U.S. 243 (1833). In addition, Section Five of the Fourteenth Amendment expressly empowered Congress to enforce Section One's restriction on the lawmaking power of states, unlike Article IV, § 2.

That the public meaning of the Privileges or Immunities Clause in Section One was broader than the Privileges and Immunities Clause in Article IV is evidenced by an alternative to the Fourteenth Amendment, then pending ratification in the states, that was drafted in consultation with President Johnson by a group of Southerners, including the governors of Mississippi, South Carolina, Alabama, Florida, and North Carolina.[10] Their aim was "to agree on some measure as a basis of reconstruction, which will be adopted by the Southern people, meet the views of the

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[10] *See* N.Y. TIMES, Feb. 5, 1867, at 5 ("During the past two weeks a large number of prominent Southern men, who may be taken as representative men of their States, have been [in Washington] and have daily consultations with the President upon this important subject.").

President, and at the same time receive approval of the majority in Congress."[11] Their efforts culminated in a proposed amendment that eliminated the congressional enforcement power in Section Five, and made a revealing change to Section One. The third section of their proposal was worded as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States in which they reside; and *the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.* No State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[12]

Significantly, the only deviation from Section One was the substitution of the wording of Article IV, § 2—with that provision's focus on rights of state citizenship and non-discrimination—for the wording of the Privileges or Immunities Clause.

This alternative formulation is powerful evidence that the public meaning of the Privileges or Immunities Clause of Section One was broader than the Privileges and Immunities Clause of Article IV. When combined with the elimination of Section Five, this alteration would have sharply curtailed, if not eliminated, the power of the federal courts and Congress to protect fundamental rights of blacks, Unionists and Republicans in the South. Arguably, neither the courts nor Congress could have enforced the substantive protections of the Bill of Rights against the states, and whatever protection might have been afforded U.S. citizens would have been limited to discrimination against U.S. citizens from other states.

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[11] *Id. See also* WALTER FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 238-40 (1906) (reprinting draft with President Johnson's annotations).

[12] N.Y. TIMES, *supra*, at 5 (emphasis added).

II. THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE INCLUDED AN INDIVIDUAL RIGHT TO BEAR ARMS.

As was shown in Section I, *supra*, the public meaning of "privileges or immunities of citizens of the United States" included the "personal rights guarantied and secured by the first eight amendments of the Constitution," such as the individual "right to keep and bear arms." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard).

The Reconstruction Congress was particularly concerned that the right to arms be protected in order to enable the freedmen to protect themselves from violence, including violence by southern militias. "Confederate veterans still wearing their gray uniforms...frequently terrorized the black population, ransacking their homes to seize shotguns and other property and abusing those who refused to sign plantation labor contracts." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988). *See also* Cong. Globe, 39th Cong., 1st Sess. 40 (1866) (Sen. Wilson) ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them."); *id.* at 914, 941 (Letter from Colonel Samuel Thomas to Major General O.O. Howard, quoted by Sens. Wilson and Trumbull) ("Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the state] militia."). *See generally* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991) (arguing that efforts to disarm freed slaves "played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change").

Of central concern to the Joint Committee on Reconstruction and Congress were the Black Codes.[13] The Black Codes undermined the ability of the freedmen to defend themselves by prohibiting former slaves from having their own firearms. *See* FONER, at 199-201; CURTIS, NO STATE SHALL ABRIDGE, at 35. *See also Heller*, 128 S.Ct. at

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[13] For discussions of the Black Codes in Congress, see Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.

2810 (noting that "[b]lacks were routinely disarmed by Southern States after the Civil War" and that opponents of "these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms"). Members of the Reconstruction Congress condemned these laws. One senator explained that the newly freed slaves should be guaranteed the "essential safeguards of the Constitution," including "the right to bear arms," Cong. Globe, 39th Cong., 1st Sess. at 1183 (Sen. Pomeroy); another member of Congress described how southern states had disarmed blacks. *Id.* at 1838-39 (Rep. Clarke). Rep. Eliot decried a Louisiana ordinance that prevented freedmen not in the military from possessing firearms within town limits without special written permission from an employer. *Id.* at 516-17.

Because state statutes disarming freedmen—as well as legislative restrictions on other fundamental rights—were considered to be the South's post-war attempt to re-institutionalize the system of slavery in a different guise, Congress initially thought itself justified in exercising its Thirteenth Amendment powers to enact the Civil Rights Act of 1866. If slavery is the opposite of liberty, then the Thirteenth Amendment empowered Congress to police restrictions on fundamental liberties that amounted to a partial imposition of slavery.[14] However, as Frederick

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[14] *See id.* at 474 (Sen. Trumbull) ("Liberty and slavery are opposite terms; one is opposed to the other."); *id.* at 475 ("[I]t is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law...that does not

Douglass explained in 1865, the Thirteenth Amendment was not adequate protection for these liberties:

> [W]hile the Legislatures of the South can take from him the right to keep and bear arms, as they can—they would not allow a Negro to walk with a cane where I came from, they would not allow five of them to assemble together—the work of the Abolitionists is not finished. Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged, the black man has never had the right either to keep [or] bear arms; and the Legislatures of the States will still have the power to forbid it, under this Amendment.

Speech of Frederick Douglass to the Anti-Slavery Society, May 10, 1865 *in* THE CIVIL WAR ARCHIVE: THE HISTORY OF THE CIVIL WAR IN DOCUMENTS 584 (Henry Steele Commager & Erik Bruun eds. 2000).

The Joint Committee investigated the disarmament of African Americans, raising concerns about the deprivation of the right to arms. It reported testimony that the Southerners "are

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allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.").

extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property," and noted that "[t]he planters are disposed...to insert into their contracts tyrannical provisions,...to prevent the negroes from leaving the plantation...or to have fire-arms in their possession." REPORT OF THE JOINT COMMITTEE Pt. II, 4 and Pt. II, 240. *See* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) (presenting chronologically testimony heard by the Joint Committee on southern efforts to disarm freedmen and Unionists).

In this way, "Reconstruction Republicans recast arms bearing as a core *civil* right....Arms were needed not as part of political and politicized militia service but to protect one's individual homestead." AMAR, at 258-59. *See also* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1251-53 & n.55 (1994) (noting that the "personal protection" aspect of the right to keep and bear arms was even more clear at the time the Fourteenth Amendment was passed than in the original Second Amendment). Sen. Pomeroy listed as one of the constitutional "safeguards of liberty" the "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866); *see also id.* ("And if the cabin door of the freedmen is broken open...then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world....”). There is no record of any member of Congress ever denying this claim.

The Reconstruction Congress acted to explicitly protect the right of the freedmen to keep and bear arms in the re-enacted Freedman's Bureau Bill, which provided that African Americans should have “the full and equal benefit of all laws and proceedings for the security of person and property, *including the constitutional right of bearing arms*.” 14 Stat. 173 (39th Cong. 1866) (emphasis added). *See also* Cong. Globe, 39th Cong., 1st Sess. 654 (Rep. Eliot) (proposing the addition of the words “including the constitutional right to bear arms”); *id.* at 585 (Rep. Banks) (stating his intent to modify the bill so that it explicitly protected “the constitutional right to bear arms”).

By employing the phrase “privileges or immunities of citizens of the United States,” the Joint Committee on Reconstruction worded Section One broadly enough to protect substantive fundamental rights enumerated in the Bill of Rights, including the right to keep and bear arms.

III. PRECEDENT DOES NOT PREVENT THE COURT FROM RECOGNIZING THAT THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECTS AN INDIVIDUAL RIGHT TO BEAR ARMS AGAINST STATE INFRINGEMENT.

This Court should follow the text, history, and original public meaning of the Privileges or

Immunities Clause of the Fourteenth Amendment to protect an individual right to bear arms. Previous decisions notwithstanding, it is never too late to adhere to the text of the Constitution.

A. *Slaughter-House* And Its Progeny Were Wrong As A Matter Of Text And History And Have Been Completely Undermined By This Court's Subsequent Application Of Most Of The Bill Of Rights To The States.

In explaining to the House the need for a constitutional amendment to secure fundamental rights, Rep. Bingham complained of the absurdity that "[w]e have the power to vindicate the personal liberty and all the personal rights of the citizen in the remotest sea...while we have not the power in time of peace to enforce the citizens' right to life, liberty, and property within the limits of South Carolina…." Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Ironically, when the Supreme Court later limited the scope of the Privileges or Immunities Clause to rights of a purely federal nature, it gave as an example the right to "the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government," *Slaughter-House Cases*, 83 U.S. 36, 79 (1873), despite the fact that the authors of the Clause clearly saw the protection of life, liberty, and property in the states as requiring more immediate federal protection.

Further stalling the project of rights-protection in the states, three years later, the Court held that the protections of the Bill of Rights limited only the federal government. *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the First and Second Amendments secure rights only against federal infringement). *Cruikshank* essentially reinstated *Barron v. Baltimore*, which the framers of the Fourteenth Amendment thought they had superseded. *See supra* Section I.C. Both *Slaughter-House* and *Cruikshank* reflected a national mood that had grown weary of Reconstruction. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 38 (2007) (arguing that "there can be no doubt that *Slaughter-House* and *Cruikshank* reflected America's loss of will to memorialize the reforms begun in the late-1860s").

The reasoning employed by Justice Miller to reach the result in *Slaughter-House* directly contradicted the original meaning of the Privileges or Immunities Clause and eviscerated its intended effect from that day to this. While Justice Miller did cite *Corfield*, it was only to reject the proposition that the framers of the Fourteenth Amendment intended to protect the fundamental rights recognized by Justice Washington. Justice Miller's principal support for this claim was that the consequences of providing federal protection of these civil rights would be too radical to have been intended by Congress. *Slaughter-House*, 83 U.S. at 75-78. He offered no evidence for this speculation—and ignored overwhelming evidence to the contrary. Justice Miller effectively wrote the Privileges or

Immunities Clause out of the Constitution, bringing the Amendment in line with President Johnson's alternative Fourteenth Amendment that Miller had supported. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 660 n. 228 (1994).

In contrast, the dissents in *Slaughter-House* summarized the original meaning of the Privileges or Immunities Clause described in Section I, *supra*, and powerfully rebutted Justice Miller's opinion. Justice Swayne observed that the majority's cramped reading of the Clause "turns...what was meant for bread into stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment." *Slaughter-House*, 83 U.S. at 129 (Swayne, J., dissenting). Similarly, Justice Field accused the majority of reducing the Clause to "a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage." *Id.* at 96 (Field, J., dissenting). Following a lengthy quote from *Corfield*, Field declared: "This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments*." *Id.* at 97.

The decision in *Slaughter-House* was immediately condemned by former members of the Thirty-ninth Congress as a "great mistake," Cong.

Rec., 43rd Cong., 1st Sess. 4116 (1874) (Sen. Boutwell), which had perverted the Constitution by "assert[ing] a principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States." *Id.* at 4148 (Sen. Howe). Senator George Franklin Edmunds said that the *Slaughter-House* Court's view of the Privileges or Immunities Clause "radically differed" from the framers' intent. CURTIS, NO STATE SHALL ABRIDGE, at 177; *see also* Lawrence, 72 MO. L. REV. at 29-35.

The reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to an overwhelming consensus among leading constitutional scholars today, who agree that the opinion is egregiously wrong.[15] "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Amar, 28 PEPP. L. REV. at 631 n.178.[16]

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[15] *E.g.*, AMAR, at 163-230; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22-30 (1980); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 7-6, at 1320-31 (2000); BARNETT, at 195-203; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007); Aynes, 11 U. PA. J. CONST. L. at 1310. *See generally* DAVID H. GANS & DOUGLAS T. KENDALL, THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT (2008).

[16] Undoubtedly, there are a handful of modern scholars willing to come to the defense of Justice Miller's interpretation of the Privileges or Immunities Clause, but the contrary consensus of preeminent constitutional scholars and

Indeed, the principle for which *Slaughter-House* and *Cruikshank* stand—that the personal liberties in the Bill of Rights and other fundamental rights do not limit the states—has been repudiated by the Supreme Court's subsequent "incorporation" of most of the Bill of Rights as a limit on the states, and its protection of unenumerated fundamental rights. In overruling cases such as *Maxwell v. Dow*, 176 U.S. 581 (1900), *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947),[17] the Court has rejected the foundation upon which *Slaughter-House* was built: the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look solely to state government for the protection of their most basic rights.[18]

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authoritative historians of otherwise disparate viewpoints is truly remarkable.

[17] *E.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (overruling *Twining* and *Adamson*); *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968) (rejecting dicta in *Maxwell*).

[18] Recognizing at long last the original meaning of the Privileges or Immunities Clause would not prevent the states from exercising their police power to regulate the rights to which it refers. As was explained by Justice Bradley, "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves." *Slaughter-House*, 83 U.S. at 114 (Bradley, J., dissenting). Since *Slaughter-House* was decided, the Court has gained much experience in policing this type of

With the reasoning of *Slaughter-House* superseded by modern Supreme Court doctrine, *amici* urge the Court to take this opportunity to restore the Privileges or Immunities Clause to its rightful and intended place at the heart of the Fourteenth Amendment. As professors of constitutional law, we look forward to the day when we can teach our students how the Supreme Court corrected this grievous error.

B. Reviving The Privileges Or Immunities Clause Will Not Prejudice The Constitutional Rights And Liberties Of Noncitizens.

The Thirty-ninth Congress was particularly concerned with extending citizenship to the freedmen and protecting their rights as citizens, which had been denied in *Dred Scott*, as well as the rights of Unionists and Republicans in the South. However, it also took care to ensure that the fundamental rights of all "persons" would be protected by the Due Process and Equal Protection Clauses.

As was explained by Rep. Bingham as early as 1859, the Due Process Clause of the Fifth Amendment protected the fundamental rights of

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line in a variety of contexts where fundamental rights are at stake.

life, liberty, and property of all persons, citizen and noncitizen alike, from arbitrary restrictions.

> [N]atural and inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word "person," as contradistinguished from the limited term citizen--as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race....

Cong. Globe, 35th Cong., 2nd Sess. 983 (1859). According to Rep. Bingham, the the Fourteenth Amendment's Due Process Clause protected the "natural rights" of life, liberty and property of "all persons, whether citizens or strangers," *id.*, from infringement by states.

Later discussing a precursor of the Fourteenth Amendment, Rep. Bingham explained that "no man, no matter what his color, no matter beneath what sky he may have been born...shall be deprived of life or liberty or property without due process of law...." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). He also demanded that "all persons, whether citizens or strangers, within this the land...have equal protection in every State of this Union in the rights of life and liberty and property." *Id.* at 1090. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1224 (1992) ("Bingham, Howard, and company wanted to go even further [than protecting citizens] by extending the benefits of state due process to aliens."). *See also* AMAR, at 182 (explaining that the "privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles (which Bingham saw as paired, if not synonymous) would protect the wider category of persons"); Aynes, 103 YALE L.J. at 68 ("An examination of the language of the proposed Amendment shows that its 'privileges and immunities' clause would apply only to citizens, whereas its 'life, liberty, and property' clause would apply more expansively to 'all persons.'").

Additionally, Sen. Howard explained how the Equal Protection Clause in the Fourteenth Amendment bars caste legislation and protects all persons from arbitrary classifications. The Equal Protection Clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). *See also id.* at 2459 (Rep. Stevens) ("This amendment...allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.").

Indeed, the very first statute passed to enforce the Fourteenth Amendment protected the rights of aliens to equality under the law. In 1870, Congress used its newly granted power to enforce the Fourteenth Amendment to pass the Enforcement Act of 1870, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981), which protected the rights of resident aliens, primarily Chinese immigrants in California, against pervasive racial discrimination. *See* Neal K. Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1368-70 (2007) (discussing statute). As one senator explained, "we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). During the debates over the Enforcement Act, Rep. Bingham emphasized that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws." *Id.* at 3871.

Amici believe the existing rights of noncitizens are fully protected by the Due Process and Equal Protection Clauses. State governments are required to provide noncitizens with a full range of procedural protections and need a constitutionally permissible reason for either restricting the liberties of noncitizens or discriminating against any "person" with regard to the fundamental rights accorded to citizens.

CONCLUSION

The text, history, and original public meaning of the Privileges or Immunities Clause show that the Clause protects substantive fundamental rights—including the personal liberties enumerated in the Bill of Rights—against state infringement. Accordingly, *amici* urge the Court to find that the Privileges or Immunities Clause protects an individual right to keep and bear arms against state infringement, reverse the decision of the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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Supreme Court of the United States

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh
Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh
Circuit

INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF"), is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong interest in protecting the right of individuals to keep and bear arms, as set forth in the Second Amendment.

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[1] This brief is filed with the written consent of all parties, with timely notice provided. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

At a minimum, incorporation of the protections of the Bill of Rights should apply against state and local governments when the underlying right requires national uniformity. Stated another way, where lack of incorporation frustrates the enjoyment of an individual right in connection with the recognized constitutional right to travel, then incorporation doctrine should apply to protect that individual right. The right to self-defense, like the right to free speech, is such a right that requires national uniformity and thus should be included within incorporation doctrine.

Federalism has always protected against local tyranny as well as tyranny at a national level. James Madison's *The Federalist No. 10* explains how a larger, federal union provides *greater* protection against factions gaining control of government at a local level. This argument, which has been repeatedly accepted and applied by this Court, has its greatest force with respect to the liberty of self-defense enshrined in the Second Amendment.

Finally, the Second Amendment unambiguously protects an individual right, and the court below erred in looking to "contemporary debate" rather than original intent or textualism in interpreting that provision. Whatever the merits of deferring to scholarly analysis of other issues may be, the strength of expressly established constitutional rights is not a hostage to the political winds and whims of academic opinion. A robust individual right under the Second

Amendment is disfavored among many legal scholars and judges, but this Court's ruling in *District of Columbia v. Heller* resolved this "contemporary debate" squarely in favor of the individual right to keep and bear arms. 128 S. Ct. 2783 (2008). The lower court erred in giving undue legal significance to ever-changing contemporary opinion in a matter of constitutional interpretation. The individual right was established as part of the Constitution, and the only way to dilute that right would be by constitutional amendment, not a flood of so-called expert opinions.

ARGUMENT

In rejecting incorporation of the Second Amendment against the States, the court below made three errors. First, it viewed incorporation doctrine as though it were a random process incapable of a coherent foundation. In fact, incorporation doctrine looks to whether a right is part of "ordered liberty" and, as in this case concerning the right of self-defense, it should be applied against the States. We explain below how rights similar in nature to the Second Amendment protection have already been applied against the States.

Second, the court below erred in viewing federalism as disfavoring application of the Second Amendment against the States. Quite the contrary, a full view of federalism requires incorporation, in the spirit of *The Federalist No. 10*, which explained that occasionally a national structure can protect against local tyranny.

Third, the lower court erred in giving undue priority to "contemporary debate." The time for debate was closed when the Second and Fourteenth Amendments were ratified, and they fully protect the individual right to bear arms against governmental encroachment. The safeguard against tyranny established by the Second Amendment would be meaningless and contrary to the intent of the Founders if guns could be banned by local governments.

I. THE SECOND AMENDMENT BY ITS NATURE REQUIRES UNIFORM APPLICATION NATIONWIDE, AND THE RIGHT OF SELF-DEFENSE IS ANALOGOUS TO RIGHTS THAT ARE INCORPORATED.

The right to self-defense is a type of individual right that can only be fully protected with some degree of national uniformity. In *Heller*, this Court expressly held that "the inherent right of self-defense has been central to the Second Amendment right," and this right is worth less if it disappears and reappears during a citizen's road trip across the nation, or as a citizen relocates from town to town, or state to state. 128 S. Ct. at 2817. A patchwork of recognition and non-recognition of the fundamental right of self-defense would make little constitutional sense, and is inconsistent with the *Heller* holding. A crazy quilt of different local restrictions on the fundamental right of self-defense is as untenable as it would be for the right of free speech.

The Second Amendment right of self-defense is an "*ordered* liberty" justifying its application against state and local governments. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (emphasis added). A robust right of self-defense should be recognized as an essential "prerequisite to social justice and peace." *Sell v. United States*, 539 U.S. 166 (2003) (quoting

Riggins v. Nevada, 504 U.S. 127, 135-36 (1992), which quotes *Illinois* v. *Allen,* 397 U.S. 337, 347 (1970) (Brennan, J., concurring)). Government power – including state and local governments – is limited where protection of ordered liberty so requires. Self-defense is a quintessential example of such a liberty.

At issue in the *Sell* case was a right of mental self-defense against government-mandated, mind-altering medication. Justice Breyer, writing for the 6-3 Court, held that Defendant Sell's right to decline mind-altering medication could trump the interests of the State in taking his case to trial. This Court thereby implicitly held that a type of self-defense fits squarely and comfortably within the "ordered liberty" recognized and pursued by government.

The Second Amendment right of self-defense is analogous to the Fifth and Sixth Amendment rights against forced medication, which this Court has incorporated against the States. *See Riggins v. Nevada,* 504 U.S. 127 (1992) (holding that the constitutional right against forced medication applies against the State of Nevada, and reversing a conviction for violation of that right); *Washington v. Harper,* 494 U.S. 210 (1990) (observing that the constitutional right against forced medication, though not absolute, is incorporated against the State of Washington).

Similarly, this Court recognized that the defensive right against an uncompensated "taking" of private property is fully incorporated against state and local government. *See, e.g., Kelo v. City of New London,* 545 U.S. 469 (2005). This protects the individual right despite the fact that "[s]ome state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation." *Id.* at 508 n.1 (O'Connor, J., dissenting). This Court has long recognized that the right of self-defense against deprivation of property is incorporated against the States. Similarly, the right of self-defense established by the Second Amendment must also be incorporated against state and local government.

The common characteristic of rights that have not been incorporated against the States is that they are inherently local in nature, and not entirely earth-shattering, such as the right to a grand jury and the right to bail (which can be denied anyway, in the discretion of a judge). *See National Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 858 (2009). In sharp contrast is the meaningful right to self-defense established by the Second Amendment, which is not inherently local given the mobility of our society and which is highly significant, often meaning the difference between life and death.

Not all the amendments in the Bill of Rights establish fundamental rights that require ordering or uniformity. There is no need or even desirability for uniformity in grand jury proceedings, for example. While the right to a grand jury is undeniably a type of liberty, it does not qualify within the meaning of the phrase "*ordered* liberty" with respect to incorporation doctrine. The Second Amendment, in contrast, does so qualify.

The lower court thus overstated ambiguities in current incorporation doctrine by declaring that "'[s]elective incorporation' thus cannot be reduced to a formula." *Id.* at 859. Compared with other areas of constitutional jurisprudence, incorporation doctrine is clear enough: incorporation applies to individual rights protected in the Bill of Rights if "necessary to an Anglo-American regime of ordered liberty," *Dun-*

can, 391 U.S. at 149 n.14, and "deeply rooted in this Nation's history and tradition." ***Washington v. Glucksberg***, 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted). As explained above, the right to bear arms easily meets these standards.

Incorporation of the Second Amendment against the States does not imply that *all* elements of the Bill of Rights should likewise be incorporated. Rights that are not *individual* in nature, for example, do not benefit from national uniformity and have no need or justification for incorporation. For example, the right to travel and enjoy individual rights is not disturbed by *religious* diversity from region to region. *See, e.g.*, *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 45-46 (2004) (Thomas, J., concurring) ("[T]he Establishment Clause is a federalism provision, which, for this reason, resists incorporation."); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 677-680 & n.3 (2002) (Thomas, J., concurring). The right to self-defense – a right that is meaningless unless protected against state encroachment – is a far better candidate for incorporation than the "federalism provision" against establishment of religion, which arguably should not be incorporated against the many diverse States.

If any right is incorporated against the States, and many are, then the right of self-defense recognized by this Court in *Heller* should also be incorporated.

II. FEDERALISM, AS ADOPTED BY THE FOUNDING FATHERS, SOMETIMES PROTECTS AGAINST LOCAL TYRANNY AS WELL AS NATIONAL TYRANNY.

The unique American system of dual sovereignties protects against tyranny by either, and while most often it is the local sovereignty that provides an important check and balance against the national sovereignty, there are instances where nationalism provides essential protection against local tyranny. James Madison made this compelling case for nationalism as a safeguard against tyranny by factions in his *Federalist No. 10.* The issue at bar is a perfect illustration.

Madison's insight was that a new United States of America, with its large size and separation of powers, would actually guard against tyranny and evil factions better than individual colonies could:

> Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

The Federalist No. 10 (quoting its opening sentence).[2]

This lucid justification for national protection against local tyranny has been oft repeated by Justices of this Court. For example, Justice Scalia observed that:

> [A]s American political scientists have known since James Madison pointed it out, see The Fede-

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[2] http://www.constitution.org/fed/federa10.htm (available 11/21/09).

> ralist No. 10, pp. 62-64 (H. Dawson ed. 1876), the dangers of factionalism decrease as the political unit becomes larger.

Norman v. Reed, 502 U.S. 279, 299-300 (1992) (Scalia, J., dissenting). Similarly, Justice Stevens has cited this Federalist paper to emphasize "the greater tendency of smaller societies to promote oppressive and narrow interests above the common good." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 289 (1991) (Stevens, J., dissenting) (citing *The Federalist No. 10*).

Here, the factionalism of irrational gun control has taken hold of a small, notoriously corrupt political unit (the City of Chicago) when such gun control would not be adopted by a larger political unit (the State of Illinois). Federalism, as informed by *The Federalist No. 10*, protects against this triumph of factionalism.

The Court below errs in its indiscriminate view that "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *NRA*, 567 F.3d at 860. Quite the contrary, the Constitution – as informed by *The Federalist No. 10* – was ratified in part to combat precisely the kind of local factionalism demonstrated by the City of Chicago.

As Justice Kennedy has explained:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Fra-

> mers that *freedom was enhanced by the creation of two governments, not one.*

United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing H. Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977) and G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 524-532, 564 (1969), emphasis added). While often that freedom-enhancing effect of a dual sovereignty arises from local government checking the power of national rights, sometimes a national right enhances freedom by checking the tyranny of local government. This is such a case here.

Federalism militates for invalidation of the gun control ordinance. Whether the lower court is correct that "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon" is beside the point. *NRA*, 567 F.3d at 860. Federalism supports application of the Second Amendment as a safeguard against local tyranny, just as it supports application of national standards concerning freedom of political speech against local attempts to restrict such freedom.

III. THE SECOND AMENDMENT UNAMBIGUOUSLY PROTECTS AN INDIVIDUAL RIGHT, AND THE COURT BELOW ERRED IN GIVING PRIORITY TO "CONTEMPORARY DEBATE."

The Second Amendment unambiguously protects an individual right, as confirmed by this Court in *Heller*, yet the court below erred in giving priority to contemporary debate. In *Heller*, this Court conclusively resolved any lingering doubt about the nature and scope of the Second Amendment: it *fully* protects an individual right. *See* 128 S. Ct. at 2799 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."). In light of that unambiguous decision, it was clear error for the lower court to rule that "[t]he way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate." *NRA*, 567 F.3d at 860. It is not *contemporary* debate that defines the contours of the Second Amendment. What matters is the agreed-upon text at the time of its adoption (and prior to the ratification of the Fourteenth Amendment). This approach reinforces how the Second Amendment provides sweeping protection of the individual right to bear arms.

The Founding Fathers anticipated tyranny and added the Second Amendment in part as a safeguard against it, but this defense against tyranny would be meaningless if local governments could simply take it away. James Madison observed "the advantage of being armed, which the Americans possess over the people of almost every other nation" and noted how this was an important check and balance on the power of government. *The Federalist No. 46.* In 1787 Thomas Jefferson wrote, "What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? *Let them take arms.*" Letter from Thomas Jefferson to William Stephens Smith, 1787, *The Works of Thomas Jefferson,* Federal Edition, Vol. 5 (1904-5) (emphasis added). Like a criminal defendant's right to trial by jury – which is also incorporated against the states – the right to bear arms is a well-recognized limit on government power.

Supreme Court Justice Joseph Story considered the Second Amendment to be the most important individual right of all:

> The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, "Commentaries on the Constitution of the United States" (1830), *quoted in* Les Adams, "The Second Amendment Primer" (1996).

If anything, "contemporary" developments reinforce the need for meaningful self-defense as envisioned by the Founders. Self-defense with firearms protects against threats to liberty by terrorism, which might be described as a modern type of tyranny. Airplanes were easy prey for the 9/11 terrorists partly because the pilots were senselessly disarmed. In contrast Israel, long experienced in combating terrorism, promotes armed self-defense. *See, e.g.*, John-Peter Lund, "NOTE: Do Federal Firearms Laws Violate the Second Amendment by Disarming the Militia?" 10 Tex. Rev. Law & Pol. 469, 500 (Spring 2006) ("[I]n Israel, teenage conscripts freely walk the streets and frequent nightclubs bearing fully automatic rifles during their military service."). Chicago's irrational, sweeping gun control leaves its population prey to the tyranny of apolitical crime and terrorism, something the Second Amendment helps safeguard against.

The only proper role for the "contemporary debate" referenced by the court below would be to amend the Constitution, not redefine it. As this Court made so clear in *Heller*, there has been "reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms," which cannot be nullified by the contemporary view of even "hundreds of judges" who might disagree. *Heller*, 128 S. Ct. at 2815 n.24. These "millions of Americans" relied on the protection of the Second Amendment against interference of their right to bear arms by state and local governments as well as by the federal government.

CONCLUSION

The full protections of the Second Amendment should be incorporated against state and local governments, and laws that violate this individual right to keep and bear arms should be declared unconstitutional.

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AMICUS
CURIAE
BRIEF

B269

No. 08-1521

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF SUPPORTING RESPONDENTS OF *AMICUS CURIAE* EDUCATIONAL FUND TO STOP GUN VIOLENCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Educational Fund to Stop Gun Violence ("EFSGV") is an organization that seeks to secure freedom from gun violence through research, strategic engagement, and effective policy advocacy. EFSGV has a strong interest in stemming the tide of gun violence that threatens lives and our communities. EFSGV believes that the Second Amendment does not include an individual right to bear arms for insurrectionary purposes and that incorporating such a broad right would eviscerate the ability of States and municipalities to regulate firearms in any meaningful manner—even through laws that this Court has called "presumptively valid." EFSGV supports the City of Chicago's right to determine its own gun laws and believes that the Second Amendment should not be incorporated by the Fourteenth Amendment to apply to the States. If, however, the Court does hold that the Amendment is incorporated, EFSGV urges the Court to clarify that the scope of the right protected does not include an individual right to amass or use arms against the government.[1]

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[1] Pursuant to this Court's Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *Amicus's* counsel made such a contribution. Pursuant to this Court's Rule 37.3, this brief is filed with the parties' consent. Petitioner and the National Rifle Association of America, Inc. ("NRA") consented to the filing of *amicus* briefs conditioned on seven days written notice and Respondents consented conditioned on ten days written notice. Counsel for *Amicus* provided notice of intent to file this brief on December 10, 2009.

SUMMARY OF ARGUMENT

The Second Amendment should not be incorporated. *See generally* Chicago Resp'ts' Br.

But if it is, this Court should clarify that the Second Amendment protects the right to bear arms only for lawful purposes. *See D.C. v. Heller*, 128 S. Ct. 2783, 2813, 2815-16, 2816-17 (2008); *infra* Section II. Advocates for unfettered access to firearms argue that there exists in the Second Amendment an individual and constitutionally-protected right to keep and bear arms for the insurrectionary purpose of attacking so-called government "tyranny." *See infra* Section III. In *District of Columbia v. Heller*, the Court appears to suggest that the Second Amendment protects "the existence of a 'citizens' militia' " (*i.e.*, one that exists apart from the democratically-controlled State militia) "as a safeguard against tyranny." 128 S. Ct. at 2802; *see infra* Section III.A.2. This understanding of the Second Amendment's purpose and scope is historically erroneous, dangerous, and inconsistent with the Court's other decisions.

Contrary to the arguments advanced by insurrectionist *amici*, the Framers of the Constitution, and the thinkers who most influenced them, rejected the notion that the right to keep and bear arms included an individual right to insurrection. As James Madison declared in response to Shays' Rebellion in 1787, "[l]iberty may be endangered by the abuses of liberty as well as the abuses of power." Eric Foner, *Give Me Liberty! An American History* 219 (Norton & Co. 2006). With the need to maintain order and the rule of law at the forefront of their agenda, the Framers sought to increase the power and effectiveness of the State militia. The clear language of the Constitution shows that the militia was intended to serve as the main body that would prevent individual insurrection and revolts. The Constitution, and the structure it created, was designed to create a government that could secure liberty, while at the same time provide for a peaceable mechanism for changing the system of government through the amendment process. As the eminent historian Gordon Wood put it: "Americans had in fact institutionalized and legitimized revolution. Thereafter, they believed, new knowledge about the nature of government could be converted into concrete form without resorting to violence . . . ." *See* Joshua Horwitz & Casey Anderson, *Guns, Democracy, and the Insurrectionist Idea* 109 (Univ. of Mich. Press 2009); *see infra* Sections III.A.1-2.

For the Framers, it was the "rule of law, not arms, [that] was the primary guarantee of life, liberty, and property." Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 34-35 (Oxford Univ. Press 2006). Accordingly, the text of the Constitution, contemporaneous State constitutional provisions, and case law all provide strong evidence that the Framers intended to strengthen the government as a means to quell, rather than foster, insurrections. Nothing in the history or language of the Second Amendment undermines that fact. *See infra* Sections III.A.1-5. This constitutional commitment to quell insurrection was reaffirmed by Lincoln and the Reconstruction Amendments following the South's attempt to secede from what it deemed government tyranny. *See infra* Section III.C.6-7.

In addition to being historically inaccurate, the insurrectionists' argument that there is an individual right to amass or use arms against the government is incompatible with our existing constitutional order, national sovereignty, universally recognized principles of democracy, and public safety. *See infra* Section IV.

ARGUMENT

I. The Second Amendment Should Not Be Incorporated

Amicus agrees with and incorporates Respondents' argument that the Second Amendment is not incorporated by the Fourteenth Amendment to apply to the States. *See generally*, Chicago Resp'ts' Br. The Second Amendment is a guarantee directed at the *federal* government, and "properly understood, it is no limitation upon arms control by the states." Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* 137 (Princeton Univ. Press 1997). Thus, "States [are] free to restrict or protect the right under their police powers." *Heller*, 128 S. Ct. at 2813 (explaining *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1876)).

II. If the Second Amendment Is Incorporated, This Court Must Clarify That the Right Incorporated Does Not Include an Insurrectionary Component

In *Heller*, the Court held that the District of Columbia's prohibition on the possession of usable handguns in the home violated the Second Amendment. 128 S. Ct. at 2821-22. In so doing, the Court embarked upon the complex endeavor of illuminating the scope of the right to keep and bear arms. While the precise metes and bounds of this right will, no doubt, require fine-tuning in the years to come, there can be little question today that the right is a limited one. *Id.* at 2799, 2816-17. "From Blackstone through the 19th-century, cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 2816. The Court, accordingly, instructed that "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 2799 (emphasis added).

Nor can there be any doubt, on the basis of the Constitution's text and history, that an individual's right to keep and bear arms does not include any purported right to take up arms against the government. Indeed, it has long been settled that the Second Amendment protects the right to bear arms only "for a lawful purpose." *Id.* at 2813 (quoting *Cruikshank*, at 553); *Hamblen v. U.S.*, No. 09-5025, *5 (6th Cir. Dec. 30, 2009). Notwithstanding this irrefutable precept, insurrectionist *amici* advocate for a reading of the Second Amendment that protects armed conflict against government officials as a means of defending against so-called "official tyranny." *See, e.g.*, *Amicus* Br. of Rocky Mountain Gun Owners and Nat'l Ass'n for Gun Rights at 17-18 ("Rocky Mountain Gun Owners' Brief"). It is therefore crucial that the Court curb such dangerous advocacy by clarifying that the Second Amendment excludes any such purported right to insurrection.

In *Heller*, the Court recognized that the Second Amendment forbids the federal government from imposing an across-the-board prohibition on the possession of an operable handgun by a "law-abiding, responsible citizen[ ]" in his home for the limited "purpose of immediate self-defense." 128 S. Ct. at 2821-22. Although the Court extended the right to keep and bear arms to individuals, the Court stressed that this right protects only *lawful* conduct that properly falls within the confines of the rule of law. *See id.* at 2813 (describing "the right protected by the Second Amendment as 'bearing arms for a lawful purpose' ") (citing *Cruikshank*); *id.* at 2815-16 ("[T]he Second Amendment does not protect . . . weapons not typically possessed by *law-abiding* citizens for *lawful* purposes.") (citing *U.S. v. Miller*, 307 U.S. 174 (1939)) (emphasis added); *see also id.* at 2816-17 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . .").

Glossing over this limitation, the NRA and insurrectionist *amici* have latched onto the Court's statement that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 2801. The NRA goes so far as to suggest that this statement provides the "fundamental link" between the right to bear arms and "*individual* liberty." NRA Br. at 31-32 (emphasis added); *but see Heller*, 128 S. Ct. at 2800-01 (resisting tyranny was merely one of the "many reasons why *the militia* was thought to be 'necessary' ") (emphasis added). The Court should correct this misapprehension before incorporating the Second Amendment because the failure to do so would eviscerate the State's police power.

III. The Second Amendment Does Not Protect a Right to Violent Confrontation Against the Government

Insurrectionists argue that the Second Amendment protects a right to keep and bear arms for the purpose of fighting government tyranny, either individually or in private groups apart from a State militia. *See generally*, Horwitz, *supra*. Private ownership of firearms, they argue, is a vital check against government overreaching, even in its most democratically accountable form. *See id.*; *see also* Horwitz & Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 Alb. Gov't L. Rev. 496 (2008). Thus, insurrectionists invoke the Second Amendment as a basis to rise up in arms against the very same institutions of government that the Constitution was intended to protect. *See* Horwitz, 1 Alb. Gov't L. Rev. at 502-04.

Not only do insurrectionists insist that firearms are "tools of political dissent [that] should be privately owned and unregistered,"[2] they also are dangerously vague as to what constitutes the "tyranny" justifying armed violence, who is a proper target of such uprisings, and who gets to make such decisions.[3] While our country has long rejected private insurrectionism (*see infra*, Section III.A), modern day proponents of this idea glorify the murder of law enforcement officers (and, collaterally, innocent bystanders and children) as a constitutionally-protected *right* in a fight against "tyranny."[1] The Rocky Mountain Gun Owners, for example, define "defense against tyranny" as the use of deadly force against law enforcement officers exercising a judicial warrant. Rocky Mountain Gun Owners' Br. at 17-18 (discussing Ruby Ridge); *Harris v. Roderick*, 126 F.3d 1189, 1193 (9th Cir. 1997) ("Marshals came . . . to serve an arrest warrant."). Another *amicus*, by contrast, identifies terrorism as a "modern type of tyranny." *See Amicus* Br. of Eagle Forum Educ. & Legal Defense at 12. In a world in which "tyranny" means many different things to many different people, it is of paramount importance that the Court choose its words carefully when discussing just what is, and what is not, protected by the Second Amendment.

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[2] David B. Kopel, *Trust the People: The Case Against Gun Control*, CATO Policy Analysis No. 109 (July 11, 1988), at 25.

[3] For example, members of Shays' rebellion described their mission as "[s]uppressing a tyrannical government in the Massachusetts State." C.O. Parmenter, History of Pelham 373 (Carpenter & Morehouse 1898). In another example, when asked to explain increased ammunition sales, the head of the NRA stated, "I [ ] think that it's people worrying about [whether] they'll be attacked by politicians. They're suspicious, and justifiably so." David A. Fahrenthold & Fredrick Kunkle, *U.S. Sees Shortage of Ammunition*, Washington Post (Nov. 3, 2009).

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[1] Deeming the government "tyrannical," groups like the Tax Protest Movement, the White Supremacist Movement, the Sovereign Citizen Movement, and the so-called "militia" movement have all been prosecuted for plotting to blow up federal buildings or otherwise engaging in violent antigovernment activities. *See* Anti-Defamation League, Extremism in America, *available at* http://www.adl.org/learn/ext_us/default.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=1&item=0;http://www.splcenter.org/intel/intelreport/article.jsp?aid=197. For example, Timothy McVeigh's decision to bomb the Murrah Federal Building in Oklahoma City was motivated in part by a desire to avenge perceived government tyranny at Ruby Ridge, Idaho, and Waco, Texas. Lou Michel & Dan Herbeck, *American Terrorist: Timothy McVeigh and the Oklahoma City Bombing* 136-37, 285-86 (Harper Collins 2001).

A. History Demonstrates That the Second Amendment Does Not Include a Right to Keep or Bear Arms for Insurrection

As this Court recognized in *Heller*, "the Second Amendment is not unlimited" and indeed proscribes certain purposes. *Heller*, 128 S. Ct. at 2799, 2816. The historical record makes clear that the Second Amendment does not include a private right of insurrection, particularly where the constitutional order is functioning, where elections occur regularly, and where "the courts are open." *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 554, 572 (2004) (Scalia, J., dissenting) (recognizing "where the courts are open," Suspension Clause is in effect).

1. Pre-ratification History Demonstrates That the Right to Bear Arms Does Not Include a Right to Insurrection

Insurrectionist *amici* argue that the thinkers who influenced the Framers, "such as William Blackstone," believed that "the right to keep and bear arms is essential for the preservation of liberty." *See, e.g., Amicus* Br. of Center for Constitutional Jurisprudence at 15-16. Insurrectionists' reliance on Blackstone, however, is misplaced. Blackstone rejected the notion that the people had an inherent right to possess arms for insurrection.

> It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby for-

> feited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot adopt it, nor argue from it . . . . For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people, reduces all members to their original state of equality, and by annihilating the sovereign power repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual. So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

1 William Blackstone, *Commentaries on the Laws of England* 157 (1765). Blackstone viewed any "right" that would allow individuals to decide for themselves if and when the exercise of armed force against the government is necessary as tantamount to a license for "anarchy," which would be as "fatal to civil liberty as tyranny itself." *Id.* at 244. In fact, Blackstone rejected as "extreme" any view that would "allow[ ] to every individual the right of determining th[e] expedience" of "proclaim[ing] . . . resistance [to the prince] necessary" "and of employing private force to resist even private oppression." *Id.*

Nor does Blackstone provide any support for the proposition that English common law provided an unqualified personal right to bear arms. His *Com-*

mentaries separated the civic and auxiliary right to bear arms from the personal right of self-defense. 1 Blackstone, *supra*, at 184-85. Blackstone's fifth auxiliary right "is that of having arms for their defence, suitable to their condition and degree, and such *as are allowed by law*." 1 Blackstone, *supra*, at 139. Likewise, Article VII of the English Bill of Rights states "[t]hat the Subjects which are Protestants may have Armes for their defence Suitable to their Conditions and *as allowed by law*." Bill of Rights, 1689, 1 W. & M., st. 2, c. 2 (Eng.) (emphasis added). "As allowed by law" qualifies the right of "Protestants [to] have Armes for their defence." Not surprisingly, this Court has recognized that the Second Amendment similarly limits the use of firearms for "lawful purposes." *Heller*, 128 S. Ct. at 2813, 2815-16.

2. The Framers' Constitutional Design Excludes Any Purported Right to Insurrection Against the States

Like Blackstone, the Framers similarly rejected the right of individuals or ad hoc groups to insurrection. The debates during the Constitutional Convention and the ratifying State conventions focused instead on concerns that centralized control of the nation's military posed a threat to the role of State militias. Horwitz, *supra*, at 100-01. Indeed, "Madison and his colleagues provided for an amendment dealing with the militia because most of the states that proposed amendments wanted some guarantee that Congress would not destroy their militias." *Id.* (citation omitted). It was therefore the militia, "united and conducted by governments possessing their affections and confidence," that was intended to balance the power of an oppressive standing army, even if the constitutional order were to break down. Federalist Papers, No. 46 (Madison). Accordingly, virtually every State enacted legislation to regulate its militia, typically subjugating its control under the governor. *See, e.g.*, Conn. Const. of 1818, art. I, § 18 ("The military shall, in all cases, and at all times, be in strict subordination to the civil power."); Ark. Const. of 1868, art. 12, § 3 ("The Governor shall be, Commander-in-Chief, and shall have power to call out the militia to execute the laws [and] suppress insurrection . . . ."); *see generally*, Samuel P. Huntington, *Civilian Control and the Constitution*, 50 Am. Pol. Sci. Rev. 676, 676-77 (1956). Contemporaneous State constitutions reflect this as well. *See infra*, Section III.A.4.

Contrary to the Framers' vision that *the States* were to serve as the guardians against any threat of tyrannical oppression, the Court in *Heller* referred without citation to a Second Amendment right intended to "assure the existence of a '*citizens*' militia' as a safeguard against tyranny." *Heller*, 128 S. Ct. at 2802 (emphasis added); *id.* at 2801 ("It was understood across the political spectrum [in 1788] that the [Second Amendment] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."); *see also Heller* Oral Arg. Tr. at *7 (Scalia, J.) ("[T]he militia that resisted the British was not State-managed."); *id.* at *69 (referring to "the kind of militia that America had, which was a militia separate from the state, separate from the government, which enabled the revolt against the British"). Insofar as this statement can be read to suggest that an individual right to bear arms for insurrectionary purposes is inherent in the Second Amendment, it is unsupported by the historical record.

First, the revolutionary militia was not in fact composed of individuals who acted "separate from government:" "Colonists who bore arms did not act as isolated individuals, but rather acted collectively for the common defense, and did so within a clear set of legal structures." Cornell, *supra*, at 12-13; *see also* John R. Galvin, *The Minute Men: The First Fight: Myths & Realities of the American Revolution* (Pergamon-Brassey's Int'l Defense 1989) ("Many of the [Massachusetts] towns required their minute men to train twice a week . . . .' "); John W. Shy, *A People Numerous & Armed: Reflections on the Military Struggle for American Independence* 126 (Univ. of Mich. 1990) ("Towns, not individuals, decided to fight.").

Second, the Framers plainly did not envision ad hoc groups of armed individuals beyond State control (*i.e.*, a "citizens' militia") as a constitutional check on tyranny; they saw them as unruly mobs that must be quelled. *See* Cornell, *supra*, at 14 ("Without legal authority, a group of armed citizens acting on their own was little more than a riotous mob."). Rather, it was a "well regulated Militia" that they viewed as "necessary to the security of a free State." U.S. Const. amend. II.

Third, and in any event, the "militia" enshrined in the Constitution was intended to be an improvement upon the barely functioning militias that fought in the American Revolution. "Most responsible leaders of the federal government . . . understood that . . . the militia was an unreliable main defense force" and would be ineffective in defending the young country. C. Edward Skeen, *Citizen Soldiers in the War of 1812* 3-4 (Univ. Press of Kentucky 1999) (quoting George Washington, "[the militiamen] come in, you cannot tell how; go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last in a critical moment."); James K. Martin, *A Respectable Army: The Military Origins of the Republic, 1763-1789* 19 (1982) (quoting General James Wolfe, who described the militia as "the dirtiest most contemptible, cowardly dogs you can conceive. There is no depending on them in combat."); *Heller*, 128 S. Ct. at 2832 & n.17 (Stevens, J., dissenting). These persistent shortcomings led the Framers to employ federalism as a means of increasing the militia's effectiveness.[5]

The Framers believed that a constitutional government, rather than a right to insurrection, would be the protector of individual liberty. Indeed, it was the 1787 quelling of Shays' Rebellion, an armed insurrection by farmers seeking tax relief, that prompted George Washington to emerge from retirement to advocate for a stronger federal government. Leonard L. Richards, *Shays' Rebellion: The American Revolution's Final Battle* 1-4, 129-30 (Univ. of Penn. Press 2002). Those opposing Shays believed that, "[i]n a situation in which representative institutions and courts of law were functioning, the rule of law, not arms, was the primary guarantee of life, liberty, and property." Cornell, *supra*, at 34-35.

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[5] U.S. Const. art. I, § 8, cl. 16 ("The Congress shall have Power . . . To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia . . . ."); U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief . . . of the Militia of the several States . . . .").

The Framers understood the dangers of insurrectionism from their own experience, just as we do today. The lesson of such uprisings as Shays' Rebellion was that "the rebellion of a people against a government established by themselves is *not* justifiable, *even in an extreme case*, and can only result in dishonor to the state, and calamity and disgrace to those who participate in it." Josiah Holland, *History of Western Massachusetts* 299-300 (Springfield, Bowles & Co. 1855) (emphasis added). As James Madison stated, "[l]iberty may be endangered by the abuses of liberty as well as the abuses of power." Foner, *supra*, at 219. Examining the Constitution as a whole, it is clear that its purpose was to create a stronger government that could better protect individual liberty from the dangers of mob rule, a fact which was quickly illustrated by the new federal government's response to the Whiskey Rebellion of 1794, when George Washington called forth the constitutional militia of the States to swiftly suppress an insurrection by self-styled citizen militias. Mark Bonsteel Tachau, *A New Look at the Whiskey Rebellion*, in *The Whiskey Rebellion: Past and Present Perspectives* 97 (Steven R. Boyd ed., 1985). Modern experience confirms the view that it is the rule of law, rather than insurrection, that guarantees individual liberty.

3. A Second Amendment Right to Insurrection Would Create Conflict Among Constitutional Provisions

Just as courts should not read one provision of a statute to conflict with another, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000), they ought not read the Second Amendment as arming the populace to commit what the Constitution itself deems a capital offense, *see Cohens v. Virginia*, 19 U.S. 264, 393 (1821) (describing "the duty of the Court" to "construe the constitution as to give effect to both provisions, . . . and not to permit their seeming repugnancy to destroy each other"). "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). The Second Amendment, article I, section 8 of the Constitution, and contemporaneous State constitutions and militia statutes all provide for the militias to be called forth to preserve the *security of the State* and to *quell insurrections*. *See supra* III.A.2 and *infra* III.A.4. To read the Second Amendment as providing arms so that militias can quell, while at the same time facilitating, insurrection makes no sense.

Nor is it plausible to suggest that the Second Amendment *sub silentio* protects a right to bear arms to overthrow the government any time some unspecified number of individuals, in their unguided discretion, decide that the government is "tyrannical." Rather, those individuals are bound by the Constitution to either live within the confines of the rule of law or to garner a supermajority in favor of amendment. *See* U.S. Const. art. V. Should they choose to follow any other course of action, the Constitution is replete with its own survival mechanisms, including the power of Congress to "call[ ] forth the Militia to execute the Laws of the Union [and] *suppress Insurrections*," U.S. Const. art. I, § 8, cl. 15 (emphasis added), and "in Cases of Rebellion" that threaten the nation's unity, even to invade the otherwise invulnerable privilege of habeas corpus, *see* U.S. Const. art. I, § 9, cl. 2; *Hamdi*, 542 U.S. at 525. In addition to these powers, early on, Congress augmented the President's power to quash insurrection with the Calling Forth Act, 1 Stat. 264 (1792) ("in case of insurrection in any state, against the government thereof," the President may call forth the militia to suppress the insurrection), and strengthened this power following the Whiskey Rebellion, 1 Stat. 424, § 1 (1795). In this regard, the Constitution forms an amendable, yet indestructible, Union of indestructible States. *See Texas v. White*, 74 U.S. 700, 725 (1868), *overruled on other grounds by Morgan v. U.S.*, 113 U.S. 476 (1885) (citation omitted); U.S. Const. art. IV § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them . . . against domestic Violence.").

4. Contemporaneous State Constitutions Reinforce That the Right to Bear Arms Had No Insurrectionary Component

State constitutions in existence at the time of the founding predominately reflect a right to bear arms *in defense of the State* or for the "common defense." Indeed, all 15 State constitutions in effect through 1820 that mentioned arms protection expressly limited the exercise of such right in whole or part to the protection of "the State" or for "the common defence," a concept that is fundamentally at odds with any purported right to take up arms *against* the State. *See* Appendix A. Three additional State constitutions identified the "well regulated militia," not an ad hoc "citizens' militia," as "the proper" defense of the State. *Id.* By contrast, the Court in *Heller* identified a mere seven of the 24 State constitutions then in effect that arguably reflected some form of right to bear arms for self-defense. *Heller*, 128 S. Ct. at 2802.

The historical record over the next century is to the same effect. Of the 37 States in the Union at the time of the adoption of the Fourteenth Amendment, only 26 had some form of a constitutional right to bear arms. *See* Appendix B.[6] While a small number of these provisions apparently included a right to "self-defense," *Heller*, at 2802-03, strikingly, 19 of the 26 expressly restricted the right to bear arms for the purpose of defending the State or for the "common defense." Appendix B. Moreover, six that did not (Georgia, Maryland, New Hampshire, North Carolina, Rhode Island, and Virginia) largely mirrored in whole or part the federal text. *See* Appendix B; U.S. Const. amend. II. This underscores the fact that at no time has the Second Amendment been understood to protect a personal or private right of insurrection.

5. Pre-Civil War Case Law Demonstrates That the Right to Bear Arms Did Not Entail a Right to Insurrection

Heller posits that 19-century cases support the existence of an individual right to bear arms unconnected to militia service. 128 S. Ct. at 2807. Even accepting that conclusion as true, the cases on which the Court relied make clear that there is no constitutionally-protected right to bear arms for insurrectionary purposes. *Houston v. Moore*, 18 U.S.

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[6] As noted above, *Amicus* incorporates Respondents' argument that the right to bear arms is not "fundamental," and thus may not be applied to the States through the Fourteenth Amendment. *See generally* Resp'ts' Br.; *Washington v. Glucksburg*, 521 U.S. 702, 719-20 (1997).

1, 50 (1820), the principal case on which the *Heller* Court relied, could not have been more clear on this point: while Congress has limited constitutional powers over the militia, "in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities." While the *Heller* majority and dissent differed about Justice Story's view, the Justice was quite clear in the unanimous *Martin v. Mott*, 25 U.S. 19 (1827), that the Constitution does not embody a right to keep arms for insurrection. The Constitution itself protected against tyranny:

> The remedy for . . . official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, . . . the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

Id. at 32; *see also* Story on the Constitution § 1201 (5th ed.) ("There is but one of two alternatives, which can be resorted to in cases of insurrection . . . either to employ regular troops or to employ the militia to suppress them.").

Other cases relied on by the Court in *Heller* also belie any right to keep and bear arms for insurrection against the government. *See Aymette v. State*, 21 Tenn. 154, 158 (1840) ("The object then, for which the right of keeping and bearing arms is secured, is the defence of the *public* . . . to maintain the supremacy of the laws and the constitution."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) ("[T]he right guaranteed . . . is calculated to incite men to a manly and noble defence *of . . . their country*.") (emphasis added); *U.S. v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) ("No rights are intended to be granted by [the Second Amendment] for an unlawful or unjustifiable purpose.").

Other contemporaneous cases, not discussed by the Court in *Heller*, are to the same effect. The Arkansas Supreme Court, for example, was explicit in disavowing any concordant right to insurrection: "[T]he Legislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to . . . in any manner endanger the free institutions of this State or the United States." *State v. Buzzard*, 4 Ark. 18, 27 (Ark. 1842); *see also State v. Smith*, 11 La. Ann. 633 (1856) ("[The Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke."); *Speer v. Sch. Dirs.*, 50 Pa. 150, 165-66 (1865) (describing Pennsylvania's constitutional provisions against insurrection). In Texas, meanwhile, it was understood that the State constitution's right to bear arms in "the lawful defence of himself or the State," created an individual right that was "in addition [to]" and went beyond the Second Amendment right. *See Cockrum v. State*, 24 Tex. 394, 401 (1859).

6. The Defeat of the Confederacy Cemented the Union's Constitutional Commitment to Quell Insurrection

Secessionists who disagreed with the election of Abraham Lincoln rose up in arms against what they claimed was government tyranny. Bernard Schwartz, *From Confederation to Nation: The American Constitution 1835-1877* 132 (Johns Hopkins Univ. Press 1973). The secessionists' claim that they were free to secede belied the plain language of the newly-enacted constitutional amendments and the very concept of the Union. As Lincoln stated, the Union was "perpetual;" once a State bound itself to the Union, the only way to separate was by agreement between the majority of States: "no State, upon its own mere motion, can lawfully get out of the union . . . acts of violence, within any State or States, against the authority of the United States are insurrectionary or revolutionary. . . ." 4 Abraham Lincoln, *The Collected Works of Abraham Lincoln* 267 (Roy P. Basler ed., Rutgers Univ. Press 1955); Abraham Lincoln, *The Collected Works of Abraham Lincoln: First Supplement, 1832-1865* 434 (Roy P. Basler ed., Greenwood 1974); *see also infra* Section IV.

The defeat of the Confederacy cemented the Union's commitment to quell insurrection and rebellion. *See* Cornell, *supra* 167. The Fourteenth Amendment is replete with anti-insurrectionary and anti-rebellion language, leaving no doubt that insurrection against the government is far from a constitutionally-protected right. U.S. Const. amend. XIV § 2 (protecting against denial of right to vote "except for participation in rebellion"), § 3 (preventing holding of office by those who "shall have engaged in insurrection or rebellion"), and §4 (excluding from the public debt "any debt or obligation incurred in aid of insurrection or rebellion against the United States").

7. The History of Reconstruction Does Not Provide Justification for Reinterpreting the Insurrectionary Scope of the Second Amendment

Insurrectionists claim that a narrow interpretation of the Second Amendment prevented freedman from forcefully resisting white tyranny. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 309-61, 354-55 (1991). The irony in this claim is rich. It is no secret that the "[i]nsurrectionist construct is a continuation of a concerted effort, born and nurtured in the antebellum South, to limit the federal government's effectiveness in protecting the democratic rights of the most vulnerable Americans." Horwitz, *supra*, at 126. Private white militias (*i.e.*, the unorganized militia, including the Klan, Knights of White Camelia and local rifle clubs) brutalized, killed, and otherwise disenfranchised southern blacks under the guise of resisting the tyranny of the federal government. *See* Eric Foner, *The Reconstruction Amendments: Official Documents as Social History, History Now*, 562-63 (Dec. 2004). It was, in fact, the federal government that was the most effective protector of the freedmen from unorganized militias.

Insurrectionists' argument that arms would have facilitated black resistance to white oppression also ignores the practical impossibility of such resistance. The freedmen were outnumbered by well-trained, private militia forces (including many returning Confederate soldiers) that, in the absence of federal troops, were able to terrorize them even when they did have access to weapons. Horwitz, *supra*, at 132-33. While there are inspirational instances of former slaves using arms in legitimate self-defense, it was the federal government, for the most part, that could, and indeed for a time did, provide the needed protection. Nothing exemplifies this more clearly than the Colfax massacre in 1873, in which a standoff between armed black Republicans and white private militias in the wake of a contested election resulted in the death of hundreds of blacks. *Id*.

Respondent NRA argues that the Freedmen's Bureau Act, which was passed by the same Congress that passed the Fourteenth Amendment, created a substantive right to bear arms that was enforceable against the States. NRA Br. at 13-14. Yet like the Civil Rights Act before it, the Freedmen's Bureau Act had an equality limitation:

> the right to . . . have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district *without respect to race or color or previous condition of slavery*.

Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866) (emphasis added). The last phrase would be surplusage if the Act were read to guarantee a substantive right. Lawrence Rosenthal, *The New*

Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation at 22, *at* http://ssrn.com/abstract=1358473.

Faced with violence in the South, Congress did not view the solution as simply arming the freedmen. Rather, Congress *limited* the proliferation of arms amongst former Confederates and others by disbanding the militias and prohibiting their arming. *See* Otis A. Singletary, *Negro Militia and Reconstruction* 3-4 (1963); *see* Act of Mar. 2, 1867, ch. 170 § 6, 14 Stat. 485, 487 (1866). While the drafters of the Freedmen's Bureau Act removed the word "disarm" from the text, this was done as a political accommodation over concerns that it would disarm *all* persons, including those loyal to the State. It was understood that whatever the Second Amendment may mean, it did not include a right to bear arms for the purpose of insurrection. *See* Cong. Globe, 39th Cong., 1st Sess. 1849 (1866) (Mr. Hendricks) ("people bearing arms in hostility to the Government would not be protected by [the Second Amendment]"); *id.* (Mr. Willey) ("I should be very willing to favor discriminating legislation that would regulate the use of arms by the militia in the South."). Thus, Congress affirmed that the Second Amendment provides no protection to those who seek to bear arms outside of the legitimate purposes provided for by State law. *Cf. Presser v. Illinois*, 116 U.S. 252 (1886).

IV. An Incorporated Individual Right to Keep and Bear Arms to Resist Governmental Authority Cannot Be Reconciled with Our Existing Constitutional Order, National Sovereignty, or Our Democratic Form of Government, and Would Also Prevent States From Banning Private Military Organizations

Under insurrectionist theory, one of the purposes of the Second Amendment is to preserve the ability of individuals (or, more realistically, groups of individuals) to prepare for armed "resistance" to a tyrannical government. According to this theory, the threatened or actual use of force against the government is legitimate if the government is perceived to be acting in a tyrannical or unjust manner.

As stated by one *amicus*: " 'To many gun owners, firearms [and the threat of their use] represent the last line of defense against official tyranny . . . ,' although actual armed conflicts with the government are rare." Rocky Mountain Gun Owners Br. at 17. Accordingly, "widespread possession of guns amongst the populace often serves to deter government tyranny without resorting to actual violence." *Id.* Inherent in the logic of a right to possess firearms for the purpose of resisting a perceived threat of governmental tyranny is that, at some point, individuals are entitled to take the next step and use violence if the government refuses to yield. The proposition that the Second Amendment includes a right to resort to the threatened or actual use of violence as a method of influencing governmental action has profound, deleterious, and multifaceted implications.

A. An Insurrectionist Right Is Logically and Functionally Unworkable Within Our Existing Constitutional Order

As discussed above, the Constitution is replete with provisions intended to quell violent resistance to the government. Taken together, these clauses "make it overwhelmingly clear that the Constitution was framed to forbid, prevent, and punish insurrection against its own law—as, indeed, any constitution that claims legitimate authority must do." Gary Wills, *A Necessary Evil: A History of American Distrust of Government* 214 (Simon and Schuster 1999).

The Declaration of Independence recognized that human beings possess an inalienable right derived from natural law to resist and abolish tyrannical governments; but this revolutionary right is not a *constitutional* right, and "it does not find any support anywhere in the text, background, or court interpretation of the Second Amendment." Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent L. Rev. 349, 359-360 (2000). In contrast to the Declaration of Independence, the Constitution is not a charter for revolution; it is a charter for government. *See* Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107, 129 (1991). "History and logic do not permit one to take the right of armed revolution as a serious proposition of positive constitutional law. Only the legal revolutions provided by the political process are recognized by the Constitution." Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 Hamline L. Rev. 69, 95 (1986). The Civil War was fought largely to vindicate the principle that the democratic institutions of our constitutional government cannot be overruled by violent dissenters. Horwitz, *supra*, at 174.

Indeed, in his first inaugural address, President Lincoln flatly rejected the argument, made by the seceding States, that a right to resist the government by force of arms had a constitutional basis:

> Whenever [the people] shall grow weary of this existing Government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember or overthrow it.

Lincoln, First Inaugural Address, Mar. 4, 1861, *available at http://www.bartleby.com/124/pres31.html* (Emphasis original). The two rights are mutually exclusive. Lincoln further stated:

> It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself.

Id. Ninety years later, this Court affirmed Lincoln's reading of the Constitution by recognizing that any right to violent resistance to governmental authority is extra-constitutional and a predicate to its exercise in this country is the destruction of the existing constitutional order:

> Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of

> the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy.

Dennis v. U.S., 341 U.S. 494, 501 (1951).

Under *Dennis*, therefore, the use (or threatened use) of violence to resist governmental authority violates the Constitution and is permissible (as an extra-constitutional right) only if the existing constitutional order completely breaks down. *Id.* Accordingly, the Second Amendment cannot be read to establish a constitutional right to bear arms for the purpose of resisting perceived governmental tyranny because, logically, such a right (like any constitutional right) can be exercised only *within* the existing constitutional order; if that order is extant, then the prerequisite conditions for lawful violent resistance are necessarily absent.

In addition to being baseless and illogical, a purported constitutional right to take up arms to resist governmental tyranny would also be unworkable and functionally ludicrous. If an individual asserts that the government has become sufficiently tyrannical to justify armed resistance under the Second Amendment, there must be some constitutional authority to examine and judge the legitimacy of the individual's claim (history having demonstrated that the difference between tyranny and good government is often subjective). But the right to bear arms in resistance to the government would, of course, be empty if it permitted that same government (through its courts or otherwise) to be the arbiter of whether or not it was acting tyrannically. Henigan, *supra*, at

123. And if the government were in fact tyrannical, it would never recognize a legitimate cause for resistance against itself. *See* Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 St. John's J. Legal Comment 41, 100-01 (2002). In short, because a purported constitutional right to resist a tyrannical government cannot logically or sensibly be exercised within the existing constitutional order, it should not be recognized.

B. An Insurrectionist Right Cannot Be Reconciled With State Sovereignty

As this Court recognized in *Dennis*, any purported constitutional right to employ violence or the threat of violence as a method to resist governmental authority is a recipe for anarchy. 341 U.S. at 501. Because a constitutional right in our system is a limitation on the power of the democratically-elected majority, a constitutional right to bear arms to resist governmental authority "must operate to restrain the power of that majority to prevent armed insurrection. Once democratic government is stripped of that power, it is stripped of the power to protect all of our other liberties." Henigan, *supra*, at 128. As stated by Roscoe Pound, a "legal right of the citizen to wage war on the government is something that cannot be admitted [because it] would defeat the whole Bill of Rights." Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 90-91 (Yale Univ. Press 1957). If a government's authority can be overruled by violent dissent, the government has lost its monopoly on the use of force, ceases to be a State, and "its form of organization becomes indistinguishable from other types of organizations."

Ezra Suleiman, *Dismantling Democratic States* 24 (Princeton Univ. Press 2003).

According to one *amicus*, the so-called "Sagebrush Rebellion," a dispute between local citizens and the federal government over land-use policies in the western United States in the late twentieth century, is an example of a heavily-armed populace successfully exercising its Second Amendment rights to resist the federal government with an implied threat of violence (although "no shots were fired"). *See* Rocky Mountain Gun Owners' Br. at 17-18. Even if the Sagebrush Rebellion ended peacefully, there are profound implications to the assertion that citizens may legitimately use even an implied threat of violence to influence governmental policy.

During the Virginia convention to ratify the Constitution, James Madison noted that the monopoly on force was a fundamental organizing principle of any political entity:

> There never was a government without force. What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all.

3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* at 414 (2d ed. 1863). According to one well-known definition, "[a] compulsory political association with continuous organization . . . will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its

order." Max Weber, *The Theory of Social and Economic Organization* at 154 (Oxford Univ. Press 1946). If a State is deterred from enforcing its judicial or administrative prerogatives by threats of violence (as is approvingly alleged by insurrectionist *amici* to have occurred to the federal government during the Sagebrush Rebellion), it has lost the monopoly on force and is not functioning as a State but has, instead, reverted to a pre-governmental society where might makes right. Horwitz, *supra*, at 174. Ultimately, if a State is unable to enforce its will in the face of violent dissent, it has lost its claim to sovereignty.

C. Allowing Violent Resistance to Influence Government Action Violates the Equal Protection Clause of the Fourteenth Amendment and Is Inherently Antidemocratic

Recognition of an individual right to bear arms for the purpose of influencing governmental action through violence (or the threat of violence) is antithetical to universally recognized principles of democracy and violates the Equal Protection Clause of the Fourteenth Amendment. Ours is a democratic system of government and the right of all qualified citizens to vote in State and federal elections is guaranteed by the Constitution. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Under our democratic form of government, "people govern themselves through their elected representatives" and " 'each and every citizen has an inalienable right to full and effective participation in the political processes.' " *Bd. of Estimate v. Morris*, 489 U.S. 688, 693 (1989) (quoting *Reynolds*, 377 U.S. at 565). The essence of our democratic system of government is the idea that each person is an equal citizen with equal political and civil rights. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualification."); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

The Equal Protection Clause of the Fourteenth Amendment prohibits any citizen from being given greater political rights than any other citizen. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.

The end result of our democratic system is that governmental actions reflect the will of the majority or at least the will of the majority's elected representatives. Thus, the decision of a group of individuals to take up arms to resist governmental authority is in effect an attempt to veto the decision of the majority through violence. Horwitz, *supra*, at 166. To legitimize the use of private violence as a means of influencing the government necessarily gives relatively greater political power to individuals and groups willing and able to use violence to achieve their political objectives. This aggregation of relatively greater political power in a violent subset of citizens is antithetical to universally-accepted principles of democracy and cannot be reconciled with the Equal Protection Clause of the Fourteenth Amendment, which this Court has repeatedly held prohibits "debasement or dilution" of the political rights of certain citizens relative to others. *Reynolds*, 377 U.S. at 555.

D. Incorporation of an Insurrectionist Right Could Prevent States From Banning Private Military Organizations

Because a lone individual could not realistically resist a tyrannical government in a meaningful way, an individual right to bear arms in resistance to government tyranny necessarily implies that groups of individuals may join together to resist. Because effective collective resistance with firearms requires group training and drill, recognition of an insurrectionist right threatens to invalidate State laws that prohibit private paramilitary organizations. This Court's decision in *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886), held that the Second Amendment did not prohibit States from forbidding "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law." But the holding in *Presser* was based on "the fact that the [Second] amendment is a limitation only upon the power of congress and the national government, and not upon that of the state." *Id.* at 265. Thus, if this Court holds that the Second Amendment is applicable to the States through the Fourteenth Amendment, the continuing vitality of *Presser* is called into question.

Heller noted the holding in *Presser*, but suggested that no one supporting "the individual-rights interpretation of the [Second] Amendment" had "contended that States may not ban such [private paramilitary] groups." 128 S. Ct. at 2813. To the contrary, that was near precisely the holding in *Nunn v. State*, 1 Ga. 243, 251 (1846), which the Court in *Heller* quoted at length and praised as "perfectly captur[ing]" the interplay of the operative and prefatory clauses of the Second Amendment. 128 S. Ct. at 2809. In *Nunn*, the Georgia Supreme Court wrote:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, ... Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right. . . .

1 Ga. at 251. While none of the parties or *amici* in *Heller* may have pressed this argument, it was obviously raised in *Presser* and has also been posited more recently. In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982), for instance, the KKK argued that a Texas law banning private armies violated the Second Amendment. The district court upheld the Texas law on the grounds that the "Second Amendment has not been incorporated into the Fourteenth Amendment and thus is not directly applicable to the states" and that the organization in question had "no relationship whatsoever to any state or federal militia." *Id.* Now that *Heller* has held that the Second Amendment protects the right to bear arms without regard to militia affiliation, appli-

cation of the Second Amendment to the States through the Fourteenth Amendment would eliminate the bases on which the district court rejected the KKK's Second Amendment attack on the prohibition of private armies. This could make it difficult if not impossible for States to ban private armies sponsored by terrorists or other violent extremist groups.

CONCLUSION

For the foregoing reasons, *Amicus* submits that the Second Amendment should not be incorporated by the Fourteenth Amendment to apply to the States. If, however, the Court holds that the Amendment is incorporated, *Amicus* urges the Court to clarify that the scope of the right protected does not include an individual right to amass arms or use arms against the government.

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APPENDIX

APPENDIX A

STATE CONSTITUTIONAL PROVISIONS RELATING TO THE RIGHT TO ARMS IN EFFECT THROUGH 1820

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Connecticut	1638	None.
Rhode Island	1663	None.
Delaware	1776	None.
Maryland	1776	Dec. of Rts., Art. XXV: That *a well-regulated militia is the proper and natural defence of a free government.*
New Hampshire	1776	None.
New Jersey	1776	None.

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
North Carolina	1776	Dec. of Rts. § XVII: That the people have a right to bear arms, *for the defence of the State*; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.
Pennsylvania	1776	Dec. of Rts. § XIII: That the people have a right to bear arms *for the defence of* themselves and *the state*; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
South Carolina	1776	None.
Virginia	1776	Bill of Rts., § 13: That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe *defence of a free State*; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases *the military should be under strict subordination to, and governed by, the civil power.*
Georgia	1777	None.*

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* A 1770 Georgia law provided that men qualified for militia duty were required "to carry fire arms" "for the security and *defence of this province* from internal dangers and insurrections." *See D.C. v. Heller*, 128 S. Ct. 2783, 2802-03 (2008).

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
New York	1777	Art. XL: And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and *it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it*; this convention therefore . . . declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness *for service* . . .

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Vermont	1777	Ch. I, art. 16: That the people have a right to bear arms *for the defence of* themselves and *the State* – and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power . . . . Ch. II, art. V: The freemen of this Commonwealth, and their sons, shall be trained and *armed for its defence*, under such regulations, restrictions and exceptions as the general assembly shall, by law, direct . . . .
South Carolina	1778	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Massachusetts	1780	Pt. I, art. XVII: The people have a right to keep and to bear arms *for the common defence.* And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.
New Hampshire	1784	Pt. 1st, art. 24: A *well regulated militia is the proper, natural, and sure defense, of a State.*

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
Vermont	1786	Ch. I, art. XVIII: [Same as 1777 – "*for the defence of . . . the State*"]. Ch. II, art. XIX: The inhabitants of this Commonwealth shall be trained and armed *for its defence*, under such regulations, restrictions, and exceptions, as the General Assembly shall by law direct.
Georgia	1789	None.
Pennsylvania	1790	Art. IX, § 21: That the right of citizens to bear arms, *in defence of* themselves and *the State*, shall not be questioned.
South Carolina	1790	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
U.S. Constitution	1791	Second Amendment: *A well regulated Militia, being necessary to the security of a free State*, the right of the people to keep and bear Arms, shall not be infringed.
Delaware	1792	None.
Kentucky	1792	Art. XII, § 23: The rights of the citizens to bear arms *in defense of* themselves and *the State* shall not be questioned.
New Hampshire	1792	Art. XXIV: [Same as 1784 – "*A well regulated militia is the proper, natural, and sure defence of a state.*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Vermont	1793	Ch. I, art. XVI: [Same as 1786 – "*for the defence of . . . the State*"]. Ch. II, art. LIX: [Same as 1786 – "inhabitants of this Commonwealth shall be trained and armed *for its defence*"].
Tennessee	1796	Art. XI, § 26: That the free men of this State have a right to keep and to bear arms *for their common defence.*
Georgia	1798	None.
Kentucky	1799	Art. 10, § 23: [Same as 1792 – "*in defence of . . . the State*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Ohio	1802	Art. VIII, § 20: That the people have a right to bear arms *for the defense of* themselves and *the State*; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and that the military shall be kept under strict subordination to the civil power.
Louisiana	1812	Art. III, § 22: The free white men of this State, shall be armed and disciplined *for its defence*; but those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled so to do, but shall pay an equivalent for personal service.

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
Indiana	1816	Art. I, § 20: That the people have a right to bear arms *for the defence of* themselves, and *the state*; and that the military shall be kept in strict subordination to the civil power.
Mississippi	1817	Art. I, § 23: Every citizen has a right to bear arms *in defence of* himself and *the State.*
Connecticut	1818	Art. I, § 17: Every citizen has a right to bear arms *in defence of* himself and *the state.*
Illinois	1818	None.

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
Alabama	1819	Art. I, § 23: Every citizen has a right to bear arms *in defence of* himself and *the State.*
Maine	1819	Art. I, § 16: "Every citizen has a right to keep and bear arms *for the common defence*; and this right shall never be questioned."
Missouri	1820	Art. CIII, § 3: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms, *in defense of* themselves and of *the state*, cannot be questioned.

APPENDIX B

STATE CONSTITUTIONAL PROVISIONS RELATING TO THE RIGHT TO ARMS IN EFFECT FROM 1821 THROUGH 1868

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Massachusetts	1780	[Unchanged since 1780 – "*for the common defence*"].
New Hampshire	1792	[Unchanged since 1792 – "*A well regulated militia is the proper, natural, and sure defence of a state.*"].
Vermont	1793	[Unchanged since 1793 – "*for the defence of . . . the State*"].
Connecticut	1818	[Unchanged since 1818 – "*in defence of . . . the state*"].
Maine	1819	[Unchanged since 1819 – "*for the common defence*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
New York	1821	None.
Virginia	1830	Art. I: [Same as 1776: "*defence of a free State*"].
Delaware	1831	None.
Mississippi	1832	Art. I, § 23: [Same as 1817 - "*in defence of . . . the state*"].
Michigan	1835	Art. I, § 13: Every person has a right to bear arms *for the defense of* himself and *the state.*

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Tennessee	1835	Art. I, § 26: That the free white men of this State have a right to keep and to bear arms *for their common defence.* Art. I, § 24: That *the sure and certain defence of a free people, is a well regulated militia*: and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Arkansas	1836	Art. II, § 21: That the free white men of this state shall have a right to keep and bear arms *for their common defence*.
Texas	1836	Dec. of Rts., § 14: Every citizen shall have the right to bear arms *in defence of* himself and *the republic*. The military shall at all times and in all cases be subordinate to the civil power. Dec. of Rts., § 15: The *sure and certain defence of a free people is a well-regulated militia*; and it shall be the duty of the legislature to enact such laws as may be necessary to the organizing of the militia of this republic.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Florida	1838	Art. I, § 21: That the free white men of this State shall have the right to keep and to bear arms, *for their common defense.*
Pennsylvania	1838	Art. IX, § 21: The right of the citizens to bear arms, *in defence of* themselves and *the State*, shall not be questioned.
Rhode Island	1843	Art. I, § 22: The right of the people to keep and bear arms shall not be infringed.
New Jersey	1844	None.
Louisiana	1845	Tit. III, art. 60: [Same as 1812 - "men of this State . . . armed . . . *for its defence*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Texas	1845	Art. I, § 13: Every citizen shall have the right to keep and bear arms, *in the lawful defence* of himself or *the State.*
Iowa	1846	None.
New York	1846	None.
Illinois	1848	None.
Wisconsin	1848	None.
California	1849	None.
Kentucky	1850	Art. XIII, § 25: That the rights of the citizens to bear arms *in defence of* themselves and *the State* shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms.

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
Michigan	1850	Art. XVIII, § 7: Every person has a right to bear arms *for the defense of* himself and *the state.*
Virginia	1850	Art. XIII: [Same as 1830: "*defence of a free State*"].
Indiana	1851	Art. I, § 32: The people shall have a right to bear arms, *for the defense of* themselves and *the State.*
Maryland	1851	Dec. of Rts. § 25: [Same as 1776 – "That a *well-regulated militia is the proper and natural defence of a free government.*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Ohio	1851	Art. I, § 4: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.
Louisiana	1852	Tit. III, art. 59: [Same as 1845 – "men of this State . . . armed . . . *for its defence*"].
Iowa	1857	None.
Minnesota	1857	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Oregon	1857	Art. I, § 27: The people shall have the right to bear arms for the *defence of* themselves, and *the State*, but the Military shall be kept in strict subordination to the civil power[.]
Kansas	1859	Bill of Rts., § 4: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.
Alabama	1861	Art. I, § 23: [Same as 1819 – "*in defence of . . . the State*"].

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Arkansas	1861	Art. II, § 21: That the free white men and Indians of this State have the right to keep and bear arms *for their* individual or *common defense.*
Florida	1861	Art. I, § 21: [Same as 1838 – "*for their common defense*"].
Louisiana	1861	Tit. III, art. 59: [Same as 1852 – "men of this State . . . armed . . . *for its defence*"].
Mississippi	1861	Art. I, § 23: [Same as 1832 – "*in defence of . . . the state*"].
South Carolina	1861	None.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
West Virginia	1863	None.
Arkansas	1864	Art. II, § 21: [Same as 1836 – "*for their common defence*"].
Louisiana	1864	Art. IV, § 67: All able-bodied men in the State shall be armed and disciplined *for its defence*.
Maryland	1864	Dec. of Rts. § 25: [Same as 1851 - "That a *well-regulated militia is the proper and natural defence of a free government.*"].
Nevada	1864	None.
Virginia	1864	None.
Alabama	1865	Art. I, § 27: That every citizen has a right to bear arms *in defence of* himself and *the State*.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
Florida	1865	None [1838 provision deleted].
Georgia	1865	Art. I, § 4: A *well regulated militia, being necessary to the security of a free State*, the right of the people to keep and bear arms shall not be infringed.
Missouri	1865	Art. I, § 8: [Same as 1820 – "*in defense of . . . the state*"].
South Carolina	1865	None.
Texas	1866	Art. I, § 13: Every citizen shall have the right to keep and bear arms, *in the lawful defence of* himself or *the State*.

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
Maryland	1867	Dec. of Rts. § 28: [Same as 1864 – "That a *well-regulated militia is the proper and natural defence of a free government.*"].
Alabama	1868	Art. I, § 28: [Same as 1865 – "*in defence of . . . the state*"].
Arkansas	1868	Art. I, § 5: The citizens of this State shall have the right to keep and bear arms *for their common defense.*
Florida	1868	Dec. of Rts., § 22: The people shall have the right to bear arms *in defense of* themselves and of *the lawful authority of the State.*

STATE	**YEAR ENACTED**	**PURPOSE OF THE RIGHT**
Georgia	1868	Art. I, § 14: A *well-regulated militia being necessary to the security of a free people*, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.
Louisiana	1868	None.
Mississippi	1868	Art. I, § 15: All persons shall have a right to keep and bear arms for their defence.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
North Carolina	1868	Art. I, § 24: A *well-regulated militia being necessary to the security of a free State*, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power.

STATE	YEAR ENACTED	PURPOSE OF THE RIGHT
South Carolina	1868	Art. I, § 28: The people have a right to keep and bear arms *for the common defence.* As, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the general assembly. The military power ought always to be held in an exact subordination to the civil authority, and be governed by it.

AMICUS
CURIAE
BRIEF

No. 08-1521

In The

Supreme Court of the United States

◆

OTIS McDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

◆

BRIEF FOR ENGLISH/EARLY AMERICAN HISTORIANS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

◆

To [illegible]
[illegible]

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are scholars and professional historians whose collective expertise covers the following areas: the history of Stuart England, the Restoration, the 1689 Glorious Revolution, the American Revolution, the Early Republic, American legal history, American Constitutional history, and Anglo-American history. Each has earned one or more advanced degrees in history, political science and/or law. The depth of knowledge they bring to the Court's inquiry in this case is reflected in the biographical information provided in the accompanying Appendix.

Amici Curiae have an interest in the Court having a well-informed and accurate understanding of the Anglo-American tradition to "have arms" from which the Second Amendment originated.

◆

SUMMARY OF ARGUMENT

The ultimate question in this case is whether the Second Amendment is a right that is "deeply rooted in this Nation's history and tradition" and "necessary to the Anglo-American conception of ordered liberty that we have inherited" such that it applies to the states through the Fourteenth Amendment's Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have received at least 7 days written notice from *amici* pursuant to the blanket consents on file herein.

In *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798-99 (2008), the Court examined the English Declaration of Rights of 1689, correctly finding that the right to "have arms" in Article VII is the basis of the right enshrined in the Second Amendment. The Court also correctly recognized that the Second Amendment right to bear arms was an individual right to have and use arms for "self preservation and defense" as in its English predecessor. However, contrary to discredited scholarship upon which *Heller* relied, the right to "have arms" embodied in the English Declaration of Rights did not intend to protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars (what, in modern times, we mean when we use the term "self-defense"). Rather, it referred to a right to possess arms in defense of the realm. Accordingly, the right to own or use arms for private purposes is not a right deeply rooted in our nation's tradition, and should not be incorporated as against the states by the Fourteenth Amendment.

The "have arms" provision in the English Declaration of Rights, which was later codified as the Bill of Rights, provided two protections to the individual. First, the right to "have arms" gave certain persons (qualified Protestants) the right to possess arms to take part in defending the realm against enemies within (i.e., Catholics) as well as foreign invaders. Second, the grant of a right to "have arms" was a compromise of a dispute over control of the militia that gave Parliament concurrent power (with the sovereign) over arming the landed gentry. It allowed Parliament to invoke its right of "self-preservation" and "resistance" should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation.

The Court "throughout its history has freely exercised its power to reexamine the [historical] basis of constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665-66 (1944). *See also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 574-75 (1993); *United States Term Limits v. Thornton,* 514 U.S. 779, 788-800 (1995). That the *Heller* decision is recent only weighs in favor of quick action by the Court to correct its error of historical interpretation. *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (overruled by *Payne v. Tenn.*, 501 U.S. 808 (1991)).

As set forth below, reconstructing the historical meaning of the right to "have arms" deserves better than Petitioners' selective reading and mischaracterization of Blackstone's reference to the "natural right of resistance and self-preservation," the 1768 Boston Town Council's militia resolve, and the grievance against Thomas Gage expressed in the *Declaration of the Causes and Necessity for Taking Up*

Arms. In order to understand what the right to "have arms" meant to the Founders, we must examine Parliament's purpose in codifying the right to "have arms," and review the political protection this right afforded, as well as what Blackstone and St. George Tucker meant by the "natural right of resistance and self-preservation," based on contemporaneous use of those terms. The evidence compiled by scholars discussed herein shows that the Second Amendment gave individual United States citizens the right to take part in the militia to defend their political liberties and to restore their Constitution should, as Blackstone wrote, "the sanctions of society and laws [be] found insufficient to restrain the violence of oppression." It is this right of "self-preservation" and "resistance" that the Boston Town Council invoked in 1768 and the American colonies exercised when they rebelled against England.

Nothing in this brief challenges the fact that eighteenth-century Americans valued the concept of a well-armed citizenry. Nor do the English and Early American Historians express a view here on policy or the wisdom of state laws concerning gun ownership or use of guns for defense of the home. *Amici* simply urge that the Court base its decision on a well-informed study of historical facts, which demonstrates that armed self-defense of the home by individuals acting for private interests was not the right enshrined in the Second Amendment.

◆

ARGUMENT

I. THE SUPREME COURT SHOULD REEXAMINE PRIOR FINDINGS IN LIGHT OF SOUNDER SCHOLARSHIP WHEN INTERPRETING RIGHTS IN THE CONSTITUTION

The Court has in the past reexamined the historical underpinnings of its rulings where appropriate. *See*, *e.g.*, *United States Term Limits v. Thornton*, 514 U.S. 788-800 (1995) (examining historical analysis in prior decision and considering new scholarship bearing upon the interpretation of U.S. Const. art. I, § 2, art. I, § 3, cl. 7 (Qualifications Clauses)). In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 575 (1993), Justice Souter's concurrence recommended that the Court reconsider the rule of *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990), based on "recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause." Such reconsideration does not conflict with principles of *stare decisis*. *Id*. Moreover, that the *Heller* decision is recent weighs in favor of such an undertaking, as the opinion has not yet acquired the stature that accompanies age. *See South Carolina v. Gathers*, 490 U.S. 825 (noting that "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.").

In this case, the Court is called upon to examine the Anglo-American tradition of the right enshrined in the Second Amendment in order to determine whether that right is "fundamental to the American scheme of justice" and hence, incorporated under the Due Process Clause to the states. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Court should undertake its examination of the origins of the Second Amendment afresh in order to properly decide the question presented here.

II. THE ALLOWANCE OF A RIGHT TO "HAVE ARMS" SET FORTH IN THE 1689 DECLARATION OF RIGHTS WAS THE PRECURSOR TO THE SECOND AMENDMENT

A. *Heller* Recognized This Historical Fact and Its Critical Importance to Interpreting the Second Amendment

Heller correctly found that the English right to "have arms" was an expression of the same right that has "long been understood to be the predecessor to our Second Amendment." *Heller*, 128 S.Ct. at 2798. The Court also correctly noted "the historical reality that the Second Amendment was not intended to lay down a 'novel principl[e],' but rather codified a right 'inherited from our English Ancestors'[.]" *Id.* at 2801-02. Moreover, the Court's ultimate conclusion that this was an "individual" right that related to "defensive purposes" was not, strictly speaking, inaccurate. Where the Court erred was by interpreting the quoted terms in a manner divorced from their historical context, reading "individual" to mean "private," "defence" to mean "defense against harm by private individuals acting for private purposes" and equating "self-preservation" with the modern usage of the term "self-defense." In doing so, the Court relied heavily on the scholarship of Joyce Lee Malcolm.[2] The overwhelming consensus among leading English historians, however, is that Malcolm's work is flawed on this point.[3] The origins of the Second Amendment in the English right to "have arms" demonstrate that this right of self-preservation/self-defense gives individuals the right to collectively defend their public interests against organized assault or tyranny, not only in case of a foreign invasion, but, in 1689, in the event of a Catholic plot to overthrow English Protestants. Moreover, the right of "self-preservation" was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives, whether Parliament, the Boston Town Council, or otherwise.

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[2] Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994).

[3] *See, e.g.*, Lois G. Schwoerer, The Declaration of Rights, 1689, at 74-78 (1981); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27 (2000); Tim Harris, Revolution: The Great Crisis of the British Monarchy, 1685-1720, at 343 (2006); David T. Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295 (2009).

B. The Meaning of the Terms "Self-Defense" and "Self-Preservation" in the Time Period Leading Up to the English Bill of Rights

The doctrines of "self-defense" and "self-preservation" referenced in the debates leading to the 1689 Declaration of Rights surfaced earlier in the 1642 English Civil War,[4] during which the King and Parliament struggled over the division of governmental power, especially with respect to control over the militia.[5] The interest at stake, however, was not protection of the bodily "self" that we think of when we use these terms today. Rather, the "self" referred to by these speakers was the public "self" – the collection of rights that lay at the heart of an Englishman's identity, which were intended to be protected by his elected representatives in Parliament. (Thus, the word "people" was also frequently used interchangeably with "Parliament.") Following the work of Hugo Grotius (1583-1645),[6] numerous political pamphlets of that era show that "self-preservation" referred to the philosophical principle that the people are entitled to use force (and arms if necessary) to restore their rights should the sovereign violate the laws, liberties, religion, and estates of the realm.[7]

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[4] J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 409-10 (2003).

[5] LOIS G. SCHWOERER, NO STANDING ARMIES!: THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 33-50 (1974).

For instance, in *A Vindication of Psalme 105.15*, William Prynne defended Parliament's exercise of what he referred to as the right of "self-preservation" because "it is more unlawfull for Kings to plunder and make War upon their Subject[s] by way of offence, then for the Subjects to take up Armes against Kings in such cases by way of defence."[8] Similarly, in a 1643 pamphlet entitled *A Plea for Defensive Armes*, Stephen Marshall addressed whether "a people, especially the representative body of a State, may (after all humble Remonstrances) defend themselves against the unlawfull violence of the Supr[eme] Magistrate ... Endeavoring ... to deprive them of their lawfull Liberties."[9] Marshall knew, of course, that the existing law of the realm gave the power to array the militia to the sovereign. However, he argued that Parliament could lawfully array the militia to "take up these Defensive arms" for the "benefit of preservation[.]"[10] Another tract entitled *The Cause of God and of these Nations* described the removal of Charles I from the throne as an "[a]ction for *self-preservation*" because the King had "forfeited the *security* we might have laid upon him[.]"[11]

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[6] HUGO GROTIUS, *Of War Made by Subjects Against their Superiors*, THE RIGHTS OF WAR AND PEACE (1608).

[7] For further discussion *see* Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 24-35 (2010).

[8] WILLIAM PRYNNE, A VINDICATION OF PSALME 105.15, at 1 (1642). In 1643, Prynne made a similar statement when he explained that Parliament must "defend their owne and the Subjects Liberties, persons, privileges, [etc.] against his Majesties offensive Armies which invade them." WILLIAM PRYNNE, THE THIRD PART OF THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES 4 (1643). The power to engage in such rebellion was "agreeable to the very Law of nature and reason," and, therefore, Prynne explained it was "lawfull to take up Armes for their Defence when it was needful." *Id*.

Use of the rhetoric of "self-preservation" and "defense of themselves" in this fashion was not limited to the pamphleteers. During the papist scare of 1643 members of Parliament repeatedly cited "self-preservation" as justification for Parliament to call upon the county militias. For instance, Warwickshire's militia was arrayed "in the mutual Preservation and Defence of themselves, and the Peace of the said Cities and Counties from all Rapine, Plundering, and Spoiling of said Papists, and ill-affected Persons." In this case, Parliament appealed to those that might

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[9] STEPHEN MARSHALL, A PLEA FOR DEFENSIVE ARMES, at 3 (1643).

[10] *Id.* at 24-25.

[11] THE CAUSE OF GOD, AND OF THESE NATIONS 3 (1658).

"murmur and complain" about being arrayed. Such qualified subjects were reminded that the array was "required of them for their own Preservation, as well as for the publick Safety."[12]

During the Glorious Revolution of 1688-89, which laid the foundation for modern parliamentary democracy, the right of "self-preservation" was again invoked. Thus, Gilbert Burnet's 1688 political tract addressed whether it was "Lawful or Necessary for *Subjects*, to Defend their *Religion, Lives,* and *Liberties*."[13] Invoking the right of "self-preservation," Burnet asserted that the "common principles of all Religion bind the people to preserve themselves and their rights."[14] In another political pamphlet, Robert Ferguson supported Parliament's exercise of the political right of "self-preservation," holding that right to be superior to the 1662 Militia Act's prohibition against the taking up of arms against the sovereign.[15]

Similar to what John Locke penned in *The Second Treatise of Government*,[16] Samuel Johnson

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[12] 5 Historical Collections of Private Passages of State 102-27 (1721).

[13] Gilbert Burnet, An Enquiry into the Measures of Submission to the Supream Authority 2 (1688).

[14] *Id.*

[15] Robert Ferguson, A Brief Justification of the Prince of Orange's Descent into England (1689).

[16] John Locke, The Second Treatise of Government §§ 199-210, 220 (1690). *See also* Steven J. Heyman, *Natural Rights and*

(Continued on following page)

argued that "Everyman has the Right of Self-Preservation, as [e]ntire under the Civil Government, as he had in a state of Nature" when government engages in "acts of Illegal Violence ... and armed with no manner of Authority at all[.]"[17] William Denton wrote of his belief that the people are only bound to "submit to such Laws as may preserve themselves in Peace, and Godliness, and from unjust Violence, and Oppression[.]"[18] However, "if Kings Tyrannize over the People," Denton argued the people may exercise the right of "self-preservation" because such acts are "against the Law of Nature, and consequently against the Law of God; for ... all acts of Tyranny are Oppression, and sinful Justice, and therefore cannot be from God."[19]

The term "self-defence" was used in the same sense: principled rebellion of the people against tyranny. In 1649 James Howell described Parliament's rebellion against Charles I as "self-defense."[20] In a 1689 tract entitled *The History of Self-Defence in Requital to the History of Passive Obedience*, an anonymous writer asserted that "Subjects [may] lawfully defend themselves against

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the Second Amendment, 76 CHI.-KENT L. REV. 237, 241-50 (2000).

[17] SAMUEL JOHNSON, REMARKS UPON DR. SHERLOCK'S BOOK 54 (1689).

[18] WILLIAM DENTON, JUS REGIMINIS 47 (1689).

[19] *Id.*

[20] JAMES HOWELL, AN INQUISITION AFTER BLOOD 4-5 (1649).

the Encroachments of Princes upon their Laws and Liberties."[21] The author sums up the principle of lawful rebellion by stating:

> [Until there are] better Arguments for Non-resistance than we have yet seen, we must take the Liberty to say, that in order to the preserving of our Lives against a Tyrant that would take them away, we may as warrantably make use of Self-Defense[.][22]

C. The History of the Declaration of Rights Demonstrates the Nature of the Right Granted by the Second Amendment

1. Political and Historical Background of the Declaration of Rights

Article VII of the Declaration of Rights provides "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." To interpret this provision, one must first understand the forces behind it. Joyce Lee Malcolm argued in the work relied upon in *Heller* that popular dissatisfaction with the game laws, coupled with the Stuart monarchy's widespread disarmament of Protestants, led Parliament to draft a provision that ensured Protestants a right to "have arms" for private self-defense.[23] *Amici*, based on a wealth of scholarship, disagree with Malcolm's conclusions.[24] Contrary to Malcolm's view, the "have arms" provision was the result of a political dispute over whether ultimate control over the militia[25] – the fighting force composed of qualified subjects of the realm – resided with the sovereign, or in Parliament.

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[21] THE HISTORY OF SELF-DEFENCE IN REQUITAL TO THE HISTORY OF PASSIVE OBEDIENCE 22 (1689).

[22] *Id.* at 30. For additional examples, *see* Charles, *The Right of Self-Preservation*, *supra*, at 33-35.

Immediately prior to the 1662 Militia Act, Parliament, not the sovereign, held control over militia. The prevailing view, as reflected in a 1658 tract entitled *The Leveller* was that it was "prudent and safe for the People to be masters of their own Arms, and to be commanded in the use of them by a part of themselves, (that is their Parliaments) whose interest is the same with theirs."[26] (Notably, people were "masters of their own arms" if they were

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[23] MALCOLM, *supra*, at 116-31.

[24] *See supra* note 3 and *generally* Patrick J. Charles, *"Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 NO. 3 CLEV. ST. L. REV. 351 (2009).

[25] In his treatise entitled AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT 4 (1697), John Trenchard describes the militia as consisting "of the same persons as have the property," which is consistent with the militia statutes of the realm that required members to hold property.

[26] THE LEVELLER 9 (1658).

"formed into such a Constant military posture, by and under the commands of their Parliament.")[27]

However, when Charles II was restored to the throne in 1660, control over the militia was placed in the sovereign's hands.[28] The 1662 Militia Act proclaimed that "both or either of the Houses of Parliament cannot nor ought to pretend [to have command of the militia] ... nor lawfully may raise or levy any War offensive or defensive" against the sovereign.[29] The 1662 Militia Act thus expressly prevented Parliament from exercising the right of "self-preservation" against the tyranny of the king.[30]

The 1662 Militia Act provided for the King to appoint Lieutenants who had the power to call and assemble the militia: to "arm and array them" according to hierarchal and socio-economic status "in case of Insurrection, Rebellion or Invasion."[31] The same Lieutenants also had the power to disarm, as they were authorized to "employ such Person or Persons" as they shall thinke fit" to "search for and seize all Armes in the custody or possession of any person or persons" judged "dangerous to the Peace of the Kingdome."[32] This search and seizure provision was "for the better securing the Peace of the Kingdome" and was not questioned until the employment of Catholic Lieutenants by James II.[33] Until then, the historical record provides numerous instances of governmental disarmament of various "dangerous, disaffected, and unqualified persons," both Catholic and Protestant.[34]

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[27] *Id.* at 8.

[28] 13 Car. 2, c. 6 (1661) (Eng.); 13 & 14 Car. 2, c. 3 (1662) (Eng.).

[29] 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

[30] Charles, *Right of Self-Preservation*, *supra*, at 44-56.

[31] 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

2. James II's Employment of Catholic Lieutenants Led to the Codification of the Parliamentary Allowance to "Have Arms" to Defend the Nation and Exercise the Right of "Self-Preservation"

Although the 1662 Militia Act placed power over the militias in the hands of the sovereign, Parliament could still rely on the Test Acts to ensure that only qualified Protestants could take part in defending the nation and their liberties, as these laws prevented Catholics from serving as Lieutenants. The Test Acts required, for example, "all and every person or persons ... admitted ... into any Office or Offices Civill or Military" to take oaths attesting to disbelief in the doctrine of transubstantiation, a central tenet of the Catholic faith.[35] James II, however, who ascended to the throne in 1685, proceeded to appoint Catholics as Lieutenants in violation of the Test Act. The King's grant of power to Catholics to arm the militia and disarm persons deemed "disaffected" gave rise to a fear amongst Protestants that England would be overthrown by Catholics. It was this fear – reflected in the February 1689 Heads of Grievances – that would lead to the drafting of the Declaration of Rights' "have arms" provision.[36]

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[32] *Id.* § 13.

[33] *Id.*

[34] Charles, *Arms for Their Defence*, *supra*, at 373-79.

As early as 1680, Francis Winnington expressed his concern over the threat a Catholic army posed. He knew the "Militia of London" could "disarm men at discretion" if they pleased. If the militia was composed of Catholics, it was possible for papists to disarm all the Protestants at any time.[37] Despite this ongoing fear, James made clear his intent to continue the Catholic appointments. He hoped that Parliament would "be convinced, that the Militia, which [had] been so much depended on, [was] not sufficient" for occasions such as Monmouth's Rebellion.[38] Members of Parliament, however, were not convinced. Thomas Clarges stated he felt a "great difference" toward such an action and was "afflicted greatly at this Breach of our Liberties."[39]

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[35] 25 Car. 2, c. 2, § 2 (1672) (Eng.).

[36] SCHWOERER, DECLARATION, *supra*, at 22-23.

[37] 8 ANCHITELL GREY, DEBATES ON THE HOUSE OF COMMONS 165 (1769).

[38] 4 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND 1369 (1808).

Another member of the House viewed the employment of Catholic Lieutenants as "dispensing with all the Laws at once."[40] It was "treason for any man to be reconciled to the Church of Rome; for the Pope, by law is [a] declared enemy to this kingdom."[41] John Maynard predicted these employments would lead to the disarming of purportedly disaffected Protestants. Citing the 1662 Militia Act, Maynard reminded the House that not only was it now illegal to take up arms against the King,[42] but that "lords-lieutenants, and deputy-lieutenants, have power to disarm the disaffected."[43] He felt that if Parliament acquiesced in the formation of an army with Catholic officers, it would be providing James II with the means of destroying England. Maynard argued that the Test Act was not a "punishment for the Papists, but a protection for ourselves."[44] (Note that here, too, Maynard's reference to "protection of ourselves" does not refer to private self-defense.)

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[39] *Id.* at 1373.

[40] *Id.* at 1374.

[41] *Id.*

[42] 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

[43] 4 COBBETT, *supra*, at 1374-75.

[44] *Id.* at 1375.

The burdens that creation of a standing army could cause,[45] coupled with the highly unpopular employment of Catholic Lieutenants, was a contributing factor to the Glorious Revolution and James II's removal from the throne, as well as the right to "have arms" in the 1689 Declaration of Rights.[46] What would become the Declaration of Rights was initially drafted as the Heads of Grievances by a committee chaired by George Treby. Numbers 5, 6 and 7 of the Heads of Grievances read as follows:

> 5. The Acts concerning the Militia are grievous to the Subject;
>
> 6. The raising or keeping a Standing Army within this Kingdom in time of Peace, unless it be with the consent of Parliament, is against Law;
>
> 7. [I]t [is] necessary to the public safety that the Subjects, which are Protestants, should provide and keep arms for the common defense, and that arms, which have been seized and taken from them be restored.' "[47]

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[45] The standing army grievance was not real, but propaganda. SCHWOERER, DECLARATION, *supra*, at 71-74.

[46] The Scottish Claim of Right confirms this. *See* David T. Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119 (2004).

[47] 10 H.C. JOUR. 17 (1802).

The last portion of the seventh Grievance – "and arms that have been seized from them be restored" – was removed five days later,[48] indicating that the disarmament referenced was potential rather than factual.[49]

Contrary to Petitioners' claim, Parliament's concern as expressed by the Grievances was not with the various searches and seizures of arms conducted pursuant to the 1662 Militia Act. Rather, it was a reaction to a fear of rule by Catholic armies. This is demonstrated by the fact that at no time during any of the debates to revise the Militia Act did either House of Parliament seek to alter the search and seizure of arms provision.[50]

Indeed, disarmament of disaffected people was a remnant from the Interregnum,[51] continued upon the Restoration of Charles II, and popularly supported even following the accession of William & Mary of Orange.[52] By 1666, it was even generally accepted that it was within the King's authority to place a "special watch on those of the disaffected who had horses or arms above their station, which were to be taken from them."[53] This was affirmed again in 1678 after the Popish Plot.[54] Sir Robert Sawyer advocated calling up one third of the militia, the sheriff, and the *posse comitatus* of the county to search and seize the arms of papists and other disaffected persons potentially participating in the Popish Plot.[55] Parliament wholeheartedly agreed with the Militia Act's search and seizure provision; Sawyer summed up its consensus on the matter by stating, "By Law, when the Kingdom is in danger, those persons who are the authors of that danger should be secured."[56]

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[48] SCHWOERER, DECLARATION, *supra*, at 75.

[49] Charles, *Arms for Their Defence*, *supra*, at 363-79.

[50] When the 1662 Militia Act was adopted, Parliament supported its provisions. *See* 4 Cobbett, *supra*, at 245-46. Following the Glorious Revolution, Parliament supported the search and seizure of arms provision and did not attempt to alter it. 5 Cobbett, *supra*, at 342 (William Williams was for executing "the laws as they are, and ... [for forming] the Militia as well as [the Lieutenants] can").

[51] ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 74-76, 648-50, 992-94, 1233-51 (1911).

[52] *See supra* note 49.

When William and Mary assumed the throne and Parliament proposed a new militia bill, the search and seizure provision was never mentioned in debate. William of Orange sought to put the militia "into some better Posture"[57] and the House of Commons worked to accomplish this objective. The Militia bill was referred to a committee of thirty-eight members, including Richard Temple, Mr. Sacheverell, Sir

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[53] J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 32 (1965).

[54] 6 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS 211 (1769).

[55] *Id.* at 215.

[56] *Id.* at 216.

[57] 10 H.C. JOUR. 200 (1802).

William Williams, and Mr. Boscawen,[58] each of whom had shown dissatisfaction with the disarming of the Protestant militia during the Declaration of Rights' Convention. However, these members and Parliament supported the seizure of arms, as long as the power to do so was held by loyal people (Protestants) and not by treasonous Catholics.[59]

Long after the English Bill of Rights granted the right to "have arms," disarmament pursuant to the 1662 Militia Acts continued unchecked with popular support. In 1701, William granted monetary rewards for arms seized from dangerous or disaffected persons.[60] Far from objecting to these seizures as a violation of the "have arms" provision, Parliament "humbly thanked his majesty for ... order[ing] the seizing of all horses and arms of Papists, and other disaffected persons, and hav[ing] those ill men removed from London, according to the law"[61] and hoped the King would "give directions" for a further search of arms.[62]

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[58] *Id.* at 102-03.

[59] The search and seizure provision remained in force until the enactment of the 1757 Militia Act which removed the search and seizure provisions, but gave arms to the militia only during drills. 30 Geo. 2, c. 25 (1757) (Eng.); 15 COBBETT, *supra*, at 738.

[60] 6 CALENDAR OF STATE PAPERS, *Domestic Series of the Reign of William III, 1700 1702*, at 234 (1969).

[61] 5 COBBETT, *supra*, at 1236.

[62] *Id.*

The notion that the "have arms" provision was a negation of the 1671 Game Act's restrictions on gun ownership is also inaccurate. There is nothing in the drafting history of the Declaration of Rights that extended the right to "have arms" to hunting or shooting of game. None of the grievances or debates even mentions it in passing.[63] The "have arms" provision only ensured that Parliament had the power to arm loyal members of the landed gentry to participate in the militia, to defend the realm and secure the right of "self-preservation" should the sovereign usurp the English Constitution.

This right to defend the realm is what was meant by the language "arms for their defence," not armed individual self-defense of one's person, home, or property. For instance, when Parliament was calling upon the county militias for the "mutual Preservation and Defense of themselves," John Pym described it as "Preparation to take up Arms for their Defence[.]"[64] A 1642 parliamentary resolution for *Defence of Popular* used similar language when it ordered the inhabitants of Popular and Blackwell to provide "One Hundred and Fifty Pounds" to provide "Arms for their Defence[.]"[65]

Lastly, John Sadler's 1682 tract perfectly describes the significance of having "arms for their defence." In discussing the importance of a militia, Sadler stated, "Men ought indeed have *Arms*, and them to keep in Readiness for Defence of the King and Kingdom." Such arms "must be *Assessed by the Common Consent*" of Parliament in "Proportion [to] every Man's *Estate*, and *Fee for the Defence of the Kingdom*[.]"[66] Sadler was against placing the power to assess and array the militia in "two or three Strangers[.]" He felt it important that such power be placed in "Men but themselves" – i.e., Parliament – "to provide and bear Arms, *how*, and *when*, and *where* it shall seem good to such Commissioners[.]" Sadler explained that "all matters of History, telleth us their general Custom was; *Not to entrust any man with bearing Arms ... till some Common Council, more or less, had approved him*."[67]

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[63] Charles, *Arms for Their Defence*, *supra*, at 386-98.

[64] 3 COBBETT, *supra*, at 58.

[65] 2 H.C. JOUR. 855 (1802).

III. BLACKSTONE'S ARTICULATION OF THE RIGHT TO HAVE ARMS AND THE RIGHTS OF "SELF-PRESERVATION" AND "RESISTANCE" WAS CONSISTENT WITH THE USAGE DISCUSSED ABOVE IN CONNECTION WITH THE ENGLISH BILL OF RIGHTS

The influential 18th century treatise on English common law, William Blackstone's *Commentaries*, has been cited in support of the view that the English Bill of Rights "have arms" provision and the Second Amendment both grant an "individual" (or personal) right to armed self-defense. Such arguments, however, take Blackstone's words out of context. Blackstone perfectly articulated the right that the "have arms" provision sought to protect when he wrote:

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[66] JOHN SADLER, RIGHTS OF THE KINGDOM 143 (1682).

[67] *Id.* at 159.

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[68]

Blackstone's fifth auxiliary right does not refer to armed self-defense for private purposes, contrary to Malcolm's view.[69] It is a *public* allowance (under due restrictions) of a "natural right" – and that allowance is made for a particular, *public* purpose: to "restrain the violence of oppression." This is the only interpretation that comports with Blackstone's definition of an "auxiliary right": a means of ensuring that rights "ascertained, and protected by the dead letter of the laws, [would remain in force] if the constitution had provided no other method to secure their actual enjoyment."[70] The first auxiliary right (i.e., the first means by which to protect primary rights) is Parliament's exercise of its powers; the second is through the sovereign; and the third is by the courts of justice.[71] When those fail, resort may be had to the fourth auxiliary right: the right to petition Parliament or the King for the "redress of grievances." And only after *that* right is exhausted may the people resort to "have arms." Thus, in Blackstone's construct, the Declaration's guarantees – the right to petition and the allowance to "have arms" – are means by which individuals preserve and protect their liberties if Parliament, the sovereign, the courts, and their right to petition fail them.[72]

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[68] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1765).

[69] MALCOLM, *supra*, at 130.

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[70] 1 Blackstone, *supra*, at 136.

[71] *Id.* at 136-38.

[72] For a full discussion *see* Heyman, *supra*, at 252-60, and Charles, *Arms for Their Defence*, *supra*, at 414-18. Contemporaneous treatises interpreted the "have arms" provision similarly. *See* Francis Plowden, The Constitution of the United Kingdom of Great Britain & Ireland 158 (1802) ("To preserve these rights or liberties from violation it is necessary ... And to vindicate them, when actually violated or attacked, all British subjects are entitled in the first place to regular administration ... next to the right of petitioning the King and parliament ... and lastly to the right of having and using arms for self-preservation and defence."); Jean Louis de Lolme, The Constitution of England, or, An Account of the English Government 315-24 (1775) (discussing Blackstone and the right of resistance and preservation).

In no part of his *Commentaries* does Blackstone link the right of personal security with the possession of arms, nor does he cite the Declaration of Rights' "have arms" provision in his discussion of personal security. Blackstone cites other provisions of the Declaration of Rights in, for example, his discussions on excessive fines, unreasonable bail, and dispensing with and suspending laws.[73] This demonstrates the omission was deliberate: Blackstone did not simply forget to mention "having arms" in his discussion of the right of personal security; rather, the right of personal security did not carry with it a right to use arms. Nor does Blackstone mention a right to "have arms" in connection with personal self-defense; he recognizes the general natural law principle that it is lawful to use force to repel force used against one's person or family, but nowhere mentions use of arms. Blackstone's right to "have arms" is limited to use to defend liberties "when the sanctions of society and laws are found insufficient to restrain the violence of oppression" only after Parliament, the sovereign, the courts, and the right to petition have failed.[74]

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[73] See 1 BLACKSTONE, *supra*, at 131, 138; 4 BLACKSTONE, *supra*, at 372.

[74] 1 BLACKSTONE, *supra*, at 139-40. This is further supported by Blackstone's detailed discussion of the Declaration of Rights, stating it ensures "the doctrine of resistance, when the executive magistrate endeavors to subvert the constitution." 4 BLACKSTONE, *supra*, at 433.

IV. THE FOUNDERS' UNDERSTANDING OF THE RIGHT TO "HAVE ARMS" AND THE RIGHT OF SELF-PRESERVATION WAS THE SAME AS THAT OF THEIR ENGLISH PREDECESSORS

It is this right of "self-preservation" that St. George Tucker described in his edition of *Blackstone's Commentaries*[75] and that the Founders invoked during the American Revolution. The term "self-preservation" carried the same meaning in political discourse during the Founders' era as it did during the Glorious Revolution. A 1775 tract entitled *Resistance No Rebellion* justified the colonies' rebellion by stating that the people were forced "to have recourse to that resistance, which they had an unquestionable right to make use of, whenever it become absolutely necessary for the defence and preservation of their Constitution."[76] The 1777 tract *Thoughts on the Letters of Edmund Burke* stated it was the English government's "putting America out of the protection of its laws, [that] forced it, for self-preservation sake, into the state of Independency."[77] Thomas Paine stated "[w]e have several instances in the history of this country, and in many of the ages, of the people of England resisting, by force of arms ... for their own necessary defence and preservation, the support of human society and liberty, to protect themselves against all unlawful violence and tyranny[.]"[78]

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[75] Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and the Originalist Methodology*, 103 Nw. U.L. REV. 406 (2009); Charles, *Arms for Their Defence*, *supra*, at 418-21.

[76] RESISTANCE NO REBELLION 21-22 (1775).

[77] ENGLISH DEFENDERS OF AMERICAN FREEDOM 1774-1778, at 199, 226 (P. Smith ed., 1972).

An early invocation of the "right to self-preservation" in connection with the American Revolution occurred in 1768 when the Boston Town Council learned that Parliament had authorized sending British regiments from Halifax and Ireland to quell Boston's rebellious behavior.[79] The Council saw similarities in this to the issues faced by their English forefathers during the English Civil War and the Glorious Revolution. Thus, the Council issued a resolve invoking the Declaration of Rights' "have arms" provision by calling upon the Massachusetts militia to defend Boston.[80]

The Town Council's resolve has been cited as evidence that the Founders understood the "have arms" provision to refer to a right of private armed self-defense,[81] but that is incorrect. The historical evidence makes it abundantly clear that the Founders viewed their right to "have arms" as the auxiliary right that Blackstone described. For instance, the resolve stated its purposes as the "necessary Defence of the community that the good and wholesome Law of this Province, [which requires] every listed Soldier and other Householder ... [to be] provided with a well fix'd Firelock, Musket, Accoutrements and Ammunition."[82] The "good and wholesome Law" referred to the 1693 Militia Act then in force that required:

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[78] THOMAS PAINE, THE CRISIS: NUMBER XIV 114-15 (1775).

[79] COLIN NICHOLSON, THE "INFAMOUS GOVERNOR": FRANCIS BERNARD AND THE ORIGINS OF THE AMERICAN REVOLUTION 175 (2001).

[80] Charles, *Arms For Their Defence*, *supra*, at 425-35.

[81] STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 19-21 (2008).

> every listed Soldier and other Householder (except Troopers) shall be always provided with a well fix'd Firelock, Musket, of Musket or Bastard Musket bore, the Barrel not less than three Foot and a half long; or other good Fire Arms to the Satisfaction[.][83]

Just as Parliament had called upon the militia to defend against the tyranny of Charles I and James II, the Boston Town Council asserted its right of "self-preservation" by invoking the 1693 Militia Act.

Samuel Adams' numerous editorials defending the Council's resolve support this understanding.[84]

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[82] AT A MEETING OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, LEGALLY QUALIFIED AND WARN'D IN PUBLIC TOWN MEETING ASSEMBLED (1768).

[83] THE CHARTER GRANTED BY THEIR MAJESTIES KING WILLIAM AND QUEEN MARY, TO THE INHABITANTS OF THE PROVINCE OF THE MASSACHUSETTS BAY IN NEW ENGLAND 38 (1759).

[84] As befits a political propagandist, Samuel Adams shifted the grounds of his argument against the British repeatedly. However, in none of his editorials did Adams assert a right of the people to armed individual self-defense. He always referred to

(Continued on following page)

For instance, in the *New York Journal,* Adams stated that the resolve was necessary for the colonists to exercise their "natural Right which the People have reserved to themselves, confirmed by the Bill of Rights, to keep Arms for their own Defence; and as Mr. Blackstone observes, it is to be made use of when the Sanctions of Society and Law are found insufficient to restrain the Violence of Oppression."[85] Similarly, in the *Boston Gazette*, Adams defended the resolve because Boston had "reason to fear, there would be a necessity of the means of self preservation against the *violence of oppression*."[86]

Blackstone's right of "self-preservation" and "lawful resistance" to the violence of oppression was invoked by other American revolutionaries. Months prior to the battles at Lexington and Concord, the Massachusetts Assembly resolved that the "great law of self-preservation" required calling upon the militia

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the "have arms" provision as effectuating a right to engage in lawful rebellion and defense of the realm. Charles, *Arms For Their Defence*, *supra,* at 421-34. James Otis made a similar observation when he paraphrased Blackstone. *See* JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES (1765), *reprinted in*, 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 651 (Bernard Bailyn ed., 1965).

[85] Editorial, *Boston, March 17*, N.Y.J., Apr. 13, 1769, supplement at 1, column 3.

[86] 1 THE WRITINGS OF SAMUEL ADAMS 1764-1769, at 316, 318 (1968).

to “perfect[ ] themselves” in “military discipline[.]”[87] “Self-preservation” was the New York Congress’ justification for taking up arms when it resolved that “the attack at Lexington,” the British “point of the bayonet,” and “the slaughter of their fellow subjects” caused them to “naturally fle[e] to arms for their defence.”[88] The people of Hampshire County, Massachusetts similarly declared they were “obliged” to oppose England “by the law of self-preservation, to take up arms in their own defence.”[89]

Judge William Henry Drayton, in his *Charge to the Grand Jury*, declared the colonies to be lawfully separated from England. He felt that the abuses by the British government were so destructive that “[n]ature cried aloud, self-preservation is the great law,”[90] which “forced [the colonies] to take up arms in [their] own defence.”[91] Meanwhile, American pamphleteer Samuel Williams stated that "self-preservation" was the "main aim" and "end" of the English Constitution.[92]

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[87] 1 American Archives: Documents of the American Revolution, 1774-1776, Fourth Series, 1340 (Peter Force ed., 1833-46).

[88] 4 American Archives, *supra*, at 394-95. For other examples of the American revolutionaries referring to their organized resistance as “taking up arms for their defence,” *see id.* at 303, 488, 806, 1052, 1310, 1458, 1526.

[89] 6 American Archives, *supra*, at 701.

[90] 1 American Eloquence: A Collection of Speeches and Addresses by the Most Eminent Orators of America 50, 52 (1859).

[91] *Id.* at 51.

Congress similarly justified the colonists' rebellion and taking up of arms on the principle of "self-preservation." James Duane spoke before Congress, stating that the colonies must make a "vigorous preparation for our common defence" that "shall be conducted to our own self preservation[.]"[93] Congress drafted a *Letter to Great Britain* on June 27, 1775, to justify its actions, declaring that "the principles of Self preservation [no] longer permit us to neglect providing a proper defence to prevent the pernicious practices [against their] ... religion, laws, rights, and liberties of England and America."[94] A 1777 Congressional letter addressed to the *Inhabitants of the United States* proclaimed that Congress was "forced to take up arms for self-preservation" to "maintain the Religion, Liberty and Property of ourselves[.]"[95]

Personal correspondence also reflects the Founders' understanding of the "self-preservation" principle to which Blackstone referred. A May 22,

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[92] SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 21 (1775).

[93] 1 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 392 (Paul H. Smith ed., 1976-2000).

[94] *Id.* at 551.

[95] 7 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 145, 149.

1777, letter by Philip Schuyler defended the revolutionary cause, stating, "But as the first Principle of Human Nature is Self preservation; as we are engaged in a Conflict the Event of which must Either be a perfect Establishment of our Civil & Religious Priviledges or a Total Deprivation of both[.]"[96] Meanwhile, on April 26, 1776, John Hancock described the colonies' rebellion as being "compelled unprepared hastily to take up the Weapons of Self Preservation[.]"[97] Even Rhode Island's 1775 *Rules and Regulations for the Army* declared "the great Law of Self-Preservation hath required our raising and keeping an Army of Observation and Defence, in order to prevent or repel, any further Attempts to enforce the late cruel and oppressive Acts of the British Parliament."[98]

These, and other examples that abound, make it clear that the doctrines of "self-preservation" and "resistance" to which Blackstone referred had nothing to do with our modern concept of armed self-defense by private individuals.

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[96] *Id.* at 108.

[97] 3 Letters of the Delegates to Congress, 1774-1789, at 584.

[98] Rules and Regulations for the Rhode-Island Army 4 (1775). State and local declarations of independence justified separation from England on the principle of "self-preservation." Buckingham County, Virginia declared to "maintain their rights, they were obliged to repel force by force[.]" Pauline Maier, American Scripture 227 (1998). The Cheraws District Court in South Carolina declared "self-preservation" was the cause of separation from England. *Id.* at 229-30.

V. THE SECOND AMENDMENT WAS DRAFTED IN THE SPIRIT OF THE DECLARATION OF RIGHTS "HAVE ARMS" PROVISION

Like the Declaration of Rights' "have arms" provision, the Second Amendment protects the right of citizens to defend their political liberties and ensures the states are able to exercise the right of "self-preservation" should the "sanctions of society and laws [be] insufficient to restrain the violence of oppression."[99] The Second Amendment reads, "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The only difference between the English "have arms" provision and the Second Amendment is that the Second Amendment right is not dependent on privileges of wealth or birth.

The Founders did not limit themselves to borrowing the premise of the Second Amendment from English law. They also borrowed the Second Amendment's preamble from England's militia laws, for the Second Amendment's "well regulated militia" language was inspired by the preamble of the 1757 Militia Act, which stated, "Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom[.]"[100]

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[99] 1 BLACKSTONE, *supra*, at 139.

Historical records show that the Second Amendment was unrelated to any seizure of colonists' arms by British troops. Not a single document – no declaration, petition, or piece of correspondence, public or private – references any claim that the British violated the colonists' right to "have arms." No such statement appears in the Declaration of Independence, local declarations of independence,[101] Judge Drayton's *Charge to the Grand Jury*, or the writings of any American pamphleteer.[102] Moreover, there is no evidence in the Constitution's drafting debates of any correlation between the British army's seizure of arms and the right the Second Amendment affords.[103]

Briefs in support of Petitioner argue that the *Declaration of the Causes and Necessity for Taking Up*

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[100] 30 Geo. 2, c. 25 (1757) (Eng.). Similar language was used in militia laws of the colonies/states. *See* Charles, *Arms for Their Defence*, *supra*, at 450 fn. 701.

[101] Before the Continental Congress drafted the Declaration of Independence, many local declarations declared independence from England. *See* MAIER, *supra*, at 226-34; 5 AMERICAN ARCHIVES, *supra*, at 1034-35, 1046-47, 1205; 6 AMERICAN ARCHIVES, *supra*, at 556-58, 602-4, 649, 698-701, 933, 1017-21.

[102] CHARLES, *Arms For Their Defence*, *supra*, at 421-54.

[103] Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 196-236 (2000); CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen Veit ed., 1991).

Arms written in response to Thomas Gage's seizure of arms from Boston's departing inhabitants proves that the Founders viewed armed self-defense by individuals for private purposes as an inalienable right. This argument misconstrues the nature of the grievance against Gage.[104] The grievance was not with the seizure of arms as a violation of a legal or natural right, but as the breach by Gage of an express agreement with respect to the colonists' property: "the obligation of treaties, which even savage nations esteem sacred."[105] Indeed, the colonists and the Continental Congress had seized the arms of loyalists and suspected loyalists on multiple occasions with no discussion, debate, or complaint of any violation of the right to "have arms."[106]

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[104] Charles, *Arms For Their Defence*, *supra*, at 443-48.

[105] DECLARATION OF THE CAUSES AND NECESSITY FOR TAKING UP ARMS (1775).

[106] For examples, *see* 5 AMERICAN ARCHIVES, *supra*, at 1638 (Congress resolved "all persons to be disarmed ... who are notoriously disaffected to the cause of America, or have refused to associate, to defend, by arms these United Colonies"); *Id.* at 244 (Maryland Council of Safety complies with these orders to disarm disaffected persons and those that do not prescribe to the oath of allegiance); 6 AMERICAN ARCHIVES, *supra*, at 1539 ("[T]hat the Arms and Ammunition of the inimical and disaffected persons ... and of such as refuse to take ... [the] oath [of allegiance], be appraised and used, and applied" according to Congress); 4 AMERICAN ARCHIVES, *supra*, at 271 (Connecticut Assembly orders any person that "shall libel or defame" Congress to "be disarmed, and not allowed to have or keep any arms").

The historical evidence, viewed as a whole, and in context, demonstrates that the Founders viewed the right to "keep and bear arms" as an individual right to defend the state and enforce political liberties. Discussing the 1780 Massachusetts Constitution provision protecting the "right of the people to keep and bear arms for the common defence," the Massachusetts legislature stated that the right to "keep and bear arms," was a right "necessary for the safety of the state" in order "to support the civil government and oppose attempts of factitious and wicked men who may wish to subvert the laws and constitution of their country."[107]

Consistent with this is the fact the phrases "bear arms" and "keep arms" are found only in state militia laws of the era.[108] This Court stated in *Heller* that the "keep arms" was "not prevalent in the written documents of the founding period that we have found." 128 S.Ct. at 2792. However, the phrase was in fact prevalent in state militia laws and the military treatises of the period.[109] Delaware's 1782 Militia Act required every enrolled militiaman to

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[107] Act of Feb. 20, 1787, ch. 9, 1787 Mass. Laws 564.

[108] Patrick J. Charles, The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court 22-30 (2009). In connection with this work, the author read every colony and state militia, patrol, game, slave, gunpowder, and firearm law from the inception of each to 1800.

[109] *Id.* at 27-34; Baron Von Steuben, Regulations for the Order and Discipline of the Troops of the United States 120, 144, 146, 148 (Joseph Riling ed., 1966).

"keep the [same] arms by him at all times, ready and fit for Service" or pay a fine of twenty shillings.[110] Maryland's 1799 Militia Act restricted the "keeping" of arms when it provided that if "any private or non commissioned officer, to whom a musket is delivered, shall use the same in hunting, gunning or fowling or shall not keep his arms ... in neat and clean order ... shall [pay a fine]."[111] Meanwhile, Virginia's 1784 militia law required the slave patrols to "constantly keep the aforesaid arms, accoutrements, and ammunition ready."[112]

Conversely, the language "keep arms" or "bear arms" was not used in any laws dealing with personal self-defense, hunting, game, or private firearm ownership or use.[113] Moreover, one did not need to own or even possess arms in order to "keep" them.[114] Frequently states provided militia members with arms that these individuals were entitled to use only during times of muster – similar to what was permitted by England's 1757 Militia Act.[115] "Keeping" arms referred to the obligation to *maintain* arms; that is, to maintain them in working order. In short, as the historical records show, the state and federal governments had concurrent power over the right to keep and bear arms. While the federal government had the power to arm, organize, and array the federal militia, each state possessed the right to regulate its own militia – and hence, regulate the possession of guns by individuals, as long as the state did not "prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security[.]"[116] *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

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[110] AN ACT FOR ESTABLISHING A MILITIA WITHIN THIS STATE, § 6 (Del. 1782).

[111] A SUPPLEMENT TO THE ACT ENTITLED, AN ACT TO REGULATE AND DISCIPLINE THE MILITIA OF THIS STATE, § 30 (Md. 1799).

[112] 11 STATUTES AT LARGE OF VIRGINIA 478-79 (1823). *See also* 3 AMERICAN ARCHIVES, *supra*, at 1019 ("all others [in the militia] ... are by law obliged to keep Arms, to be reviewed"); 5 AMERICAN ARCHIVES, *supra*, at 1609 ("all others [in the militia] ... are by law obliged to keep arms ... who are between sixteen and fifty-five years of age").

[113] CHARLES, THE SECOND AMENDMENT, *supra*, at 17-21.

[114] *Id.* at 31-34; ROBERT J. SPITZER, GUN CONTROL: A DOCUMENTARY AND REFERENCE GUIDE 54-55 (2009).

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[115] 30 Geo. 2, c. 25 (1757) (Eng.).

[116] *See* CHARLES, THE SECOND AMENDMENT, *supra*, at 71-79, 139-53.

CONCLUSION

Based on the foregoing, we ask that the Court correct its view of the historical background of the Second Amendment as set forth in *Heller.*

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OTIS MCDONALD, et al.,
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v.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning the right to keep and bear arms (*District of Columbia v. Heller*), religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that our God-given freedom starts with the natural right of self-defense, a right recognized by the Second Amendment's protection of the individual ownership and use of firearms. This brief primarily focuses on the God-given nature of the right of the people protected by the Second Amendment and how such a right is a privilege and immunity of all United States citizens.

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[1] *Amicus curiae* Foundation for Moral Law files this brief with blanket consent from both Petitioners and Respondents, granted with the condition of prior notice. Counsel of record for all parties received timely notice of the Foundation's intention to file this brief, copies of which are on file in the Clerk's Office. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation, and properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This Court confirmed in *District of Columbia v. Heller* that constitutional "words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008) (quotation omitted). The plain meaning of the Constitution's text should also guide the Court in this case.

The right to keep and bear arms, like many rights, was not granted by the Constitution; it codified and protected a "pre-existing right." *Id.* at 2797. It is pre-existing not merely because the English Bill of Rights codified it, but because it is derived from the natural, inalienable right of self-defense given by Almighty God. This natural right was recognized as early as ancient Israel, in the Roman Republic, and at the founding of the United States Constitution. The Founders knew that the Second Amendment was protecting a right of the people derived not from mere men or manuscripts, but from the law of nature and of nature's God.

The Fourteenth Amendment prevents states from abridging "the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. This Court affirmed in *Heller* that "the right of the people to keep and bear arms" was an individual right, one that "belongs to all Americans," a "class of persons who are part of a national community." *Id.* at 2791 (quotations omitted). Given the deeply-rooted importance of the Second Amendment right to American history, independence, and liberty, U.S. citizens should be able to assert this privilege and immunity against such abridgement seen in the Chicago and Oak Park, Illinois, handgun bans.

Although *Amicus* does not agree that the original meaning of the Due Process Clause of the Fourteenth Amendment protects substantive rights incorporated to the states, the right to keep and bear arms in the Second Amendment fits the criteria this Court has used in past cases to incorporate certain other rights and interests in the Bill of Rights. Instead of continuing the subjective and unpredictable method of "selective incorporation," however, this Court should adopt the relatively more principled approach of "total incorporation," which would sweep in the Second Amendment's right along with all the others enumerated in the Bill of Rights.

Even if this Court continues to use the "selective" approach to incorporation, there are several reasons to incorporate the "right to keep and bear arms" through the Due Process Clause. First, the text of the Second Amendment provides a general prohibition, contrary to the proscription on "Congress" found in the First Amendment, thus rendering its "right of the people" more textually amenable to incorporation against the states and local governments than the undoubtedly important rights protected in the First. Second, as *Heller* took great pains to explain, the right to keep and bear arms was and is a fundamental right of the people to preserve not only personal safety but also the civil and political liberties of a "free state." Third, for similar reasons, this right ought to be incorporated because it is so deeply rooted in our nation's history and tradition. Indeed, the right to keep and bear arms articulated in the Constitution may be *more* qualified for incorporation than many of the other, extra-textual "rights" that this Court has found to deserve constitutional protection.

The Chicago and Oak Park handgun bans are as draconian in their infringement of the people's right to keep and bear arms as the District of Columbia laws struck down in *Heller* and should suffer the same fate.

ARGUMENT

I. THIS COURT SHOULD AGAIN BE GUIDED IN THIS CASE BY THE ORIGINAL MEANING OF THE CONSTITUTIONAL TEXTS AT ISSUE.

James Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

"In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). In *Heller* this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 2821.

II. THE RIGHT TO KEEP AND BEAR ARMS IS A PRE-EXISTING RIGHT NATURALLY DERIVED FROM THE INALIENABLE RIGHT OF SELF-DEFENSE GIVEN BY GOD.

In last year's *Heller* decision, this Court acknowledged that the Second Amendment did not create the right to keep a bear arms, it "codified a *pre-existing* right." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we

> said in *United States v. Cruikshank*, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed."

Id. at 2797-98 (citation omitted).

The *Heller* Court looked for the source of this right's pre-existence to the right of "Protestants" to "have arms for their defense" protected in the English Bill of Rights of 1689, "long understood to be the predecessor to our Second Amendment." *Id.* at 2798. Sir William Blackstone, in turn, wrote that the arms provision in the English Bill of Rights was derived from "the *natural right* of resistance and self-preservation." *Id.* (quoting 1 William Blackstone, *Commentaries on the Laws of England* 139 (1765)) (emphasis added). The Court also cited a New York article from 1769 calling the right to keep arms "a *natural right*." *Id.* at 2799 (emphasis added). In its discussion of legal commentary published after the amendment's ratification, this Court quoted from St. George Tucker's version of Blackstone's Commentaries, describing the "right to self-defence" as "the first law of nature." *Id.* at 2805. This law of nature, according to J. Ordronaux's legal commentary, was not just pre-existing, "*it had always existed.*" *Id.* at 2812 (quoting Ordronaux, *Constitutional Litigation in the United States* 241-242 (1891)) (emphasis added).

What *Heller* described as a pre-existing, natural right, however, was not granted by mere legal documents or positive law:

> The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power.

Alexander Hamilton, *The Farmer Refuted* (1775) (emphasis added). The natural right to self-defense is among the inalienable rights given by nature and nature's God and recognized in antiquity.

This natural right predates not just the Constitution but America and even England. The Israel of the Old Testament, which influenced western law in general and Anglo-American law in particular,[2] relied upon a citizen militia of men who bore their own arms for defense against foreign enemies. As Chaim Herzog and Mordechai Gichon observe,

> The military organization of the Israelites was, like that of all nations emerging from tribal status, based on the duty of every able-bodied male to bear

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[2] On October 4, 1982, the United States Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentence of the bill read, "Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States . . . ." President John Adams wrote, "As much as I love, esteem and admire the Greeks, I believe the Hebrews have done more to civilize the world. Moses did more than all their legislators and philosophers." John Adams, Handwritten comments on his copy of a book by the Marquis de Concorcet, *Outlines of an Historical View of the Progress of the Human Mind*, *in* Zoltan Haraszti, *Adams and the Prophets* 225 (Harvard Univ. Press 1952).

arms and serve, whenever necessary, in his tribal contingent in the national host. According to the Bible, Moses and Aaron organized the first Israelite army when leaving the Egyptian bondage:

> Take ye the sum of all the congregation of the children of Israel, after their families, by the house of their fathers, with the number of their names, every male by their polls; from twenty years old and upward, all that are able to go forth to war in Israel: thou and Aaron shall number them by their armies. And with you there shall be a man of every tribe; everyone head of the house of his fathers. (Num. 1:2-4)

Chaim Herzog and Mordechai Gichon, *Battles of the Bible* 37 (Greenhill Books, 1997).

In classical Rome, Marcus Tullius Cicero spoke of the right to use arms in self-defense:

> And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. . . . [A] man who has used arms in self-defense is not regarded as having carried them with homicidal aim.

Cicero, *Selected Political Speeches* 222, in Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 17 (Independent Institute 1994).[3]

Hugo Grotius, whom the Framers of our Constitution frequently quoted and who is sometimes called the "Father of International Law," likewise recognized the right of self-defense with arms, "for all animals are provided by nature with means for the very purpose of self-defence." Halbrook 26.

The Founders believed that the right to self-defense was a natural right given by God and essential to the preservation of life and liberty alike. The language of the Declaration of Independence allows for this, it being a "self-evident" truth that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that *among these* are life, liberty, and the pursuit of happiness." (Emphasis added.) The three unalienable (or inalienable) rights listed in the Declaration were not exhaustive but were "among" others granted by the Creator. Religious liberty was another such right, according to James Madison in his *Memorial and Remonstrance* of 1785:

> Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may

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[3] Halbrook adds, "James Otis relied on this passage in arguing self-defense in a trial held in 1771. Most of the passage is quoted in William Eden, *Principles of Penal Law* 213-14 (London 1772), a work heavily relied on by Thomas Jefferson." Halbrook 203 n.76 (citations omitted).

dictate. This right is in its nature an unalienable right.

The Founders considered the right to self-defense to be of like stature and origin. Alexander Hamilton acknowledged that "*the Supreme Being* gave existence to man . . . [and] invested him with an inviolable right to personal liberty and personal safety." Hamilton, *Farmer Refuted* (emphasis added). George Mason, considered the "Father of the Bill of Rights," argued at the Virginia Ratifying Convention, "*divine providence* has given to every individual the means of self-defense." George Mason, Debate in Virginia Ratifying Convention (June 14, 1788), in 3 *The Founders' Constitution* 156 (Phillip Kurland & Ralph Lerner eds., 1987) (emphasis added).[4]

This gift of God cannot be alienated by man or his laws. Justice James Wilson, one of the first Supreme Court justices and a signer of both the Declaration and the Constitution, wrote that the "great natural law of self-preservation cannot be repealed, or superseded, or suspended by any human institution." 3 *The Works of*

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[4] Even Revolutionary pamphleteer Thomas Paine credited God for the right to bear arms in self-defense:

> I am thus far a Quaker [pacifist], that I would gladly agree with all the world to lay aside the use of arms, and settle matters by negotiation: but unless the whole will, the matter ends, and I take up my musket and thank heaven he has put it in my power.

Thomas Paine (attributed), *Thoughts on Defensive War*, from *Pennsylvania Magazine* (July 1775), in 1 *The Writings of Thomas Paine* 55 (Moncure Daniel Conway ed. 1906).

the Honourable James Wilson, L.L.D., Lectures on Law 84 (Bird Wilson publisher 1804); Barton, *Second Amendment* 16 n.9. James Kent, considered one of the fathers of American jurisprudence, wrote that the law of self-defense "is founded on the law of nature, and is not and cannot be superseded by the law of society." 2 James Kent, *Commentaries on American Law* 16 (1826) (O. W. Holmes, Jr. ed., 12th edition, 1896).

From this God-given natural right of "resistance and self-preservation," as Blackstone called it, is derived the people's right of "having arms for their defense." 1 Blackstone 139; *Heller*, 128 S. Ct. at 2798. Richard Henry Lee, a signer of the Declaration, wrote, "To preserve liberty, it is essential that the *whole body* of the people *always* possess arms, and be taught alike, especially when young, how to use them." Richard Henry Lee, Letter XVIII (January 25, 1788), *in An Additional Number of Letters From the Federal Farmer to The Republican* 170 (1788) (emphasis added). And not just civil liberty: Zechariah Johnston, a Virginia legislator and Constitutional Ratification Convention, declared that the right to bear arms is "a principle which secures religious liberty most firmly." Zechariah Johnston, *Debates in the Convention of the Commonwealth of Virginia*, June 25, 1788, in Barton, *supra* 26 n.9. Mason argued that "disarm[ing] the people [is] the best and most effectual way to enslave them." Mason, Virginia Ratifying Convention, in 3 *Founders' Constitution* 156. Given the importance of this right, he wondered aloud, "Why should we not provide against the danger . . . ?" *Id.*

Less than two years before the ratification of the Second Amendment, President George Washington told Congress: "A free people ought . . . to be armed." G. Washington, First Annual Meeting Message to Congress (January 8, 1790), in 1 *American State Papers: Documents, Legislative and Executive, of the Congress of the United States* 11 (Washington: Gales & Seaton 1833). Justice Joseph Story wrote in his *Commentaries on the Constitution* about the "importance" of the Second Amendment "as the palladium of the liberties of a republic since it offers a strong moral check against the usurpation and arbitrary power of rulers." 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833), in 5 *The Founders' Constitution* 214.

Since this Court's *Heller* decision did much to elucidate the importance of the right to keep and bear arms to America's historic concept of personal and civil liberty and security, *Amicus* need not further belabor that point. But what *Heller* called a "natural" and "pre-existing" right had those attributes precisely because it did not spontaneously generate out of positive law or "musty parchments"; the right to keep and bear arms is rather an inalienable gift from "the hand of divinity itself," the Creator God.

III. THE CHICAGO AND OAK PARK HANDGUN BANS VIOLATE THE RIGHT TO KEEP AND BEAR ARMS, A PRIVILEGE AND IMMUNITY UNDER THE FOURTEENTH AMENDMENT.

For the natural, inalienable right to keep and bear arms to be enforceable by this Court, however, it must be protected by the text of the Constitution. For a right as important to the life and liberty of every U.S. citizen, it is hardly a surprise that the right to keep and bear arms would be one of the "privileges and immunities" protected by the Fourteenth Amendment.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV (emphasis added). While "any person" may claim a Fourteenth Amendment right to due process and equal protection, only the particular class of "citizens of the United States"—defined as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof"—are protected against state abridgement of their "privileges or immunities."

In *Heller*, this Court affirmed that the right to keep and bear arms was an individual "right of the people," not a right limited to those in an organized militia or military body. 128 S. Ct. at 2790-91. In protecting the right of "'the people', the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 2791. The "Second Amendment right is exercised individually," but not by all persons within the borders of the United States; rather, it "belongs to *all Americans.*" *Id.* (emphasis added).

> "'[T]he people' protected by the . . . Second Amendment[] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

Id. at 2791 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). American *citizens* fit that definition of "a class of persons" with "sufficient connection" to the "national community." Thus, the right to keep and bear arms should be considered one of the "privileges or immunities" of citizens of the United States. "The right to bear arms has always been the distinctive privilege of freemen." *Id.* at 2812 (quoting Ordronaux, *Constitutional Litigation* 241).

Heller dealt only with a federal District of Columbia handgun ban and, therefore, did not analyze the Fourteenth Amendment question now presented. *See Heller*, 128 S. Ct. at 2813 n.23 (noting question of incorporation "not presented by this case"). But this Court did say that, "whatever else [the Second Amendment] leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible *citizens* to use arms in defense of hearth and home." *Id.* at 2821 (emphasis added). The Chicago and Oak Park handgun prohibitions in this case are akin to the "severe restriction of the District's handgun ban," and just as constitutionally infirm: "a complete prohibition of [handgun] use is invalid" under the right to keep and bear arms. *Id.* at 2818. As citizens of the United States, the citizens of Illinois enjoy the same privilege or immunity to keep and bear arms under the Fourteenth Amendment as do the citizens of Washington, D.C. under the Second Amendment.

IV. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS A FUNDAMENTAL AND DEEPLY-ROOTED AMERICAN RIGHT THAT EASILY SATIFIES THE COURT'S CRITERIA FOR INCORPORATION THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As Chief Justice Marshall observed for a unanimous Court in *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833), the Bill of Rights as originally written restricted only the federal government. *See also Heller*, 128 S. Ct. at 2816 (noting that "[f]or most of our history, the Bill of Rights was not thought applicable to the States"). For vindication of their rights against violations by state and local governments, citizens looked to their respective state courts and state constitutions.

When the people ratified the Fourteenth Amendment in 1868, however, states were not only prevented from abridging the "privileges or immunities" of citizens, they were prohibited from "depriv[ing] any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Beginning in the mid-1920s, the Court began to hold that various rights found in the Bill of Rights—such as freedom of speech, freedom of religion, freedom of the press, the right to counsel—are "incorporated" as a substantive right through the "liberty interest" of the Due Process Clause and thereby applied to state and local governments. *See, e.g., Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel). Some of these incorporated "rights" have no express textual origin in the Constitution, such as the "right to privacy" in its varying manifestations. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (sodomy). This interpretation of the Fourteenth Amendment is known as the "incorporation doctrine."

This Court has generally used two different rules for determining whether a right in the United States Constitution is incorporated against the states through the Fourteenth Amendment. In *Palko v. Connecticut*, the Court held that the criterion is whether the right at issue involves "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 302 U.S. 319, 328 (1937) (quotation omitted). On other occasions, such as in *Moore v. East Cleveland*, the Court asks whether this constitutional protection is "deeply rooted in this Nation's history and tradition." 431 U.S. 494, 503 (1977).[5]

Amicus does not accept the incorporation doctrine. But if one does accept the incorporation doctrine, there are more persuasive reasons to incorporate the "right of the people to keep and bear arms" guaranteed by the Second Amendment than other rights which have been incorporated.

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[5] Another question that is sometimes asked, whether the right is essential to fundamental fairness, applies to procedural rights and is not germane to the issues involved in this case.

A. Compared to Total Incorporation, Selective Incorporation is Subjective and Unreliable.

Justice Hugo Black insisted that the Bill of Rights is totally incorporated into the Fourteenth Amendment and is as fully applicable to state and local governments as to the federal government.

> My study of the historical events that culminated in the Fourteenth Amendment . . . persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.

Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting). Justices Murphy and Rutledge also dissented in *Adamson*, stating that they were "in substantial agreement with the views of Mr. Justice Black," *id.* at 123 (Murphy, J., dissenting), but wanted to go further and state that the Fourteenth Amendment is not "entirely and necessarily limited by the Bill of Rights": "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." *Id.* at 124.

The majority of this Court, however, has not accepted Justice Black's "total incorporation" interpretation, preferring instead "selective incorporation," whereby some of the rights found in the Bill of Rights are incorporated and some are not.

Justice Felix Frankfurter noted the subjectivity of the selective incorporation approach. In his concurring opinion in *Adamson* he wrote:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of twelve for every claim above twenty dollars might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.

Id. at 65 (Frankfurter, J., concurring).

Similarly, Justice Harlan, joined by Justice Stewart, criticized the subjectivity of the selective incorporation approach in his dissent in *Douglas v. Louisiana*:

> Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial by trial jury in the situation before us, or in other situations, is fundamentally unfair. Consequently the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out."

391 U.S. 145, 180-81 (1968) (Harlan, J., dissenting).

The opinions of Justices Black, Frankfurter, and Harlan demonstrate the danger of relying upon the subjective preferences of individual Judges and Justices to determine whether rights like those guaranteed by the Second Amendment are incorporated and applied to the states. Whether the Justices personally find firearms and/or hunting distasteful should not determine the extent of this constitutional protection. "The very enumeration of the right [to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." *Heller*, 128 S. Ct. at 2821. Rather, the decision should rest upon the prominent place this constitutional protection holds in the American constitutional framework.

B. The Second Amendment's Prohibition is General, Protecting a Right of the People Against Encroachment by Anyone.

The Second Amendment protects a right of the people that "shall not be infringed," but does not identify who or what is prohibited from infringing the right.[6] U.S. Const. amend. II. The First Amendment's constitutional protections, by contrast, are incorporated against the states and local governments—all three branches—despite the fact that the text of the amendment is a limitation on the power of the United States "Congress" alone. U.S. Const. amend. I. All other incorporated amendments likewise employ the passive voice to protect rights:

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[6] The open-ended prohibition permitted William Rawle, pre-*Barron*, to write of the Second Amendment:

> The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

Heller, 128 S. Ct. at 2806 (quoting Rawle, *A View of the Constitution of the United States of America* 121-22 (1825)).

e.g., "The right of the people . . . shall not be violated . . ." (Fourth Amendment); "No person shall be held . . . nor shall be compelled . . ." (Fifth Amendment); "the accused shall enjoy the right . . ." (Sixth Amendment); and "nor cruel and unusual punishments inflicted" (Eighth Amendment). The Second Amendment leaves open-ended the identity of the proscribed actor, prohibiting not simply "Congress" from infringement of the right to keep and bear arms. Thus, the text of the Second Amendment lends itself to incorporation more readily than the First.

C. The Right to Keep and Bear Arms Lies at the Base of Our Civil and Political Institutions.

This Court has maintained a "longstanding view that the Bill of Rights codified venerable, widely understood liberties." *Heller*, 128 S. Ct. at 2804. The Second Amendment's own text explains the right's purpose: to prevent the elimination of the militia, which in turn was "necessary to the security of a free state." *Id.* at 2800-01. Like the other rights protected in the first ten amendments, the Framers debated not whether the right to keep and bear arms "was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution." *Id.* at 2801. "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* "[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.*

The Second Amendment was codified in the Bill of Rights precisely because it was deemed essential to the maintenance of liberty. It is the only right with "teeth," and the one by which the people can defend and maintain all their other rights. Indeed, if the right that is expressly protected as "necessary to the security of a free state" and considered the "true palladium of liberty" is not "fundamental" enough to be incorporated through the Due Process Clause of the Fourteenth Amendment, then it is hard to imagine what right qualifies.

D. The Right to Keep and Bear Arms Is Deeply Rooted in This Nation's History and Tradition.

Heller upheld the individual right to keep and bear arms precisely because of its prominence in American history and tradition. Any other reading of the opinion would be patently untenable. The "historical reality" is "that the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" 128 S. Ct. at 2801-02 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

The right may have been bequeathed by England, but Americans made the right to keep and bear arms their own. Madison assured the American people they need not fear the federal government because of, among other reasons, "the advantage of being armed, which the Americans possess over the people of almost every other nation." *The Federalist No. 46* (James Madison) 247 (Carey & McClellan eds. 2001). Noah Webster, an influential confidante of many Constitutional Convention delegates, similarly tried to allay these fears of federal power in a pro-Constitution pamphlet by matter-of-factly stating: "The supreme power in America cannot enforce unjust laws by the sword; *because the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Noah Webster, "An Examination of the Leading Principles of the Federal Constitution," (1787) *reprinted in* 1 *The Debate on the Constitution* 155 (Bernard Bailyn ed. 1993) (emphasis added).

These arguments preceded the Constitution (and therefore the Bill of Rights) and were not premised on a future right but on a then-present reality: "the people are armed." Americans were armed because they were free, and they were free because they were armed. This inalienable right that was deeply rooted in America's founding, and practically necessary for winning independence, was presumed by the Founders to remain evermore.

Americans deeply valued the "ancient right" of keeping and bearing arms, *Heller*, 128 S. Ct. at 2801, and still do. The reasons for its codification in the Second Amendment are still as valid today as in 1791: preserve the militia, self-defense, hunting, and the liberty of a free state and people. *Id.* at 2801. *Amicus* does not agree with the "incorporation doctrine"; but if this Court continues to employ it in its constitutional jurisprudence, the Second Amendment right deserves to be incorporated against the states through the Fourteenth Amendment's Due Process Clause.

CONCLUSION

Last year, this Court refused to "pronounce the Second Amendment extinct." *Id.* at 2822. The Court now has the opportunity to pronounce that the people's right to keep and bear arms is alive and well beyond the city limits of Washington, D.C.

For the reasons stated, this Honorable Court should reverse the decision of the Court of Appeals and invalidate the gun ordinances at issue as violations of the Fourteenth Amendment.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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In The
Supreme Court of the United States

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OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF FOR THE GOLDWATER INSTITUTE, SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT, AND WYOMING LIBERTY GROUP AS AMICI CURIAE SUPPORTING PETITIONERS

◆

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INTEREST OF AMICI CURIAE[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis. The Goldwater Institute has filed this brief because restoring the original meaning and purpose of the Fourteenth Amendment's privileges or immunities clause would be a crucial step in securing our Nation's heritage of rightful liberty and constitutionally limited government.

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[1] Counsel of record for all parties have either filed a blanket consent letter to amicus briefs in this case or they have received notice at least 10 days before the due date of the amici's intention to file this brief and have consented. The parties' letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, has made a monetary contribution to the preparation or submission of this brief.

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they provide this Court with the chance to protect these fundamental rights through a reexamination and restoration of the Privileges and Immunities Clause.

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SUMMARY OF ARGUMENT

1. *STARE DECISIS* DOES NOT COMPEL ADHERENCE TO *SLAUGHTERHOUSE* OR ITS PROGENY BECAUSE ITS ERRONEOUS INTERPRETATION OF THE PRIVILEGES OR IMMUNITIES CLAUSE HAS PROVEN UNWORKABLE.

2. THE NORMAL AND ORDINARY MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE INCORPORATES THE RIGHT TO KEEP AND BEAR ARMS AND OTHER GUARANTEES OF RIGHTFUL LIBERTY.

3. SHIFTING INCORPORATION OF THE RIGHT TO KEEP AND BEAR ARMS AND OTHER GUARANTEES OF RIGHTFUL LIBERTY TO THE PRIVILEGES OR IMMUNITIES CLAUSE IS WORKABLE.

4. SHIFTING INCORPORATION OF THE RIGHT TO KEEP AND BEAR ARMS TO THE PRIVILEGES OR IMMUNITIES CLAUSE IS CONSISTENT WITH FEDERALISM BECAUSE DUAL SOVEREIGNTY IS MEANT TO SECURE RIGHTFUL LIBERTY.

ARGUMENT

The tragedy of our Constitution is that too many supposed "ink blots" have been judicially constructed. The *Slaughterhouse Cases*, 83 U.S. 36, 78 (1873), in particular, have long obscured the privileges or immunities clause of the Fourteenth Amendment. Nevertheless, the evidence is overwhelming that the clause was meant to restrain the states according to the same principles of rightful liberty as the federal government; including, at minimum, those undergirding the Bill of Rights, as well as the Civil Rights and Freedman's Bureau Acts of 1866. Had this fact been recognized in 1873, *Plessy v. Ferguson*, Jim Crow and the civil rights struggles of the twentieth century might have never been. The Court's recent ruling in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), would have itself largely ended the debate over the incorporation of the right to keep and bear arms. And the palladium of our Nation's heritage would have been that much more burnished today.

But sadly *Slaughterhouse* continues to obscure the proper relationship between state sovereignty and the Fourteenth Amendment's guarantee of rightful liberty. Rather than linking the protection of specific individual rights to an objective legal tradition protecting rightful liberty, *Slaughterhouse* requires courts to avert their eyes from the "privileges or immunities" of United States citizens and forces the due process and equal protection clauses to do double duty – to function not only as auxiliary protections of rightful liberty, but also as oracles of specific legal rights. *Slaughterhouse* has thereby relegated the federal judiciary to seeking out the essences of free republican government like one-eyed wandering philosophers, without the guidance or restraint that should have been provided by the privileges or immunities clause. And after more than a century of meandering, incorporation jurisprudence is only beginning to approximate the protection of the range of liberties that the privileges or immunities clause was meant to protect since July 9, 1868, when the Fourteenth Amendment was adopted.

Slaughterhouse's interpretation of the privileges or immunities clause is neither progressive nor consistent with the meaning and purpose of the Fourteenth Amendment. Requiring the States to respect the same rightful liberty undoubtedly secured by the Bill of Rights, federal statutory law, the common law and nearly all state constitutions can hardly be seen as a threat to federalism. Moreover, only by restoring the privileges or immunities clause can the nature and scope of the right to keep and bear arms be vindicated as it was originally understood. In short, if the right result is to be reached for the right reasons in this case and for the benefit of future cases, *Slaughterhouse* and its progeny, *Cruikshank*, *Presser* and *Miller*, should be overturned.

I. *Stare Decisis* Does Not Compel Adherence To The *Slaughterhouse Cases.*

Stare decisis does not command adherence to decisions that represent the unworkable remnants of a clearly erroneous and abandoned doctrine. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). This Court may abandon a prior decision that has "come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.* Moreover, *stare decisis* has its strongest justification in preserving liberties that have been firmly entrenched in society. *Id.* Here, by contrast, adherence to *stare decisis* would have the opposite effect of diluting liberty and of contributing to incoherent jurisprudence that leaves vital liberties on shaky ground. For these reasons, *stare decisis* should not command adherence to the *Slaughterhouse Cases*.

Because of the result reached in the *Slaughterhouse Cases*, it is commonly believed that the Court refused to incorporate the Second Amendment to the states through the Fourteenth Amendment's privileges or immunities clause in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas*, 153 U.S. 535 (1894).[2] *See.*,

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[2] Contrary to what is commonly believed, *Cruikshank*, *Presser* and *Miller* actually only offer *obiter dicta* on the issue of incorporation. In *Cruikshank*, this is made abundantly clear by the Court's specific ruling, which overturned the conviction of the white mob because, "[t]he Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, but this adds nothing to the rights of

(Continued on following page)

e.g., *Nat'l Rifle Assoc. of America, Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009), *cert. granted McDonald v. City of Chicago, Ill.*, 2009 WL 1631802 (2009); *Maloney v. Cuomo*, 554 F.3d 56, 57 (2nd Cir. 2009). This belief arises from the understanding that *Slaughterhouse* curtailed the universe of incorporated rights under the privileges or immunities clause to a set of legal rights that are somehow uniquely created by federal citizenship and distinct from contemporaneous understandings of civil

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one citizen as against another." *Id.* at 554-55. This statement proves that the lack of state action in *Cruikshank* determined its outcome and rendered any incorporation analysis purely gratuitous. Likewise, the result reached in *Presser* had nothing to do with incorporation because the Court's rationale in sustaining the appellant's conviction was simply that the contested conduct was not within the scope of the right to keep and bear arms, as understood under the Second Amendment. *Presser*, 116 U.S. at 264-265. Lastly, *Miller*'s reference to incorporation under the Fourteenth Amendment was wholly gratuitous because the Court dismissed that issue on procedural grounds, declaring, "And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." 153 U.S. at 538. In sum, any interpolated musing over incorporation found in *Cruikshank*, *Miller* and *Presser* was totally unnecessary to the results reached in each case; moreover, any purported non-incorporation holding is logically precluded by the actual rationale used to reach the result of each case. Accordingly, notwithstanding subsequent cases that may have mistakenly relied upon *Cruikshank*, *Miller* and *Presser* as standing against incorporation of the Second Amendment, this Court should refuse to yield to such *obiter dictum*. *See, e.g.*, *Union Tank Line v. Wright*, 249 U.S. 275, 284 (1919).

rights. *Id.*; *Slaughterhouse Cases*, 83 U.S. 78-79; *Adamson v. California*, 332 U.S. 46, 52-53 (1947) (Black, J., dissenting). Exactly what *Slaughterhouse* meant by its interpretation of the privileges or immunities clause, if anything, is a genuine mystery – various commentators have offered equally plausible contradictory interpretations of the ink blot that is Justice Miller's majority opinion. But, as conceded by the Seventh Circuit below, there is no doubt the *Slaughterhouse* approach to *incorporation* is now "defunct." *Nat'l Rifle Assoc.*, 567 F.3d at 857-58.

For over a century, the Court has bypassed and abandoned *Slaughterhouse* in favor of selective incorporation through the due process clause. Ironically, the selective incorporation doctrine has incorporated most of the rights and restraints on government guaranteed by the Bill of Rights, often based on considerations of the very federal and common law traditions seemingly rejected by the majority in *Slaughterhouse* as a source of privileges or immunities. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. State of La.*, 391 U.S. 145, 149 n.14 (1968). All that functionally remains of the *Slaughterhouse Cases* today is the refusal to interpret the Fourteenth Amendment's privileges or immunities clause as referencing and incorporating all of the privileges or immunities objectively guaranteed by federal law. But separating the privileges or immunities clause from incorporation doctrine has generated anything but workable results.

If preserving the rule of law is truly the standard by which to measure "workability" under the doctrine of *stare decisis* (*see Casey*, 505 U.S. at 854), *Slaughterhouse*'s principal result of shunting modern incorporation doctrine to the Fourteenth Amendment's due process and equal protection clauses has proven unworkable. No one pretends, for example, that a common legal principle unites the due process holdings of *Lochner*, *Caroline Products*, *Roe*, *Glucksberg* and *Lawrence* or the equal protection holdings of *Plessy*, *Korematsu*, *Brown*, *Williamson*, *City of Cleburne* and *Grutter*.[3] As these cases illustrate, the due process and equal protection clauses have undeniably served to protect both state-sponsored tyranny and rightful liberty; sometimes at the same time. The clauses have proven unreliable, inconsistent and often inexplicable guarantors of rightful liberty against state action. This is because by precluding incorporation through the privileges or immunities clause, *Slaughterhouse* has forced the due process and equal protection clauses to do far more than they were meant to do.

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[3] *Compare Lochner v. New York*, 198 U.S. 45 (1905) *with U.S. v. Caroline Products, Inc.*, 304 U.S. 144, 154 n.4 (1938); *Roe v. Wade*, 410 U.S. 113 (1973); *Glucksberg*, 521 U.S. 145; and *Lawrence v. Texas*, 539 U.S. 558 (2003); *compare Plessy v. Ferguson*, 163 U.S. 537 (1896) *with Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Although they are not devoid of substance, the due process and equal protection clauses were not meant to serve as a fount of all legal rights that would be constitutionally protected against state action. The Fourteenth Amendment's due process clause, like the clause found in the 5th Amendment and most state constitutions, was originally meant to serve as a general prohibition on government dressing up acts of tyrannical "will" as "law."[4] Like the Magna Carta's "law of the land" provision, this guarantee of

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[4] *See, e.g., Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276-77 (1855) (stating "[the 5th Amendment's due process clause] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will"); *Ex parte Law*, 15 F.Cas. 3, 10 (S.D. Ga. 1866) (observing "[b]y operation of the legislative will alone, the petitioner is already adjudged . . . without due process of law"); *Cohen v. Wright*, 22 Cal. 293, 318 (1863) (stating "'due process of law' have a distinct legal signification, clearly securing . . . essential rights [that] cannot be taken away by any mere declaration of legislative will"); *Denny v. Mattoon*, 84 Mass. 361, 377-82 (Mass. 1861) (observing "an act of legislation, operating retrospectively and purporting to give efficacy and validity to acts and processes which have been adjudged void . . . takes away from a subject his property, not by due process of law or the law of the land, but by an arbitrary exercise of legislative will"); *Taylor v. Porter & Ford*, 4 Hill 140, 144-45 (N.Y. 1843) (observing "[u]nder our form of government the legislature is not supreme . . . [t]he security of life, liberty and property, lies at the foundation of the social compact; and to say that . . . 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established").

"due process of law" legitimately blocks the most blatant abuses of government power; and, in that respect, the clause was undoubtedly meant to protect fundamental rights.[5]

But the general principles of the due process clause, which stand firmly against the likes of summary executions and arbitrary confiscations of property, are often ill-equipped to help courts articulate specific constitutional guarantees of rightful liberty that stand against subtler or more remote threats of abusive state action. Likewise, what the equal protection clause specifically guarantees against state action depends entirely on what differences are deemed "material" or "immaterial" and what rights are deemed "fundamental" or "non-fundamental;" and making this judgment call requires more than contemplation of the principle of "equality under the law" alone can provide. Consequently, if incorporation is not moored to an objective legal framework, such as that which is encompassed by the privileges or immunities clause (as discussed in the next section), incorporation necessarily becomes an *ad hoc* and lawless exercise.

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[5] *See, e.g.*, *Murray*, 59 U.S. at 276-77 (observing "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta"); *Wilkinson v. Leland*, 27 U.S. 627, 657-58 (1829) (stating "[i]n a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded"); *Wynehamer v. People*, 13 N.Y. 378, 392-93 (1856) (stating [t]o say, as has been suggested, that the law of the land, or "due process of law," may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity").

In short, while the due process and equal protection clauses do legitimately furnish a crucial check against the worst excesses of tyrannical state government, they lack sufficient content to identify specific rights reliably and consistently without risking arbitrary manipulation in accordance with subjective judicial preferences. For this reason, relying on the due process and equal protection clauses to guard against the abuse of state action is more likely to produce the rule of men and not law – much like what would happen if our unified court system abandoned principles of law in favor of exclusive reliance on equitable maxims to resolve all disputes.

Consequently, if one presumes that protecting the rule of law is the threshold principle upon which the doctrine of *stare decisis* rests, the *Slaughterhouse Cases* must be overturned so that the Fourteenth Amendment's privileges or immunities clause can supply the specific legal content that the due process and equal protection clauses lack, when they are pressed into service under selective incorporation doctrine. Doing anything else would enshrine an abandoned and unworkable doctrine that, history shows, has undermined and will continue to undermine the meaning of the Fourteenth Amendment and the values of our Republic.

II. The Privileges Or Immunities Clause Clearly Incorporates The Right To Keep And Bear Arms And Other Liberties Ignored By *Slaughterhouse*.

The majority opinion in *Slaughterhouse* blotted-out the privileges or immunities clause by giving it an obscure interpretation that could not possibly have been shared by the framers or ratifiers of the Fourteenth Amendment. It is likely that the majority was motivated not by adherence to the text, meaning or purpose of the clause, but by a desire to avoid further acrimony and conflict with the Southern states during the tumultuous Reconstruction Era. Accordingly, as requested by Justices ranging from Hugo Black to Clarence Thomas, it is now time to reconsider *Slaughterhouse*, as well as the meaning and purpose of the Fourteenth Amendment's privileges or immunities clause. *Compare Adamson*, 332 U.S. at 74-75 (Black, J., dissenting) (observing "[i]n my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights") *with Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) (stating "[b]ecause I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case").

The Constitution "was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Heller*, 128 S. Ct. at 2789. Accordingly, the interpretation of a constitutional provision, like a statute, begins with the text. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006). If the normal and ordinary meaning of the text is clear, the Court need go no further. *Id.*

Beginning with the text, section 1 of the Fourteenth Amendment says in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST., AMEND. 14. The normal and ordinary meaning of "privileges or immunities" is clear, despite its obstruction by *Slaughterhouse*.

When the Fourteenth Amendment was adopted, "privileges" and "immunities" were widely used legal terms, for which Blackstone was regarded as the authoritative source of their normal and ordinary meaning. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1205 (1992) (observing "[w]ould-be lawyers began their training with Blackstone's Commentaries, not United States Reports"); *see generally Heller*, 128 S. Ct. at 2798 (stating "Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation'") (citing *Alden v. Maine*, 527 U.S. 706, 715 (1999)). According to Blackstone, the terms "privileges" and "immunities" referred to rights of personal security, personal liberty and private property, as recognized by civil law – what are more commonly called civil rights today. *See* BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Vol. 1, 129 (19th ed. 1836) (J.E. Hovenden, editor), *available at* http://books.google.com (last visited November 4, 2009). Specifically, Blackstone described the meaning of "privileges" and "immunities" as follows:

> Thus much for the declaration of our rights and liberties. The rights themselves, thus defined by these several statutes [Magna Carta, Petition of Right, English Bill of Rights and Act of Settlement] consist in a number of private *immunities*; which will appear, from what has been premised, to be no other, than either that residuum of *natural liberty*, which is not required by the laws of society to be sacrificed to public convenience; or else those *civil privileges*,

> *which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. . . .* And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

Id. (emphasis added). This meaning is confirmed by Justice Washington's discussion of the "privileges and immunities" clause in *Corfield v. Coryell*, 6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), as well as by the usage evidenced in numerous published cases before and contemporaneously with the adoption of the Fourteenth Amendment.[6] Accordingly, an examination

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[6] *See, e.g., Jackson v. People*, 9 Mich. 111, 1860 WL 2650, * 4 (Mich. 1860) (affirming common law guarantees as "the immunity of life, liberty and property"); *Jones v. Robbins*, 74 Mass. 329, 344 (Mass. 1857) ("these privileges, as intended to be secured by the American constitutions . . . [include] '[t]he right of personal security is guarded by provisions transcribed into the constitutions in this country from Magna Charta and other fundamental acts of the English parliament, and enforced by additional and more precise injunctions'"); *Bryan v. Walton*, 14 Ga. 185, 1853 WL 1662, * 13 (Ga. 1853) (rejecting argument that manumission of a slave resulted in the former slave enjoying "all the rights, privileges and immunities which are incident to freedom, among the free white inhabitants of this country");

(Continued on following page)

State v. Claiborne, 19 Tenn. 331, 1839 WL 2264, * 6 (Tenn. 1838) (discussing "[w]ho then is a citizen? . . . certainly among the Romans, where the term had its origin, a citizen was entitled to all the privileges, immunities, and rights, civil and political. Free negroes have always been a degraded race in the United States, having the right, it is true, of controlling their own actions and enjoying the fruits of their own labor, but deprived of almost every other privilege of the free citizen, and constituting an inferior caste in society, with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom the laws have never allowed the enjoyment of equal rights, or the immunities of the free white citizen"); *Douglas v. Stevens*, 1 Del.Ch. 465, 1821 WL 183, * 3-4 (De. 1821) (observing "the words 'privileges and immunities' comprehend all the rights, and all the methods of protecting those rights which belong to a person in a state of civil society, subject, to be sure, to some restrictions, but to such only as the welfare of society and the general good require. . . . The rights of enjoying and defending life and liberty, of acquiring and protecting reputation and property, – and, in general, of attaining objects suitable to their condition, without injury to another, are the rights of a citizen; and all men by nature have them . . . There are, therefore, established certain other subordinate rights of the citizen, which serve principally as barriers to protect and maintain inviolate those great and primary rights. The preservation of these original rights includes the preservation of the subordinate rights, – the privileges and immunities which it was intended by the Constitution of this State to preserve to its citizens, and by the Constitution of the United States to preserve, in each State, to the citizens of the other States, for the protection of the primary rights before mentioned. The right of enjoying and defending life consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one's own life . . . Therefore, this privilege belongs to us, and, by the Constitution of the United States, to every other citizen of the United States in common with us") (citing Blackstone's Commentaries); *Harry v. Decker*, 1 Miss. 36, 1818 WL 1235, * 1

(Continued on following page)

of the text and common usage reveals that the ordinary and normal meaning of the "privileges or "immunities" clause was "[n]o State shall make or enforce any law which shall abridge the rights of citizens of the United States to personal security, personal liberty and private property, which are recognized under federal law."

Federal law recognized many rights of personal security, liberty and property, independently of state law at the time the Fourteenth Amendment was adopted on July 9, 1868; including the rights secured by the first nine amendments to the Bill of Rights and guaranteed by the Civil Rights and Freedman's Bureau Acts of 1866. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866); Freedman's Bureau

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(Miss. 1818) (referring to the Northwest Ordinance of 1787 as setting out "the privileges and immunities of freemen"); *Campbell v. Morris*, 3 H. & McH. 535, 565-66 (Md. 1797) (equating "privileges and immunities" with "civil right[s], which a man as a member of civil society must enjoy"); *cf. Mitchell v. Harmony*, 54 U.S. 115, 143 (1851) (Daniel, J., dissenting) (quoting Blackstone as describing the right to jury trial as "the most transcendent privilege which any subject can enjoy or wish"); *Ex parte Vallandigham*, 28 F.Cas. 874, 901 (S.D. Ohio 1863) (counsel arguing: "[h]ow, then, did they [the Founders] secure liberty? In the order of securities we find, first, certain declaratory clauses. It is one step toward establishing and securing rights to agree upon them and declare them. The citizens of each state shall be entitled to all the privileges and immunities of the several states . . . "); *Northwestern Bank v. Nelson*, 42 Va. 108, 1844 WL 2861, *12 (Va. 1844) (discussing discovery in litigation as a "privilege essential to the immunities and liberties of the citizen").

Act of 1866, ch. 200, 14 Stat. 173 (July 16, 1866). Indeed, the Fourteenth Amendment, the Civil Rights and Freedman's Bureau Acts of 1866 were clearly cut of the same cloth. *See* Cong. Globe, 39th Cong., 1st sess., 2465 (1866) (Thayer) ("[t]he amendment 'incorporat[ed] in the Constitution of the United States the principle of the civil rights bill which has lately become a law'"); *see also Bell v. Maryland*, 378 U.S. 226, 292-93 (1964) (Goldberg, J., concurring) (tracing the Fourteenth Amendment to the Civil Rights Act and Freedman's Bureau bill).

The Fourteenth Amendment was drafted and adopted because of constitutional concerns over whether Congress had the power to grant United States citizens the privileges or immunities set out in the Civil Rights and Freedman's Bureau Acts. Cong. Globe, 39th Cong., 1st sess., 2542 (1866) (Bingham) ("There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply . . . It is the power in the people, the whole people of the United States . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State"). Accordingly, the interpretive doctrine of *in pari materia* compels reading into the Fourteenth Amendment's privileges or immunities clause the various personal rights guaranteed by the two Acts, not the least of which is the "constitutional right to bear arms" – as expressly guaranteed by section 14 of the Freedman's Bureau Act of 1866. *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 733 (1885) (holding "[a]s the clause in the Constitution and the act of the legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together") (citations omitted).[7] Consideration of extrinsic evidence of the meaning of the clause only reinforces this interpretation of the privileges or immunities clause.

Contemporaneous legislative history confirms that the privileges or immunities clause was meant to incorporate the rights of personal security, liberty and property secured by the Bill of Rights, federal law and the common law, including the right to keep and bear arms. *See* Cong. Globe, 39th Cong., 1st Sess., 340, 430, 432, 813, 816, 1118, 1183, 1263, 1291, 1294, 1629, 1838, 1972 (1866). The prefactory words, "[n]o State shall make or enforce any law," after all, replicate the language that Justice Marshall held would have been necessary to enforce the liberties guaranteed by the Bill of Rights against the States in *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243 (1833). Moreover, Senator Howard famously described Section 1 of the Fourteenth Amendment as:

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[7] *See generally In re Tveten*, 402 N.W.2d 551, 554 (Minn. 1987) ("'Statutes relating to the same subject are presumed to be imbued with the same spirit and to have been passed with deliberation and full knowledge of all existing legislation on the subject and regarded by the lawmakers as being parts of a connected whole. Statutes are *in pari materia* when they relate to same matter or subject even though some are specific and some general and even though they have not been enacted simultaneously and do not refer to each other expressly. Where two acts *in pari materia* are construed together and one contains provisions omitted from the other, the omitted provisions will be applied in the proceeding under the act not containing such provisions, where not inconsistent with the purpose of the act.'") (citing 6 Dunnell, Supp. § 8984).

> [A] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States . . . [including] the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms. . . . [in order] to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st sess., 2765-66 (1866) (emphasis added). Lastly, transcripts of ratification debates in the states, contemporaneous media accounts of those debates and subsequent statements of the framers of the Fourteenth Amendment all confirm that the amendment was meant and publicly understood as protecting against state action all of the rights enjoyed by United States citizens under federal law, including the right to keep and bear arms. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 132-52 (1986) (discussing numerous media accounts, ratification debates and reported contemporaneous public statements by public officials).[8]

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[8] *See* Cong. Globe, 42nd Cong., 1st sess., 334, 370, 380, 448, 475-76 (1871) (Maynard, Bingham, Hawley, Dawes) ("privileges and immunities . . . referred to 'all the privileges and immunities declared to belong to the citizen by the Constitution itself. . . . those privileges and immunities which all Republican writers of authority agree in declaring fundamental and essential to citizenship."); Cong. Globe, 41st Cong., 2d sess., appendix 84 (1871) (Bingham) ("Mr. Speaker; that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contra distinguished from citizens of a state, are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment"); 42nd Cong., 2d sess., 843-44 (1872) (Sherman) ("What are those privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all . . . . [courts should look] first at the Constitution of the United States as the primary foundation of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . and so on back to the earliest recorded decisions of the common law"); 2 Cong. Rec. appendix 242 (1874) (Norwood) (stating "any state might have established a particular religion, or restricted freedom of speech and of the press, or the right to bear arms . . . [but] the instant the fourteenth amendment became a part of the Constitution, every State was from that moment disabled from making or enforcing any law which would deprive any citizen of a state of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution").

Taken together, the privileges or immunities clause was clearly meant to restrain state sovereignty according to the same principles of rightful liberty secured by federal law at the time the Fourteenth Amendment was adopted, including those secured by the Bill of Rights and those protected by the Civil Rights and Freedman's Bureau Acts of 1866. Emphatically, this includes the right to keep and bear arms, among many other contemporaneously-recognized civil rights.[9] This conclusion is supported by the clear meaning of the text of the Fourteenth Amendment as publicly understood in the 19th Century, the purposes explicitly given for the privileges or immunities clause as disclosed by the statements of the framers of the Fourteenth Amendment, and evidence of the public understanding of those purposes as revealed by media accounts and ratification debates.

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[9] The most immediate object to which the Civil Rights and Freedman's Bureau Acts were directed was the protection of economic liberties against the notorious "Black Codes" increasingly enacted by southern governments. Those laws were designed to oppress newly emancipated blacks and to maintain a cheap and servile labor supply by negating the most essential attributes of free labor, freedom of enterprise, private property rights and freedom of contract. Of course, these rights were squarely at issue in *Slaughterhouse* and indirectly in *Plessy* – and they were eviscerated.

III. Shifting Incorporation Of The Right To Keep And Bear Arms And Other Rights Ignored By *Slaughterhouse* And Its Progeny To The Privileges Or Immunities Clause Is Workable.

The methodology for incorporating specific guarantees of rightful liberty to restrain state sovereignty under the Fourteenth Amendment would focus on identifying and applying explicit guarantees of personal rights found in federal law when the Fourteenth Amendment was adopted on July 9, 1868. As illustrated above, proof of the federal guarantee of the right to keep and bear arms for all United States citizens, as evidenced by the Second Amendment and the Freedman's Bureau Act of 1866, would be sufficient grounds in and of itself for enforcing that right against the states under the Fourteenth Amendment. And the scope of that right would be dictated by its contemporaneous public meaning as determined by the legal framework from which it arose; i.e., by the original meaning of the Second Amendment and the legal traditions it rests upon, including the common law understanding of the right to self-defense and defense against tyranny.

This process of identifying and applying explicit legal guarantees of personal rights and freedoms under the privileges or immunities clause would be almost mechanical, and not selective in the usual sense. It would require the incorporation of all personal rights that were, in fact, shown to be protected by federal law. And it would not distinguish between so-called "fundamental" and "non-fundamental" rights – which is faithful to the founding perspective that rightful liberty was a unified whole, and that the enumeration of specific rights was not meant to deny the existence of others. But the observation that incorporation through the privileges or immunities clause would properly cease to be selective in the usual sense does not mean that there would be wholesale invalidation of state and local laws, in total disregard of our system of dual sovereignty.

IV. Shifting Incorporation Of The Right To Keep And Bear Arms And Other Guarantees Of Rightful Liberty To The Privileges Or Immunities Clause Is Consistent With Federalism.

The Fourteenth Amendment did not repeal the Tenth Amendment. The balance struck by the Fourteenth Amendment between state sovereignty and protection of rightful liberty requires respect for legitimate exercises of the state's police power, combined with a watchful eye on oppressive state laws. In fact, the *Slaughterhouse* dissenters, whose views are consistent with the understanding of privileges or immunities set forth here, were careful to distinguish proper exercises of a state's police power and violations of civil rights, such as economic liberty, that transgress that power. *See, e.g.*, *Slaughterhouse Cases*, 83 U.S. at 84-85 (Field, J., dissenting). And in hard cases, preserving federalism's vertical separation of powers between the federal government and the States may justify restraint. At the same time, however, the Seventh Circuit was wrong to reject incorporation of the Second Amendment based on the proclamation that federalism is "an older and more deeply rooted tradition" than is the right to keep and bear arms. *N.R.A.*, 567 F.3d at 860. Where two constitutional principles are at issue, the judicial task is not to determine which embodies an "older tradition" and ignore the other, but to harmonize them in accordance with more fundamental common principles.

Refusing to recognize the meaning and purpose of the privileges or immunities clause, as did the majority in the *Slaughterhouse Cases* and as did the Seventh Circuit below, is hardly consistent with constitutionalism, the rule of law or preserving rightful liberty – all of which are principles consistent with and more fundamental than federalism. The undeniable truth is that the Fourteenth Amendment significantly altered the original constitutional balance of power between the federal and state governments, at least as it pertains to protecting rightful liberty from state action. Moreover, federalism has never been an end-in-itself. *U.S. v. Lopez*, 514 U.S. 549, 576 (1995); *New York v. United States*, 505 U.S. 144, 182 (1992) (observing "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power'").

Federalism has always been aimed at securing rightful liberty from tyranny – federal or state. *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (holding "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty"); *see* Federalist No. 51 (Madison) (arguing "[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."). Accordingly, the goal of preserving federalism should not trump the rightful liberty the Constitution was meant to protect, including the right to keep and bear arms.

Any risk that the federal government would overextend the privileges or immunities clause to unduly restrain or invade state sovereignty in ways unanticipated and not intended by the framers and ratifiers of the Fourteenth Amendment would be reasonably minimized by limiting incorporated privileges or immunities to those clearly of the same type that were explicitly guaranteed by federal law at the time the Fourteenth Amendment was adopted – categories well-defined by the common law. And restoring the original meaning and purpose of the privileges or immunities clause poses no risk of transforming the Fourteenth Amendment into a source of federal police powers because the Fourteenth Amendment's prefatory language, "No State shall make or enforce any law," ensures that the clause would remain directed to restraining state action.

Lastly, it is important to emphasize that shifting the incorporation of constitutional rights to the Fourteenth Amendment's privileges or immunities clause would not deprive non-citizens of constitutional protections from state laws. This is because the Fourteenth Amendment's due process and equal protection clauses would continue to protect all "persons" regardless of citizenship status. Non-citizens and citizens alike would thereby continue to be protected from abuses of state power under settled law interpreting those clauses. *Casey*, 505 U.S. at 854-55.

CONCLUSION

The *Slaughterhouse Cases* have distorted the Fourteenth Amendment for well over a century, tethering both rightful liberty and state sovereignty to bungie-cord jurisprudence interpreting the due process and equal protection clauses, rather than an objective legal framework. The jurisprudential ride has been both nauseating and exhilarating, but it has certainly never tracked the steady path promised by constitutionalism and the rule of law.

This case provides a unique opportunity to ground the Fourteenth Amendment in its original meaning and purpose, thereby restoring stability and predictability to constitutional law and its dedication to securing rightful liberty. It all begins by recognizing that *Slaughterhouse* and its progeny, *Cruikshank*, *Presser*, and *Miller*, are not worthy of *stare decisis*, and that the privileges or immunities clause guarantees the right to keep and bear arms.

RESPECTFULLY SUBMITTED this 23rd day of November, 2009.

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BRIEF

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Supreme Court of the United States

OTIS MCDONALD, *ET AL.*, *Petitioners*,

v.

CITY OF CHICAGO, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA, INC., MARYLAND SHALL ISSUE, INC., DOWNSIZEDC.ORG, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, U.S. BORDER CONTROL, AND U.S. BORDER CONTROL FOUNDATION, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA is a citizens' lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC section 501(c)(3). GOF is an educational and legal defense organization defending the Second Amendment.

Gun Owners of California, Inc. ("GOC") (www.gunownersca.com) was incorporated in California in 1982, and is exempt from federal income tax under IRC section 501(c)(4). Affiliated with GOA, GOC lobbies on firearms legislation in Sacramento and was active in the successful legal battle to overturn the San Francisco handgun ban referendum.

Maryland Shall Issue, Inc. ("MSI") (www.marylandshallissue.org) was incorporated in Maryland in 2005. It is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of all gun owners' rights in Maryland, with a primary goal of reform to allow all law-abiding citizens the right to carry a concealed weapon and to educate the community to the awareness that "shall issue" laws have, in all cases, resulted in decreased rates of violent crime.

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[1] The parties have consented to the filing of this *amicus curiae* brief subject to 10-day or 7-day notice, which was given. A copy of the letter confirming such consent upon prior notice of intent to file an amicus brief has been filed with the Supreme Court Clerk. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

DownsizeDC.org ("DDC") (www.downsizedc.org) was incorporated in Virginia in 2001, and is exempt from federal income tax under IRC section 501(c)(4). DDC is an educational organization primarily lobbying both citizens and legislatures in favor of legislation and legal reform.

Conservative Legal Defense and Education Fund, ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law.

The Lincoln Institute for Research and Education ("Lincoln") (www.lincolnreview.com) was incorporated in the District of Columbia in 1978, and is exempt from federal income tax under IRC section 501(c)(3). Lincoln focuses primarily on public policy issues that impact the lives of black middle Americans.

U.S. Border Control ("USBC") (www.usbc.org) was incorporated in Virginia in 1988, and is exempt from federal income tax under IRC section 501(c)(4). USBC is a social welfare organization focused primarily on public policy issues such as national defense, immigration, and related matters.

U.S. Border Control Foundation ("USBCF") (www.usbcf.org) was incorporated in Virginia in 2006, and is exempt from federal income tax under IRC section 501(c)(3). USBCF is a public charity devoted to public education, particularly on public policy issues related to protecting the nation's borders and immigration.

Each of the amici curiae was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and related issues. While supporting petitioners' argument that the right to keep and bear arms applies to the states, this brief attempts to demonstrate why application of the Privileges or Immunities Clause to the states, as construed in the Slaughter-House Cases, is the correct underpinning for guaranteeing the right to keep and bear arms to United States citizens.

In the past, each of the amici has conducted research on issues involving the U.S. Constitution, and each has filed amicus curiae briefs in other federal litigation involving such issues, including amicus curiae briefs to this Court. Of relevance here, GOA, GOF, GOC, MSI, Lincoln and CLDEF filed an amicus brief in District of Columbia v. Heller, No. 07-290 (Feb. 11, 2008). GOA and GOF filed an amicus brief in support of the petition for certiorari in National Rifle Association of America, Inc., et al., v. City of Chicago, et al., and Otis McDonald, et al. v. City of Chicago, Nos. 08-1497 and 08-1521 (July 6, 2009).

It is hoped that the perspective of the amici curiae on the issues in the present case will be of assistance to the Court.

SUMMARY OF ARGUMENT

The ordinance challenged below banning handguns in Chicago is functionally identical to the District of Columbia handgun ban struck down last year in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008). In Heller, this Court determined that the Second Amendment's right to keep and bear arms protected an individual, not a collective, right, held by "the people." Since the Second Amendment applied directly to the District of Columbia, it could not be infringed by that jurisdiction. Heller also determined that the right to keep and bear arms was owned by "the people" — Americans, members of the national political community, citizens of the United States.

In the instant case, this Court is asked to determine whether the right to keep and bear arms is among the privileges or immunities of citizens of the United States. If it is, the handgun ban imposed by Chicago, a subdivision of the State of Illinois, must also be struck down as a state abridgement of those individual rights.

After this Court's decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Privileges or Immunities Clause has been rarely invoked, but it continues to protect important national rights of citizens of the United States from abridgement. The right to keep and bear arms is such a protected right of citizens of the United States.

Although petitioners have asked this Court to construe the Fourteenth Amendment as overturning Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), and have asked the Court to reverse Slaughter-House Cases and two other late nineteenth century cases, no such sweeping change would be required for this Court to find the right to keep and bear arms to be a protected privilege or immunity of U.S. citizenship which the City of Chicago cannot abridge.

Lastly, these amici urge the Court not to resolve this case by incorporating the right to keep and bear arms into the Due Process Clause of the Fourteenth Amendment. The incorporation doctrine is non-textual, and would require the Court to violate basic principles of construction. Further, the Due Process Clause applies to all "persons," while the Privileges or Immunities Clause protects only "citizens of the United States" — the Fourteenth Amendment's direct analog to "the people" protected by the Second Amendment. Moreover, due process incorporation would expose the right to keep and bear arms to erosion over time, as has already happened to the right to jury trial in criminal cases. And such an approach would temporize the right to keep and bear arms, making it vulnerable to reassessment based on changing trends in state law, as well as national and even international developments.

ARGUMENT

I. The Chicago Handgun Ban Unconstitutionally Abridges Petitioners' Right to Keep and Bear Arms, a Privilege or Immunity belonging to Them as United States Citizens Protected by the Fourteenth Amendment.

In February 1866, Congressman John Bingham of Ohio introduced into the House of Representatives the initial version of what, only after significant modification, would become sections 1 and 5 of the Fourteenth Amendment. Bingham's proposal stated:

> The Congress shall have power to make **all laws** which shall be **necessary and proper** to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property. [*See* D. Bogen, Privileges and Immunities: A Reference Guide to the United States Constitution, 44 (Praeger: 2003) (hereinafter "Bogen"); CONG. GLOBE, 39th Cong., 1st Sess. 813, 1034 (1866) (emphasis added).]

In April 1866, due to strong objection to the proposed grant of broad legislative powers to

Congress,[2] the Joint Committee on Reconstruction reported a completely different type of proposal, one that would protect three specific rights from adverse State action. The first, the "privileges or immunities" guarantee, protects the rights of American citizens, whereas the other two — the "due process" and "equal protection" guarantees — apply to individual persons regardless of their citizenship, federal or state[3]:

> **No State** shall make or enforce any law which shall abridge the **privileges or immunities** of **citizens of the United States**, nor shall any State deprive **any person** of life, liberty, or property without **due process of law**, nor deny **any person** within its jurisdiction the **equal protection of the laws**. [*Id.*, p. 47 (emphasis added).]

Further, in place of Bingham's proposed broad grant of legislative power, the Committee version limits Congress to have only the power **"to enforce"** the rights prescribed by the Amendment itself.[4]

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

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[2] *See* Bogen, pp. 46-47.

[3] *See also* A. Amar, The Bill of Rights: Creation and Reconstruction 182 (1998); R. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 68 (1993).

[4] *See* City of Boerne v. Flores, 521 U.S. 507, 524-29 (1997).

After being adopted by the House in this form, the Senate added two additional rights — one defining and securing citizenship of the United States[5] and the other, securing to a United States citizen citizenship in the state in which he chooses to reside.[6] These two guarantees constitute the first sentence of section 1 of the Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside.

In this amended form, sections 1 and 5 became a part of the Fourteenth Amendment which was ratified on July 28, 1868. *See* U.S. Constitution, Amendment XIV.

Five years later, in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the United States Supreme Court had occasion to address the meaning of each of the substantive provisions that appear in section 1 of the Fourteenth Amendment. Before turning to the constitutional text, the Court placed the Fourteenth Amendment into its historic context, mindful that it was but one of a trilogy of amendments, the "pervading purpose [of which], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, 83 U.S. at 71. While the Court acknowledged that "any fair and just construction of any section or phrase of these amendments, [would necessitate] look[ing] to [that] purpose" — not only of the Fourteenth, but also the Thirteenth and Fifteenth Amendments as well (*id.*, 83 U.S. at 72) — it did not succumb to the temptation to substitute that overarching purpose for the primacy of the text. Rather, it examined the butchers' claims that section 1 of the Fourteenth Amendment protected their right to engage in their trade free from a slaughterhouse monopoly created by the Louisiana legislature, first under the "privileges or immunities" clause (*id.*, 83 U.S. at 74-80), next under the due process guarantee (*id.*, 83 U.S. at 80-81), and finally under the equal protection clause. *Id.*, 83 U.S. at 80.

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[5] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963).

[6] *See* Saenz v. Roe, 526 U.S. 489, 503-04 (1999).

Now, 206 years after Slaughter-House, this Court must re-examine the text of section 1 of the Fourteenth Amendment to determine if it affords constitutional protection of an individual right to keep and bear arms, free from a City of Chicago ordinance that would ban possession of a handgun for individual self-defense. These amici believe that it does. For the reasons set forth below, the individual right to keep and bear arms is secured to American citizens from any state law that "shall abridge" it because such right is a "privilege[] or immunit[y] of citizens of the United States," as stated in the Fourteenth Amendment for reasons explained by this Court in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008). To reach this conclusion, this Court need not overrule Slaughter-House, and need not even address the issue of wholesale incorporation of the first eight articles of the Constitution's Bill of Rights via the Fourteenth Amendment's Privileges or Immunities Clause, nor apply the Court's due process selective incorporation doctrine, as petitioners have contended. *See* Petitioners' Brief ("Pet. Br.") 9-72.[7]

Rather, application of the Slaughter-House textual analysis of the citizenship guarantee contained in the first sentence of section 1 of the Fourteenth Amendment, and the Privilege or Immunities guarantee of that section's second sentence, together with the substance of this Court's decision in Heller to the Chicago handgun ban leads inexorably to the conclusion that the Chicago ordinance unconstitutionally "abridges" a privilege or immunity of United States citizenship in violation of the Fourteenth Amendment.

A. Section 1 of the Fourteenth Amendment Defines and Secures Dual Citizenship for All Citizens of the United States.

Since America's founding, the people of the United States have enjoyed dual citizenship, "one state and one federal, each protected from incursion by the other." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). *See also* Saenz v. Roe, 526 U.S. 489, 504 (1999). While the distinction between the two citizenships had been

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[7] *See* discussion at sections II and III, *infra*.

"clearly recognized and established," the original United States Constitution neither defined United States citizenship, nor secured any right thereto. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72-73 (1873).

Some had contended that "no man was a citizen of the United States except as he was a citizen of one of the states" (*id.*, at 72), and thus argued that if a person were the citizen of a state, then he was a citizen of the United States. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 588 (1857). In Dred Scott, the Supreme Court rejected that contention, ruling instead that only those persons who constituted the People of the United States could be citizens of the United States. *See id.*, 60 U.S. at 406. In explanation, the Dred Scott Court stated that neither those persons who had been brought into the United States as slaves — nor their descendants — could be citizens of the United States, because at the time of the formation of that national community, slaves were "regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations." *Id.*, 60 U.S. at 407.

After the victory of Union forces in the Civil War — Dred Scott notwithstanding — Congress enacted over President Andrew Johnson's veto the Civil Rights Act of 1866 which, in part, purported to confer United States citizenship upon the newly-freed slave class. 14 Stat. 25, 39th Cong. 1st Sess. (1866). The President's veto had been based, in part, on doubts about Congressional power to confer citizenship on the newly-freed slave class. *See* President Johnson's Veto of the Civil Rights Act, Messages and Papers, Vol. VI, p. 405 (1866 Richardson, ed.). *See also* K. Karst, Belonging to America: Equal Citizenship and the Constitution 51 (Yale Univ. Press: 1989). To allay these doubts, the Senate added what became the first sentence of section 1 of the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside." *See* F. Van Dyne, Citizenship of the United States 9-10 (1908).

The citizenship provision limits both "the powers of the National Government as well as the States." Saenz, 526 U.S. at 507-08. With respect to the powers of the United States government, Congress may not deny citizenship to any person who meets the provision's birthright citizenship criteria. United States v. Wong Kim Ark, 169 U.S. 649 (1898). With respect to state power, the citizenship provision confers upon any person who is a citizen of the United States the right to establish residence in any state and, thereby, to become a citizen of that state. *See* Saenz, 526 U.S. at 510-11. And by "overturn[ing] the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States," the citizenship provision denies to the states any power over United States citizenship. *See* Slaughter-House Cases, 83 U.S. at 73. Although Section 5 of the Fourteenth Amendment conferred upon Congress the "power to enforce, by appropriate legislation, the provisions of" the Amendment, "Congress may not, itself violate, nor authorize the States to violate the 14th Amendment." Saenz, 526 U.S. at 507.

As pointed out above, Section 5's enforcement language differed dramatically from Congressman Bingham's original proposal which would have granted to Congress "power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens of the several States." *See* Bogen, p. 44. As this Court has observed, Bingham's proposal "encountered immediate opposition ... from across the political spectrum": "[T]he proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." Boerne, 521 U.S. at 520-21. And as this Court has further stated, "Section 1 of the new draft Amendment imposed self-executing limits on the States, ... Congress' power [being] no longer plenary but remedial." *Id.*, 521 U.S. at 522.

Nor is the power of the judiciary plenary. Rather, bound by the "self-executing limits on the States" appearing in the Fourteenth Amendment's text, the task of the Court is to examine the text to ascertain its meaning and application. In the instant case, the question is whether the ordinance banning possession of handguns enacted and enforced by the City of Chicago — a political subdivision of the State of Illinois — violates any of the "self-executing limits" placed upon the states by the Fourteenth Amendment's "privileges or immunities" guarantee.

B. The Second Amendment Right to Keep and Bear Arms, including its Self-Defense Component, Is a Privilege or Immunity of United States Citizenship.

Petitioners are both United States citizens and citizens of the State of Illinois, residing in the City of Chicago. *See* Complaint (N.D. Il., No. 08-cv-3645), p. 1. As dual citizens, petitioners have "two political capacities, one state and one federal, **each protected from incursion by the other.**" Term Limits, 514 U.S. at 838. As United States citizens, petitioners are entitled to possess handguns in the privacy of their homes for self-defense, in that such right of self-defense is encompassed by "the right ... to secure the ideal of a **citizen** militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." Heller, 128 S.Ct. at 2801 (emphasis added). Thus, the Heller Court pronounced:

> The first salient feature of the operative clause [of the Second Amendment] is that it codifies a "right of the people," [namely] all members of the **political** community [of the United States]. [*Id.*, 128 S.Ct. at 2790 (emphasis added).]

Indeed, as the Heller Court pointed out, the right to keep and bear arms, like the right to constitute the government and the privilege to vote, does not extend to "persons," as such, but to "'a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered a part of that community.'"

Id., 128 S.Ct. at 2791 (quoting from United States v. Verdugo-Urquidez, 494 U.S. 259, at 265 (1990)). Therefore, the Second Amendment does not extend the right to keep and bear arms — and hence, the **derivative** right to possess a handgun in one's home for self-defense[8] — to, for example, a foreign national who is in the United States on a tourist, student, or other temporary visa. Nor is that right secured to a documented alien or, much less, an undocumented, and therefore, illegal alien. Rather, it is a right secured to "all Americans." *Id.*

Tracing the Second Amendment right to keep and bear arms to its historic English roots, Heller observed that the right belonged to "**English subjects**" for their "self-preservation and defense" — not only against individual threats to their personal liberties and security, but domestic military threats by the "Stuart Kings Charles II and James II ... to suppress **political dissidents**, in part by disarming their opponents." *Id.*, 128 S.Ct. at 2798 (emphasis added). Heller further noticed that when King George III "began to disarm the inhabitants of the most rebellious areas" in the American colonies, that effort, like the one previously tried by the Stuarts, was rebuffed by the "Americans invoking their rights as **Englishmen** to keep arms" to defend their rights against a tyrannical parliament and king. *See id.*, 128 S.Ct. at 2799 (emphasis added).

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[8] This does not mean that an alien does not have a common law or statutory right of self-defense, but, in contrast to an American citizen, he cannot claim a right derived from the constitutional guarantee that bars the "Federal Government [from] destroy[ing] the **citizen's** militia by taking away their arms...." Heller, 128 S.Ct. at 2801 (emphasis added).

Indeed, it was this pattern of British efforts to disarm the colonists, so as to prevent them from resisting an increasingly oppressive government, which coalesced colonists, leading directly to the American Revolution. *See* Brief Amicus Curiae of Gun Owners of America, Inc., *et al.*, District of Columbia v. Heller, No. 07-290 (Feb. 11, 2008), pp. 12-27. The colonists may have been willing to continue to suffer "a long train of abuses and usurpations," but once those abuses "evince[d] **a design** to reduce them under **absolute Despotism** ... all having in **direct object** the establishment of an **absolute Tyranny**," it was **then** that our forefathers resolved "to throw off such Government...."[9] Patrick Henry reacted to Governor Dunmore's seizure of the Williamsburg Magazine in a way that reveals that British "gun control" was the one intolerable abuse leading to war: "You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. **But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be ready to fly to arms to defend themselves.**"[10]

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[9] Declaration of Independence, The Founders' Constitution, Vol. 1, p. 10 (emphasis added).

[10] Henry, William Wirt, I Patrick Henry: Life, Correspondence, and Speeches (Sprinkle Publications, Harrisonburg, Va. 1993), p. 279 (emphasis added).

Relying in part on this colonial history, Heller "read the Second Amendment to protect the **right of citizens** to carry arms" for the preservation of their liberties, not to protect any such right of persons who willy-nilly happened to be on American soil. *See* Heller, 128 S.Ct. at 2799-2802. Heller reinforced this understanding by its examination of the overarching purposes of the Second Amendment, as expressed in its prefatory clause — "A well-organized militia, being necessary to the security of a free state" — concluding that "when the able-bodied **men of a nation** are trained in arms and organized, they are better able to resist tyranny." *Id.*, 128 S.Ct. at 2800-01 (emphasis added). In the past, Heller observed, "tyrants had eliminated a militia consisting of all the able-bodied men ... not by banning the militia but simply taking away the people's arms, enabling a select militia or standing army to suppress **political opponents**." *Id.*, 128 S.Ct. at 2801 (emphasis added). Heller further noted that, "[i]t was understood across the political spectrum [the Second Amendment] helped to secure the ideal of a **citizen** militia which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.*, 128 S.Ct. at 2801 (emphasis added).

Although Heller concluded that "the threat that the new Federal government would destroy the **citizens'** militia by taking away their arms was **the reason** that right ... was **codified** in a written Constitution," Heller also found that "individual self-defense" against a lawless government and other law-breakers "was the *central component* of the right itself," not separate from it. *Id.*, 128 S.Ct. at 2801 (italics original;

emphasis added). Thus, the right of self-defense that Heller discovered to be embodied in the Second Amendment is part and parcel of a right secured to "all Americans," not to all persons regardless of whether they are members of the political community of the United States of America. Indeed, after reviewing "nine state constitutional protections for the right to bear arms immediately after 1789," Heller stated that, since "at least seven unequivocally protected an **individual citizen's** right to self-defense[,] [it] is strong evidence that is how the founding generation conceived of that right." *Id.*, 128 S.Ct. at 2803 (emphasis added). And, in its review of nineteenth century pre-Civil War constitutional authorities and cases, Heller repeatedly identified the self-defense component of the Second Amendment right as one belonging to a "citizen," not to just any person. *Id.*, 128 S.Ct. at 2806-09.

Heller noted that, after the Civil War, there was "a widespread effort to limit ownership by a large number of **citizens**," especially the "freedmen," the deprivations of which led directly to the enactment of the Freedman's Bureau Act of 1866, one provision of which specifically secured "the constitutional right to bear arms ... to ... all the **citizens** ... without respect to race or color, or previous condition of slavery...." *Id.*, 128 S.Ct. at 2810 (emphasis added). Indeed, as the Heller Court pointed out, one Congressman "thought the Fourteenth Amendment unnecessary because "[a]s **citizens of the United States** [blacks] have equal right ... to keep and bear arms for self-defense." *Id.*, 128 S.Ct. at 2811 (emphasis added).

Nevertheless, as the Slaughter-House Court pointed out, if the Dred Scott decision "was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution." Slaughter-House, 83 U.S. at 73. "To remove this difficulty," the Slaughter-House Court observed, Congress added "a clear and comprehensive definition" of both United States and state citizenship, the "main purpose [of which] was to establish the citizenship of the negro." *Id.* Consonant with that purpose, and respectful of the nation's federal structure, Slaughter-House ruled that the Fourteenth Amendment Privileges or Immunities Clause secured to all citizens of the United States, as defined in the Amendment's citizenship clause, those "privileges and immunities ... which owe their existence of the Federal government, its national character, its Constitution, or its laws." *Id.*, 83 U.S. at 79.

Among the privileges and immunities listed in Slaughter-House is the "right to peaceably assemble and petition for redress of grievances" (83 U.S. at 79), a right — like the right to keep and bear arms — specifically identified by Heller as a "right of the people" (*id.*, 128 S.Ct. at 2790), and, hence, a right that belongs to "all Americans" (*id.*, 128 S.Ct. at 2791), that is, all persons who are citizens of the United States. According to Slaughter-House, then, the right to keep and bear arms, as recognized in Heller, is one of those privileges and immunities of United States citizenship secured by the Fourteenth Amendment.[11]

C. The Chicago Handgun Ban Ordinance Unconstitutionally Abridges Petitioners' Immunities and Privileges of United States Citizenship.

As previously noted, Justice Kennedy observed in the Term Limits case that "[American] citizens ... have two capacities, one state and one federal, each protected from **incursion** by the other." *Id.*, 514 U.S. at 838 (emphasis added). Having established that the Second Amendment right is a privilege or immunity of United States citizenship, the question now becomes whether the City of Chicago ordinance banning handgun possession in the home unconstitutionally "abridge[s]" that right.

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[11] It has been suggested that, because Heller found that "the Second Amendment, like the First ... Amendment, codified a *pre-existing* right," Slaughter-House would preclude the right to keep and bear arms from the category of United States citizen privileges or immunities, which are limited to "only [those] rights the Federal Constitution grants or the national government enables, but not those preexisting rights the Bill of Rights merely protects from federal invasion." *See* Nordyke v. King, Slip Op., pp. 4477-78 (No. 07-15763, 9th Cir., April 20, 2009) (opinion "vacated pending the Supreme Court's disposition of Maloney v. Rice, No. 08-1592, McDonald v. City of Chicago, No. 08-1521, and National Rifle Ass'n. Of Am., Inc. v. City of Chicago, No. 08-1497"). The Nordyke court was mistaken for two reasons. First, Slaughter-House included in its partial list of privileges and immunities of United States the right of the people to assemble and to petition the government for redress of grievances, rights that "preexisted" the formation of the federal government, not rights "enabled" by it. *See* Heller, 128 S.Ct. at 2797. *See also* Hague v. CIO, 307 U.S. 496, 512 (1939). Second, three years after Slaughter-House, this Court affirmed that the privileges or immunities of United States citizenship included "[t]he right of the people peaceably to assemble for lawful purposes [which] **long existed before the adoption of the Constitution of the United States.**" United States v. Cruikshank, 92 U.S. 542, 551 (1876) (emphasis added); *accord*, Hague, 307 U.S. at 513-14.

According to Heller, a District of Columbia ordinance that "totally ban[ned] handgun possession in the home" unconstitutionally infringed the right to keep and bear arms secured by the Second Amendment, "the inherent right of self-defense [being] central to the Second Amendment right." Heller, 128 S.Ct. at 2817. If the identical ban by the city of Chicago is found not to "abridge" the right to keep and bear arms secured to an American citizen residing in that city, then it would turn the citizenship guarantee of the Fourteenth Amendment on its head, making United States citizenship, and its privileges and immunities, subordinate to state citizenship, and its privileges and immunities. Indeed, such a ruling would mean that an American citizen's privilege to become a citizen of any state in which he chooses to reside, as guaranteed by the Fourteenth Amendment (Saenz, 526 U.S. at 503-04), would be conditioned upon his giving up his Second Amendment right of self-defense. But that would defeat the very purpose of the privilege and immunities guarantee — to ensure that American citizens in whatever state they might choose to reside enjoy the same United States citizenship privileges and immunities. *See* Slaughter-House, 83 U.S. at 79-80. *See also* 526 U.S. at 503-04. *Accord*, Crandall v. Nevada, 73 U.S. (Wall.) 35, 48 (1868).

In short, the City of Chicago ordinance banning possession of handguns in one's home unconstitutionally "abridges" the individual American citizen's right of self-defense "inherent" in the Second Amendment because, if so applied, the ordinance would destroy "the *central component* of the right itself." *See* Heller, 128 S.Ct. at 2801 (italics original). The right to keep and bear arms cannot be bifurcated, for if the City of Chicago can prohibit all of its residents from possessing a handgun for self-defense, that ban would necessarily extend to all of its residents who are also citizens of the United States. Indeed, the right to keep and bear arms vis-a-vis the United States government cannot be preserved, unless the privileges or immunities guarantee applies to state laws and local ordinances.[12] *See* Paul B. Paskey, "The Right of the Individual to Keep and Bear Arms as a Federally Protected Right," Safeguarding Liberty, Gun Owners Foundation (Larry Pratt, ed., 1995), p. 127.

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[12] The Cruikshank ruling that the U.S. citizenship privilege of assembly and petition may be preserved by protecting that privilege, but only if the purpose of the assembly and petition was "connected with the powers or the duties of the National Government," is inapposite. *See* United States v. Cruikshank, 92 U.S. 542, 551-52 (1876). While it may be argued that people's assemblies and petitions may be divided into two categories — one related to state and local government business and another related to the national concerns — it is a practical impossibility to divide the right to keep and bear arms without destroying that right altogether.

II. No Wholesale Change in this Court's Fourteenth Amendment Jurisprudence Is Required to Rule that the Chicago Ordinance Unconstitutionally Abridges Petitioners' Right to Keep and Bear Arms.

Petitioners' four-page summary of argument contains only two references to the "right to keep and bear arms" — what these amici had understood to be the central issue in this case. Instead, petitioners have urged the Court to make a fundamental change in its jurisprudence with respect to the Privileges or Immunities Clause. Pet. Br. 42-65. Without making any effort to demonstrate that petitioners' right to keep and bear arms is protected by the Slaughter-House ruling, petitioners' brief urges an expansion of "individual liberty" against restrictions imposed under state law unrelated to the right to keep and bear arms.

Specifically, petitioners ask this Court to view this case as "a rare opportunity to correct a serious error" in cases which "fall short" and "fail[] to honor" and fail to "meaningfully secure[]" Fourteenth Amendment rights. Pet. Br. 8-9. Consistent with that broad agenda, petitioners urge the Court to read the Fourteenth Amendment as having overturned one of its most venerable decisions, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Pet. Br. 31-32, 48. Petitioners also ask this Court to overturn The Slaughter-House Cases, 83 U.S. 36 (1873), United States v. Cruikshank , 92 U.S. 542 (1876), Presser v. Illinois, 116 U.S. 252 (1886), (*see* Pet. Br. 42-65), even though overturning these decisions should be unnecessary to strike down the Chicago ordinance banning handguns.

These amici urge this Court to follow the more modest approach of respondent National Rifle Association ("NRA"), focusing on the essential legal issue at hand — the applicability of the Second Amendment right to keep and bear arms to the states. While these amici disagree with the NRA's preferred reliance on the selective incorporation of that right via the Due Process Clause (*see* section III, *infra*), the NRA has correctly asserted that, even under the Slaughter-House interpretation, "the right to keep and bear arms is one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment," NRA Br. 38. Further, the NRA has correctly understood that Cruikshank "did not involve State law or State action abridging the right to keep and bear arms, but private actors." NRA Br. 40. And the NRA has also correctly explained that Presser "only addressed the supposed right to 'drill and parade with arms in the towns and cities of the state.'" NRA Br. 40. Only "in the alternative" — if the Court finds any current precedent to be a bar — has the NRA argued that Slaughter-House be revisited and, if necessary, overruled. NRA Br. 44.

In short, the instant case is one of great importance on its own merits, without this case being transformed into a vast expansion of federal judicial powers over the states which would alter severely the nation's federal structure in unrelated areas, such as business regulation and moral license.

III. Incorporation of the Right to Keep and Bear Arms into the Due Process Clause Would Result in Weak and Potentially Transitory Protection of that Right.

Petitioners devote the last seven pages of their brief to establish that petitioners are "also entitled to relief pursuant to the Fourteenth Amendment's due process clause." Pet. Br. 66-72. The NRA brief primarily urges that the Court apply the Due Process Clause, and only "[i]f the Court declines to selectively incorporate the Second Amendment into the Due Process Clause..., then the Court should hold that the right ... is one of the privileges and immunities of national citizenship...." NRA Br. 8-9. These amici believe that this case should **not** be decided under the Due Process Clause.

While a complete analysis of this Court's due process incorporation doctrine cannot be undertaken here, it is submitted that it violates the well-established rule that "[i]n expounding the Constitution, **every word must have its due force and meaning**." Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840) (emphasis added). Any reading of the Constitution that would "reject" any word as "superfluous or unmeaning" should be rejected. *Id.*, 39 U.S. 571. This "principle of construction applies with peculiar force" to the rights spelled out in section 1 of the Fourteenth Amendment, because they impose limits on the powers of the States. *See id.* Both the due process selective incorporation doctrine and the privileges and immunities wholesale incorporation claim fall short of this principle.

If the **Due Process Clause** of the Fourteenth Amendment is read in such a way as to **selectively "incorporate"** from the federal Bill of Rights the right to keep and bear arms, then such an interpretation would render "superfluous" the enumeration of that right in the Second Amendment, because the Bill of Rights, itself, includes in the Fifth Amendment an identical due process guarantee. As Justice Frankfurter observed in Adamson v. California, 332 U.S. 46 (1947): "Those reading the English language with the meaning which it ordinarily conveys [would] hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight amendments." *Id.*, 332 U.S. at 63 (Frankfurter, J., concurring). If, on the other hand, the Fourteenth Amendment **Privileges or Immunities Clause** is read so as to **"incorporate" wholesale** the federal Bill of Rights, including the right to keep and bear arms, then there would have been no need to insert a due process guarantee into the Fourteenth Amendment, because the Fifth Amendment due process guarantee was already included in the Privileges or Immunities Clause. *See* R. Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 462 (1981) ("If ... privileges and immunities comprehended the entire Bill of Rights, [the] due process provision [in the Fourteenth Amendment] was superfluous.")

In addition to the textual reasons for rejection of due process incorporation, incorporation of the right to keep and bear arms through the Due Process Clause would provide, at best, only weak and potentially transitory protection for that right.

A. Due Process Selective Incorporation Would Threaten to Weaken the Right to Keep and Bear Arms.

The Second Amendment protects a right owned by "the people" to keep and bear arms. As such, the Second Amendment's protected class closely parallels the protected class of the Privileges or Immunities Clause — "citizens of the United States."[13] For this reason, the Second Amendment fits well with the Privileges or Immunities Clause. The Due Process Clause is quite different — broadly protecting the rights of "any person" who may be found within the state. If the Second Amendment's "right to keep and bear arms" were selectively incorporated into the Due Process Clause of the Second Amendment, it would create immediate confusion as to who is entitled to that right. If the right belonged to "any person," as specified in the Due Process Clause, then would the Second Amendment be construed to accord to an alien the right to keep and bear arms on the same terms as it must honor a citizen's claim of right? Current federal law, 18 U.S.C. section 922(g), makes it a felony for certain aliens to purchase a firearm. Would that law be found unconstitutional because, as a matter of due process of law, the Second Amendment right belongs not just to American citizens, but also to aliens? The petitioners' brief appears to take that position. *See* Pet. Br. 63-64.

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[13] *See* Brief Amicus Curiae of Gun Owners of America, Inc. and Gun Owners Foundation In Support of Petitioners in National Rifle Association of America, Inc., et al., v. City of Chicago, et al., and Otis McDonald, et al. v. City of Chicago, Nos. 08-1497 and 08-1521 (July 6, 2009), pp. 11-16.

If the "right to keep and bear arms" were to be owned by "all persons," including aliens (even illegal aliens), it is reasonable to anticipate that, in the interest of public safety, great political (and legal) pressure would be applied to constrain the right of **all** persons, citizens and noncitizens alike. If the "right to keep and bear arms" protects the 9/11 hijackers, it is unlikely that it would be given robust interpretation. If, on the other hand, the right to keep and bear arms belongs only to citizens, then appeals to public safety would fall by the wayside, succumbing to the right's ultimate purpose — to protect the American people from being disarmed, and thereby deprived of their essential means to resist a tyrannical government. *See* Heller, 128 S.Ct. at 2801; *see also* Brief Amicus Curiae of Gun Owners of America, Inc., *et al.*, District of Columbia v. Heller, No. 07-290 (Feb. 11, 2008), pp. 12-27.

Understanding the fundamental difference between "citizens" and "persons," petitioners posit a range of judicial constructs under which the plain language of the Privileges or Immunities Clause's protection of the rights of citizens could be circumvented creatively. Pet. Br. 62-64. While petitioners may be correct that noncitizens could manipulate legal doctrine to gain the rights of citizens, it is probably more likely that the people's right to keep and bear arms would be watered down and weakened.

There is reason to believe that, when applied to the states, rights can be watered down. In their brief, petitioners have raised the selective incorporation banner of Duncan v. Louisiana, 391 U.S. 145 (1968), to support their argument that the right to keep and bear arms should apply to the states via the Due Process Clause because that right is "'fundamental to the American scheme of justice.'" Pet. Br. 67.

Duncan actually presents a good example of the risk seen here. In Duncan, the Court found that the Sixth Amendment right to a jury trial in criminal cases was "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (citing Powell v. Alabama, 287 U.S. 45 (1932)), and thus the Court incorporated the Sixth Amendment right via the Due Process Clause of the Fourteenth Amendment against the states. Prior to Duncan, it was well-settled Sixth Amendment law that a jury trial meant the right to a unanimous verdict by 12 of one's peers. *See* Thompson v. Utah, 170 U.S. 343 (1898). But in a series of cases after Duncan, the Court whittled away at the right, reducing the number of jurors required to six (Ballew v. Georgia, 435 U.S. 223 (1978)) and eliminating the unanimity requirement (Apodaca v. Oregon, 406 U.S. 404 (1972)). Guided by the Duncan selective incorporation doctrine of "fundamental principles of liberty and justice," the Court justified the watering-down of the venerable Sixth Amendment standards of unanimity and 12 persons with the observation that, in its view, a less-than-unanimous jury of less than 12 persons was sufficient to insure that the jury performed its role "to prevent oppression by the Government." *See* Williams

v. Florida, 399 U.S. 78, 100 (1970). In short, under the "selective incorporation" banner of "fundamental fairness," the 12-person, unanimous jury was dismissed as a "historic accident." 399 U.S. at 102. In Apodaca, to understand what the Sixth Amendment required (when ratified in 1791), Justice White stated that the Court's "inquiry must focus upon the function served by the jury in **contemporary** society." 406 U.S. at 410 (emphasis added).

If the Second Amendment right to keep and bear arms were applied as a matter of due process — that is, as a matter of "fundamental fairness" — there might be nothing to stand in the way of future rulings paring down that right according to the "function" of the Second Amendment in "contemporary society." If the scope of the right to keep and bear arms as applied to the states were allowed to evolve in a similar manner, one can imagine how weak and pathetic that right could become in only a matter of years.

In Heller, the Court importantly determined that the Second Amendment protected an individual, not a collective, right (128 S.Ct. 2797) and determined that a complete ban on handguns in the home violated that right (128 S.Ct. 2822). The Court favorably cited "post-Civil War 19th Century sources," including one which explained:

> [t]he purpose of the Second Amendment [to be] to secure a well-armed militia... But a militia would be useless unless the **citizens** were enabled to exercise themselves in the use of **warlike weapons**. To preserve this **privilege** and **to**

> **secure to the people** the ability to oppose themselves in **military force against the usurpations of government**, as well as against enemies from without, that **government is forbidden** by any law or proceeding to **invade or destroy the right to keep and bear arms**... [Heller, 128 S.Ct. 2812, citing J. Pomeroy, An Introduction to the Constitutional Law of the United States 152-153 (1868) (emphasis added).]

But the Court in Heller did not identify which categories of "arms" are protected against infringement (128 S.Ct. 2817).[14]

Under the selective incorporation doctrine, the right to keep and bear arms would be selected for a much more general purpose than this very specific historic one. Under the Duncan formulation, courts would be tempted to water-down the weaponry to conform to the judicially-perceived function that the right to keep and bear arms would serve in contemporary society, instead of the original purpose of resisting a tyrannical government. By basing its decision on original meaning of the Privileges or Immunities Clause, this Court could avoid the temptation to have the right to keep and bear arms devolve to the point where it only protected against state abridgement of the right to keep and bear only weapons needed for self-defense or hunting purposes.

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[14] For example, this Court may be called upon to determine whether semi-automatic so-called "assault rifles," or fully-automatic arms of the type currently used by the U.S. military easily could be found within the protective shield of the Second Amendment, either as "ordinary military equipment, or because its use could contribute to the common defense" (United States v. Miller, 307 U.S. 174, 178 (1939)), or as "a lineal descendant of ... founding-era weapon(s)" (Parker v. District of Columbia, 478 F.3d 370, 298 (2007)).

B. Due Process Selective Incorporation Would Threaten to Temporize the Right to Keep and Bear Arms.

In their summary of argument, petitioners urge this Court not only to apply the Duncan "fundamental to the American scheme of justice," test, but to subscribe to the Duncan methodology of "look[ing] to the right's historical acceptance in our nation, its recognition by the States **(including any trend** regarding state recognition), and the nature of the interest secured by the right." Pet. Br. 9 (emphasis added). These amici believe that it would be dangerous for the "right to keep and bear arms" to be protected under a doctrine which would allow this Court to temporize rights based on the shifting sands of modern "trends." Indeed, a non-textual, ever-evolving, reading of the liberty protected by the Due Process Clause of the Fourteenth Amendment could allow this Court to amend the Constitution without adherence to the constitutional processes set out in Article V.[15]

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[15] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003), overruling the 17-year old decision of Bowers v. Hardwick, 478 U.S. 186 (1986), based in part upon (i) the changing count in the number of states with anti-sodomy laws, and (ii) trends beyond the nation's borders as evidenced by a report of a committee advising the British Parliament, and a case decided by the European Court of Human Rights. *Id.*, 539 U.S. at 572-573.

As Justice Hugo Black warned in Duncan, the fundamental rights doctrine is:

> on a par with that of shocking the conscience of the Court. Each of such tests **depends entirely on the particular judge's idea of ethics and morals** instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. [Duncan, p. 168-169 (emphasis added).]

Justice Black expressed great concern about granting "unconfined power ... to judges" through the phrase "due process of law" if it is allowed to have "no permanent meaning" as its meaning is "found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country." Duncan, 391 U.S. at 168.

Justice Black was correct: modern selective incorporation doctrine is not based on a search for meaning in the text of the Due Process Clause — but predicated on near-unbridled and subjective judicial discretion, subject to change as rapidly as the composition of the Court.

Under such a standard, a decision deeming the right to keep and bear arms "fundamental" today could be undone tomorrow, particularly as other nations become ever more hostile to the ownership of firearms by their citizens, and seek to export their nation's policies through on-going United Nations-sponsored talks on a treaty[16] to regulate small arms.[17]

Before addressing a state constitutional protection of the right to keep and bear arms, the Supreme Court of Oregon rejected the temptation to interpret a constitution based on current trends, with an astute and still relevant observation:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is **to respect the principles given the status of constitutional guarantees and limitations by the drafters;** it is **not to abandon these principles** when this fits **the need of the moment**. [State v.

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[16] *See* Louis Charbonneau,"U.N. to launch global arms trade pact negotiations," Reuters (Oct. 29, 2009). http://www.reuters.com/article/newsMaps/idUSTRE59S57520091029?pageNumber=1&virtualBrandChannel=11604. *See generally* Wayne LaPierre, The Global War on Your Guns: Inside the UN Plan To Destroy the Bill of Rights, Thomas Nelson (2006), pp. vii-xxvi.

[17] Petitioners' brief favorably cites language in the Lawrence case that reveals the ephemeral qualify of due process analysis, as the Court rejected its own outdated 1986 view, and asserted its evolved modern 2003 view that 'liberty of the person both in its spatial and more transcendent dimensions' [now] supports right to consensual intimate relationships." 539 U.S. at 558 (2003), Pet. Br. 70.

Kessler, 289 Ore. 359, 614 P.2d 94, 95 (1980) (emphasis added).]

Only when the people see that this Court has resolved the important issue now before it through a faithful search for the immutable textual meaning[18] of the words used by the framers of the Fourteenth Amendment, will Americans believe that they are truly protected by a robust federal constitution which effectively constrains the entire federal government — including the federal judiciary, not the shell of a constitution subject to evolutionary revision reflecting state, national, and even international trends.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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[18] *See generally* E.D. Hirsh, Validity in Interpretation, pp. 24-25, 124-26, 212-16 (Yale Univ. Press: 1967).

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

OTIS MCDONALD, ADAM ORLOV,
COLLEEN LAWSON, DAVID LAWSON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF *AMICUS CURIAE* OF THE HEARTLAND INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Heartland Institute is a national nonprofit research and education organization, tax exempt under Section 501(c)(3) of the Internal Revenue Code, headquartered in Chicago, and founded in 1984. It is not affiliated with any political party, business, or foundation.

Heartland's mission is to discover, develop, and promote free-market solutions to social and economic problems. Heartland's nearly 200 free-market policy experts – managing editors, senior fellows, policy advisors, and contributing editors – provide testimony, articulate issue positions through the media, and help educate in other ways policymakers at all levels of government in the fifty states and Washington, D.C. Policy advisors are academics and professionals including members of the faculties of Harvard University, Georgetown University Law Center, the Massachusetts Institute of Technology, The University of Chicago, The University of Chicago Law School, UCLA School of Law, Northwestern University, and scores of other respected academic institutions. In addition, approximately 150 elected officials – Democrats as well as Republicans – serve on Heartland's Board of Legislative Advisors.

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[1] The parties were notified 12 days prior to the due date of this brief of Heartland's intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Second Amendment and gun control have long been of concern to Heartland and its researchers. In 1995, Heartland published The Heartland Institute policy study *Taking Aim at Gun Control* by Daniel Polsby, now Professor of Law and Associate Dean for Academic Affairs at George Mason University School of Law, and the late Dennis Brennen, then Chairman of the Department of Economics at Harper College in Palatine, Illinois.

The Heartland Institute filed briefs *amicus curiae* in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001); *Parker v. District of Columbia,* 311 F. Supp. 2d 103 (D.D.C. 2004); and *District of Columbia v. Heller*, ___ U.S. ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

◆

SUMMARY OF ARGUMENT

In this case, Otis McDonald and the other Petitioners seek the right to possess handguns within their homes for the purpose of self-defense. They need handguns.

In the 25 full years since Chicago passed its handgun ban, handgun murder rates have soared, as have murders by young people in the city. Chicago schools have launched a $30 million social program to deter violence by public school students, but this program has literally just begun. In the meantime, Petitioners have no right to possess handguns to defend themselves, and police have no legal or constitutional duty to rescue citizens from violence.

The Chicago handgun ban has been completely ineffective in reducing handgun murders. Therefore, it does not advance the public interest, and it ought to be found unconstitutional by this Court.

◆

ARGUMENT

I. Introduction

Otis McDonald, 76, became the lead plaintiff in this case because he "resides in a high-crime neighborhood" and "has been threatened by drug dealers." (Complaint, ¶¶1, 11.) As a result, he presently intends to possess a handgun "within his home for self-defense" but cannot do so because of the Chicago handgun ban ordinance. *Id.* at ¶11.

In a recent interview, McDonald explained the reasons why he believes he needs a gun for self-defense within his home:[2]

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[2] Maureen Martin, *Handgun Ban Plaintiff Urges Gun Rights in Crime-Ridden Neighborhoods*, The Heartland Institute (November 9, 2009) available at http://www.heartland.org/article/26330/Handgun_Ban_Plaintiff_Urges_Gun_Rights_in_CrimeRidden_Neighborhoods.html.

> Where I live [on Chicago's South Side], I'm always concerned about the neighborhood. I've lived here 30 some years, and I like it here, and I wanted to keep it clean, keep it protected, and keep the property value up.
>
> I'm concerned heavily about the kids, about the real young kids coming up in this environment, because they are being trained to be what the older ones are. They're recruited daily, nightly, to be drug dealers and gangbangers.
>
> They're only seeing the dark side. They're brought up in the dark side, and they're seeing so many kids with big cars and plenty of money. This is the only life, in their eyes. That's what they're learning. They have no respect for themselves. Therefore, you know they have no respect for police officers and certainly not the elderly people in the neighborhood.

Residents in his neighborhood are "afraid," he said, "and they have reasons to be afraid. Being out there and being confronted a few times, I know these kids; they're dangerous. They don't care about living, they have no respect for their elders, police officers."

That is why McDonald agreed to get involved in the Chicago case.

> [T]he police can't do it alone. There are too many guns in here and they're coming in here too fast. They [the police] need the community to have the right to a handgun in

> their own home. I believe to my heart that will help the police out, [protecting people] from home robbery, burglary.
>
> I will not be pinned down in my house without anything to defend myself, while they walk the streets. I will not be victimized by the law that tells me I cannot have a handgun in my own home, when I know there's a right that's out there that's given to me. The people out there on the streets don't have the right to have a gun out there on the streets. But we law-abiding citizens – senior citizens, I may stress – have the constitutional right under the Second Amendment. It will make the residents, old people like myself, feel a little more secure.

Chicago Police Department crime statistics, set out and discussed below, demonstrate that McDonald's apprehensions, and those of his neighbors, are well-founded.

II. Chicago's Handgun Ban Is an Utter Failure.

Chicago's handgun ban is not working.

The purpose of the city ordinance, enacted in 1982, was to reduce gun crime. (Brief for Respondents in Opposition to McDonald's petition for *certiorari* at 1.)

Precisely the opposite has happened.

A. Handgun Murders Have Soared During the 25 Years the Ordinance Has Been in Effect.

According to Chicago Police Department data, the percentage of murders committed with handguns has skyrocketed since 1982 and handgun murder rates per 100,000 population more than doubled in the 1990s over 1982 levels. In 2008, these rates were up more than 60% over 1983. (App. 1, charting Chicago Police Department murder and handgun murder data and calculating rates per 100,000 population.)

In 1983, the first full year the handgun ban ordinance was in effect, there were 729 murders in Chicago,[3] of which 290 (or 39.78%) were committed with handguns. For each increment of 100,000 population, the murder rate that year was 24.26 murders, and the handgun murder rate was 9.65. *Id.*

By 1990, there were 852 murders in Chicago, of which 513 (60.21%) were committed with handguns.

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[3] Chicago's murder rate by all methods is vastly higher than those rates in New York and Los Angeles. United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *2008 Crime in the United States* (known as FBI Uniform Crime Reports ("UCR")), available at http://www.fbi.gov/ucr/cius2008/data/table_08.html.

According to the 2008 UCR, in New York (population 8.34 million), there were 523 murders in 2008; in Los Angeles (population 3.85 million), there were 384 murders in 2008; in Chicago (population 2.83 million), there were 510 murders.

The murder rate per 100,000 population that year was 30.60, and the handgun murder rate was 18.42. Thus, in the first seven years the handgun ban was in effect, the number of handgun murders increased by more than 56%, and the gun murder rate nearly doubled. *Id.*

By 2003, the handgun murders committed increased to 442, from 290 in 1983. In 2003, 73.54% of murders were committed with handguns. The handgun murder rate was 15.26. *Id.*

By 2008, 402 handguns (compared to 290 guns used in 1983) were used to commit murders, 78.67% of all murders that year. The handgun murder rate was 13.88. *Id.*

In the 25 years since Chicago's handgun ban was enacted, the number of handguns used in murders and handgun murder rates dropped below 1983 levels in only four years (1984-87). *Id.*

There are handguns out there, and they are being used to kill.

B. Handgun Murders by Youths Are Soaring.

McDonald's and his neighbors' apprehension of violent youths is reflected in Chicago Police Department statistics, which demonstrate youths are committing ever-increasing percentages of Chicago murders.

In 1983, 118 (or 16.18%) of the 729 murders that year were committed by youths under the age of 21 with firearms.[4] Detective Division (Chicago Police Department) *1992 Murder Analysis* at 17. By 1990, that percentage had increased to 24.53% of the 852 murders committed that year. *Id.*

In 1991, 67.7% of 927 murders that year were committed by youths between ages 14 and 25 with any weapon. Chicago Police Department, *2008 Murder Analysis in Chicago* at 38.[5]

By 1995, the percentage in that age group rose to 72.4%, an all-time high. *Id.* In 2008, the percentage of murders committed by youth in that age group was 56.3%. *Id.*

Faced with a "national embarrassment" of youth violence, the Chicago Public Schools have launched a $30 million initiative to connect students at risk of violence "with full-time mentors and part-time jobs." Stephanie Banchero and Azam Ahmed, *Chicago Public Schools announce plan to combat violence, Schools*

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[4] Firearms include revolvers, pistols, rifles, and shotguns. Detective Division (Chicago Police Department) *1992 Murder Analysis* at 12.

[5] Available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page.

chief Ron Huberman identifies students most at risk, CHICAGO TRIBUNE, September 4, 2009.[6]

But The University of Chicago Crime Lab recently studied the occurrence and prevention of gun violence by youths in Chicago and concluded "remarkably little" is known about how to stop it. The University of Chicago Crime Lab, *Gun Violence Among School-Age Youth in Chicago* (2009)[7] at 11.

The Crime Lab has launched an initiative involving youth social intervention pilot projects of as-yet unknown types:

> Despite the enormous toll gun violence takes on young people in Chicago, and across the United States, the evidence about what works to reduce youth gun violence is extremely limited. The University of Chicago Crime Lab's mission is to work with community partners in Chicago and around the country, to learn more about what works, for whom, and why, to begin making progress in reducing the problem of crime and violence. We believe that successful innovation requires doing a better job of learning from experience.
>
> To that end we have launched the Chicago Initiative to Reduce Gun Violence Among School Age Youth Design Competition. The

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[6] Available at http://archives.chicagotribune.com/2009/sep/04/local/chi-huberman-cps-violence-04sep04.

[7] Available at http://crimelab.uchicago.edu/gun_violence/.

> first phase of this initiative is to solicit letters of interest (LOI) from city agencies, non-profit and faith-based organizations, and private sector firms that have promising ideas about pilot programs to reduce youth gun violence and promote positive youth outcomes among high risk youth, which could be implemented and rigorously evaluated should private funding become available.

The University of Chicago Crime Lab, *Chicago Youth Gun Violence Initiative* (2009), available at http://crimelab.uchicago.edu/gun_violence/.

How are McDonald and his neighbors to defend themselves while social programs and experiments are conducted? And what if they do not work? McDonald says he "will not be pinned down in my house without anything to defend myself, while they walk the streets."

But he is.

III. The Police Have No Legal or Constitutional Duty to Protect Citizens from Crime.

Under well-established Illinois law, the police have no legal duty to protect individual citizens. *DeSmet v. The County of Rock Island*, 219 Ill. 2d 497, 507, 848 N.E.2d 1030, 1037 (2006), *citing with approval Schaffrath v. Village of Buffalo Grove,* 160 Ill. App. 3d 999, 1003, 513 N.E.2d 1026, 1028 (1st Dist. 1987). In *Schaffrath*, the court stated:

> Generally, law enforcement officials have no duty to protect individual citizens from criminal acts. Their responsibility is to the general public. The duty of the police to preserve the well-being of the community is owed to the public at large rather than to specific members of the community. This rule rests upon public policy considerations that a police department's negligence, oversights, blunders or omissions are not the proximate or legal cause of harms committed by others. A general duty would put the police in the position of guaranteeing the personal safety of every member of the community.

Id.

Nor do police have any federal constitutional duty to protect particular individual citizens:

> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196 (1989). *See also Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services").

IV. The Police Have No Practical Ability to Protect All Citizens from Every Crime.

Approximately 83% of Americans "will be victims of violent crime at some point in their lives" and "in any given year serious crime touches 25 percent of all households." Daniel D. Polsby & Dennis Brennen, *Taking Aim at Gun Control* at 4, The Heartland Institute (1995).[8]

In the past decade, the number of Chicago Police Department sworn and exempt personnel has decreased slightly, from 13,484 in 1998 to 13,354 in 2008. (Chicago Police Department, *1998 Annual Report* at 34; Chicago Police Department, *2008 Annual Report* at 68.) In that same decade, the number of calls to 911 has skyrocketed. There were 3,770,795 calls to 911 in 1998. *1998 Annual Report, supra,* at 31. There were 5,076,219 calls made to 911 in 2007 and 4,704,590 such calls in 2008. Chicago Police Department, *2008 Annual Report* at 70. Apart from any legal duty, the Chicago Police Department has no practical ability to protect everyone at all times.

In most instances, and despite best efforts, police rarely arrive in time to prevent or interrupt a crime:

> Apart from the Second Amendment's role in deterring government oppression, the right to arms has another purpose that is every bit as important and urgent today as it was in

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[8] Available at http://www.heartland.org/policybot/results/9486/No_69_Taking_Aim_at_Gun_Control_Executive_Summary.html.

> the eighteenth century. That purpose is to enable American citizens to defend themselves, not against direct oppression by the government, but against oppression from which the government fails to protect them. The principal source of such oppression today is violent criminals.
>
> * * *
>
> [T]he police do not and cannot protect law-abiding citizens from criminal violence. The impotence of our governments in the face of criminal violence is so obvious that it is simply preposterous to maintain that those individuals with the means and the will to arm themselves are not thereby enhancing their ability to exercise their natural right of self-defense.

NELSON LUND, A PRIMER ON THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS, Virginia Institute for Public Policy (2002) at 13.

While Chicago struggles to deter youthful gun crime, all McDonald and the other Petitioners ask is that this Court recognize their right to keep and bear arms under the Second Amendment, as incorporated against the States by the Fourteenth Amendment's Privileges or Immunities Clause or its Due Process Clause.

Surely, that is not too much to ask.

CONCLUSION

The founder of modern criminology, Cesare Beccaria, knew two centuries ago what Chicago is only now finding out: that gun bans cause murders:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.

Lund, *supra* at 14, quoting Cesare Beccaria, *On Crimes and Punishments* 87-88 (Henry Paolucci trans., 1963) (1764).

For the foregoing reasons, The Heartland Institute respectfully requests that this Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

Year	Total Murders	Total Handgun Murders	Percentage of Handgun Murders	Murder Rate per 100,000 Population[10]	Handgun Murder Rate per 100,000 Population
1965	395[1]	158[1]	40.00%[1]	11.13	4.45
1966	510[1]	212[1]	41.57%[1]	14.37	5.97
1967	552[1]	262[1]	47.46%[1]	15.55	7.38
1968	647[1]	274[1]	42.35%[1]	18.22	7.72
1969	715[1]	334[1]	46.71%[1]	20.14	9.41
1970	810[1]	409[1]	50.49%[1]	24.05	12.15
1971	824[1]	390[1]	47.33%[1]	24.47	11.58
1972	711[1]	398[1]	55.98%[1]	21.12	11.82
1973	864[1]	459[1]	53.13%[1]	25.66	13.63
1974	970[1]	464[1]	47.84%[1]	28.81	13.78
1975	818[1]	412[1]	50.37%[1]	24.29	12.24
1976	814[1]	397[1]	48.77%[1]	24.17	11.79
1977	823[1]	424[1]	51.52%[1]	24.44	12.59
1978	787[1]	424[1]	53.88%[1]	23.27	12.59
1979	856[1]	418[1]	48.83%[1]	25.42	12.41
1980	863[1]	396[1]	45.89%[1]	28.72	13.18
1981	877[1]	374[1]	42.65%[1]	29.18	12.44
1982	668[1]	254[1]	38.02%[1]	22.23	8.45
1983	**729[1]**	**290[1]**	**39.78%[1]**	**24.26**	**9.65**
1984	741[1]	289[1]	39.00%[1]	24.66	9.62
1985	666[1]	261[1]	39.19%[1]	22.16	8.68
1986	744[1]	285[1]	38.31%[1]	24.76	9.48
1987	691[1]	260[1]	37.63%[1]	22.99	8.65
1988	660[1]	371[1]	56.21%[1]	21.96	12.35
1989	742[1]	417[1]	56.20%[1]	24.69	13.88
1990	852[1]	513[1]	60.21%[1]	30.60	18.42
1991	927[1]	542[1]	58.47%[1]	33.30	19.47
1992	940[1]	534[1]	56.81%[1]	33.76	19.18
1993	855[2]	552[3]	64.64%[3]	30.71	19.83
1994	931[2]	602[3]	64.66%[3]	33.44	21.62
1995	828[2]	523[4]	63.41%[3]	29.74	18.78
1996	796[2]	521[4]	65.58%[3]	28.59	18.71
1997	761[2]	487[5]	64.26%[3]	27.33	17.49
1998	704[2]	450[3]	63.92%[3]	25.29	16.16
1999	643[2]	376[3]	58.66%[3]	23.10	13.50
2000	633[2]	n/a	n/a	21.86	n/a
2001	667[2]	n/a	n/a	23.03	n/a
2002	656[2]	n/a	n/a	22.65	n/a
2003	601[2]	442[6]	73.54%	20.75	15.26
2004	454[2]	313[7]	68.94%	15.68	10.81
2005	451[2]	327[8]	72.50%	15.57	11.29
2006	471[2]	373[9]	79.19%	16.26	12.88
2007	445[2]	316[9]	71.01%	15.37	10.91
2008	511[2]	402[9]	78.67%	17.64	13.88

[1] Detective Division (Chicago Police Department) *1992 Murder Analysis* at 14.

[2] Chicago Police Department, *2008 Murder Analysis in Chicago* at 2, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page.

[3] Detective Division (Chicago Police Department) *1999 Murder Analysis* at 14.

[4] Chicago Police Department, *1996 Annual Report* at 21, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports.

[5] Chicago Police Department, *1997 Annual Report* at 19, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports.

[6] Research and Analysis Division, Research and Development Section (Chicago Police Department) *2003 Murder Analysis* at 27, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page.

[7] Research and Analysis Division, Research and Development Section (Chicago Police Department) *2004 Murder Analysis* at 27, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page.

[8] Research and Analysis Division, Research and Development Section (Chicago Police Department) *2005*

Murder Analysis at 26, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page.

[9] Chicago Police Department, *2006-07 Murder Analysis in Chicago* at 24, available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/Search%20Results%20Page.

[10] Murder rates per 100,000 population were calculated using official Chicago census data. Population data for 1960, 1970, 1980, and 1990 are from Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990,* Population Division Working Paper No. 27, Population Division, U.S. Bureau of the Census, June 1998, available at http://www.census.gov/population/www/documentation/twps0027/twps0027.html.

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AMICUS
CURIAE
BRIEF

No. 08-1521

In the Supreme Court of the United States

OTIS MCDONALD, et al., PETITIONERS

v.

CITY OF CHICAGO, et al., RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

BRIEF OF HISTORIANS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT CITY OF CHICAGO, *ET AL.*

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici submit this brief to address a narrow but critically important question of constitutional law and legal and historical scholarship: whether the Privileges or Immunities Clause of the Fourteenth Amendment incorporates the whole of the Bill of Rights against the States. For more than 135 years, an unbroken line of precedent has squarely rejected the "total incorporation" doctrine. Indeed, this Court has rejected the notion that the Privileges or Immunities Clause incorporated *any* part of the Bill of Rights. The historical record does not support the Petitioners' efforts to upset more than a century of this Court's settled precedent.

Amici are historians and legal scholars who have each studied, taught courses about, and/or published scholarship on the Fourteenth Amendment and its framing. Our names, institutional affiliations, and examples of our relevant scholarship are set forth in the Appendix to this brief.

We submit this brief to respond to Petitioners' claim that the Privileges or Immunities Clause provides an independent historical basis for applying the Second Amendment against the States by virtue of the total incorporation theory.[2] Nothing in the language of the Clause makes it obvious that that provision would incorporate the Bill of Rights; indeed, the text is singularly opaque if that was the framers' intention. Further, we have studied the ratification of the Fourteenth Amendment, and the historical record does not reveal that the Privileges or Immunities Clause was broadly understood to incorporate the Bill of Rights as a whole and thus to work a dramatic change in the structure of our federal system. Treatises, state ratification debates, and judicial opinions from the period demonstrate no clear understanding by the legal profession or the public at large that the Clause had applied the Bill of Rights to the States.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. *Amici* are filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

In light of that evidence, the isolated statements Petitioners cite from a handful of congressional proponents cannot establish a general legislative intent to incorporate the Bill of Rights, much less an original public understanding of total incorporation. We share an interest as academics, as citizens, and as proponents of the appropriate use of the historical record in opposing the arguments and approach advanced by Petitioners and their *amici*.

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[2] The question whether the Second Amendment should be incorporated under the Due Process Clause of the Fourteenth Amendment is outside the scope of this brief.

SUMMARY OF ARGUMENT

I. This Court should reject Petitioners' argument that the Privileges or Immunities Clause incorporates the whole of the Bill of Rights against the States. The total incorporation theory is radical in two respects. First, particularly when viewed from the perspective of the framing-era public, it would have worked a massive realignment of power between the States and the federal government. Second, embracing total incorporation would require the Court to overrule more than 135 years of unbroken—indeed, repeatedly reaffirmed—precedent. Both of these concerns militate against accepting the total incorporation theory absent convincing evidence about what the Clause actually meant to the States that ratified it.

II. Petitioners' evidence fails to meet this standard. First, nothing in the plain language of the Clause suggests that an observer from the framing era would read it to incorporate the Bill of Rights. To the contrary, prevailing legal opinion at the time did not recognize the rights granted by the first eight amendments as "privileges or immunities" guaranteed against States by virtue of national citizenship. And the Clause's closest textual analog, the Privileges and Immunities Clause of Article IV—which predated the Bill of Rights—has never been read to encompass the first eight amendments.

Petitioners' arguments based on legislative intent fare no better. Although a handful of congressional proponents seem to have envisioned some form of incorporation, the great majority of Congress either viewed the Clause simply as an anti-discrimination provision or gave little thought to its scope. The legislative record is characterized by confusion and ambiguity.

In any case, the important question is not what the *framers* of the Fourteenth Amendment intended, but rather what the *public that ratified the Amendment* understood it to mean. There is no evidence of any widespread public understanding that the language of the Privileges or Immunities Clause required total incorporation. To the contrary, during the ratification debates, even proponents of the Amendment characterized it as an antidiscrimination provision, not as a source of new substantive rights against the States. Newspapers did not report the total incorporation theory, and politicians did not discuss it.

Post-ratification sources also fail to reveal any public understanding that the Clause had applied the whole of the Bill of Rights against the States. After ratification, States enacted new laws—including provisions abolishing the grand jury—that would have been inconsistent with incorporation. They also enacted comprehensive firearms regulations without objection based on the new Amendment. Moreover, neither the leading legal scholars nor the judges of the Reconstruction period made reference to incorporation; they continued to assume that the Bill of Rights applied only to the federal government. This Court—then composed of Justices who witnessed the ratification debates firsthand—decisively rejected total incorporation when presented with the question just years after the enactment of the Fourteenth Amendment.

Absent any persuasive textual basis, legislative intent, or original public understanding favoring total incorporation, there is no basis for holding that the Privileges or Immunities Clause applies the Bill of Rights *in toto*—or the Second Amendment in particular—against the States.

III. If this Court, against the historical evidence, were to adopt the total incorporation theory, its decision would have effects reaching far beyond incorporation of the Second Amendment. It would logically require the overruling of precedent holding that the Fifth Amendment's grand jury requirement and the Seventh Amendment's right to a jury in civil cases do not apply to the States. Many States, in addition to having to modify their gun control regimes, would also have to revamp large portions of their criminal and civil justice systems to bring them into conformity with these constitutional strictures.

And there is no guarantee that, after total incorporation, the rights emanating from the Privileges or Immunities Clause would be limited to those enumerated in the Bill of Rights. To the contrary, the same legislative history sources on which Petitioners rely for incorporation also suggest that the Clause protects other unenumerated "natural rights"—including the right to contract, the right to a profession, and the right to acquire and possess property without government interference. If the Court finds these sources convincing, then it must also be prepared to accept their embrace of these and other highly indeterminate, ultimately judge-divined rights. Petitioners' constitutional theory is an invitation to resurrect *Lochner* and its progeny. This Court should decline that invitation.

ARGUMENT

I. In construing the Privileges or Immunities Clause, this Court is not writing on a blank slate.

Proponents of total incorporation face two heavy burdens. *First*, they must show that when the Fourteenth Amendment was ratified, the public understood that it would work a radical realignment of the constitutional balance of power between the Federal Government and the States. *Second*, they must demonstrate that their evidence of this original understanding is so persuasive that it should override the *stare decisis* effect of over a century of unbroken, post-ratification precedent holding that the Clause does *not* incorporate the Bill of Rights. Petitioners have done neither.

A. For the total incorporation theory to be correct, the ratifying public must have understood that the Privileges or Immunities Clause would radically alter the federal system as then understood.

Petitioners' reading of the Clause would undoubtedly work a fundamental change in federal-state relations today. See § III, *infra*. But it would have represented an even more radical redistribution of power between the Federal Government and the States at the time the Fourteenth Amendment was adopted.

The Constitution, as originally designed, imposed only a handful of enumerated limits on the powers of the States. See, *e.g.*, U.S. Const. art. I, § 10. In *Barron* v. *Baltimore*, 32 U.S. 243 (1833), Chief Justice Marshall confirmed that the limitations on government action set forth in the Bill of Rights did not apply to the States. *Id.* at 247. As the unanimous *Barron* Court explained, "[h]ad congress engaged in the extraordinary occupation of improving the constitutions of the several States, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." *Id.* at 250.[3]

That basic principle is not disputed here; no party claims that the Bill of Rights would apply to the States absent adoption of the Fourteenth Amendment, and even advocates of incorporation acknowledge that *Barron* was "almost certainly" correctly decided. Bryan J. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 Ohio St. L.J. 1509 (2007).

Viewed in light of *Barron*, the wholesale incorporation of the Bill of Rights against the States would have radically altered the existing constitutional structure: it would have been "a seismic shift in the tectonic plates that underlie our government." George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1629 (2007) (hereinafter Thomas, *Riddle*).

That is why the Court in *The Slaughter-House Cases* echoed Chief Justice Marshall's basic point when it concluded that it could not read the Privileges or Immunities Clause as subjecting the States

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[3] Indeed, the Bill of Rights as originally proposed by James Madison included an amendment that would have expressly constrained the States: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." 1 Annals of Cong. 434–435 (Joseph Gales ed., 1834). That provision was never adopted.

"to the control of Congress, in the exercise of powers heretofore universally conceded to them," in the absence of "language which expresses such a purpose *too clearly to admit of doubt.*" 83 U.S. 36, 78 (1873) (emphasis added); cf. *Minor* v. *Happersett*, 88 U.S. 162, 173 (1874) (noting, with respect to claim that the Fourteenth Amendment enfranchised all citizens, that "[s]o important a change * * * if intended, would have been expressly declared").

Petitioners' reading of the Privileges or Immunities Clause must be evaluated in light of the huge transformation in federal-state power that total incorporation would have worked. It is reasonable to expect that such far-reaching effects would be "expressly declared" in "plain and intelligible language" that was "too clear[] to admit of doubt." As we will demonstrate below, this was not the case.

B. The total incorporation theory has been rejected in more than a century's worth of unbroken precedent.

Petitioners also face an unbroken line of post-ratification precedent contradicting their position. For over 135 years, this Court has followed *Slaughter-House* and repeatedly rejected the notion that the Privileges or Immunities Clause incorporates the Bill of Rights.

In *Slaughter-House*, this Court concluded that the Clause encompassed only those privileges and immunities that "owe their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. at 79. As *Barron* recognized, these privileges and immunities of national citizenship did not include rights against *state* abridgements of the Bill of Rights. See *ibid.*

Other cases decided during the post-ratification era reaffirmed the *Slaughter-House* principle.[4] In *Edwards* v. *Elliot*, 88 U.S. 532 (1874), and *Walker* v. *Sauvinet*, 92 U.S. 90 (1876), the Court held that the Seventh Amendment right to a civil jury trial was not incorporated against the States. In *Kelly* v. *City of Pittsburgh*, 104 U.S. 78 (1881), the Court ruled that the Fifth Amendment's Just Compensation Clause did not apply to state takings. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court rejected incorporation of the First Amendment's right to assemble and the Second Amendment's right to bear arms. The Court reaffirmed the non-incorporation of the Second Amendment in *Presser* v. *Illinois*, 116 U.S. 252 (1886).[5]

In *Adamson v. California*, 332 U.S. 46 (1947), overruled in part on other grounds by *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court revisited and again rejected the total incorporation theory—this time over a lengthy dissent by Justice Black (complete with a 30-page appendix of historical sources), in which he concluded, based on his "study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage," that the Amendment was intended "to make the Bill of Rights[] applicable to the states." *Id.* at 71–72 (Black, J., dissenting). Justice Black's rejected position was the same total incorporation theory pressed here, and his historical sources (which failed to persuade a majority of the *Adamson* Court) included many of the statements on which Petitioners here principally rely.

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[4] *Slaughter-House* and these other Reconstruction-era cases are relevant not only as precedent, but because they are themselves important historical evidence of what lawyers and judges—and, by implication, the ratifying public—understood the Clause to mean during the framing period. See ___, *infra*.

[5] See also *In re Kemmler*, 136 U.S. 436 (1890) (Eighth Amendment prohibition against cruel and unusual punishment); *McElvaine* v. *Brush*, 142 U.S. 155, 159 (1891) (same); *Miller v. Texas*, 153 U.S. 535 (1894) (Second Amendment); *Maxwell* v. *Dow*, 176 U.S. 581 (1900) (Fifth Amendment right to grand jury and Sixth Amendment right to criminal jury trial); *Twining* v. *New Jersey*, 211 U.S. 78 (1908) (Fifth Amendment right against self-incrimination); *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530 (1922) (First Amendment right to freedom of speech).

This Court has implicitly reaffirmed its rejection of total incorporation many times since *Adamson* by confirming that certain protections of the Bill of Rights have no application against the States. See, *e.g.*, *Campbell* v. *Louisiana*, 523 U.S. 392, 399 (1998) (noting that the "Fifth Amendment's grand jury requirement is not binding on the States"); *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("[t]he Seventh Amendment * * * governs proceedings in federal court, but not in state court"); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972) ("the Court has never held that federal concepts of a 'grand jury,' binding on the federal courts under the Fifth Amendment, are obligatory for the States"). In short, it has treated *Slaughter-House* and its progeny as settled law.

Any departure from this long and unbroken line of precedent "demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). "*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson* v. *Callahan*, 129 S. Ct. 808, 816 (2009) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). And while obedience to precedent is not an "inexorable command," this Court "approach[es] the reconsideration of [its] decisions * * * with the utmost caution." *Ibid.* (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)).

These concerns are at their height where, as here, the Court faces "the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 233 (1995).[6] The Court's rejection of total incorporation has more than just lengthy pedigree; it also has engendered important reliance by the States. Although many of the guarantees of the Bill of Rights have been selectively incorporated through the Fourteenth Amendment's Due Process Clause, certain important rights have not: the right to a grand jury indictment, see *Campbell*, 523 U.S. at 399; the right to a civil jury trial, see *Gasperini*, 518 U.S. at 432; and of course, the right to bear arms. Many States have relied on these decisions in structuring their criminal and civil justice systems, as well as in adopting firearm regulations and law enforcement strategies designed to prevent violent crime. These vital state interests would be seriously disrupted if this Court were to repudiate its current approach to incorporation. *See* § III.1, *infra*.

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[6] See also *United States* v. *Lopez*, 514 U.S. 549, 601 n.8 (1995) (THOMAS, J., concurring) ("Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean."); *South Carolina* v. *Gathers*, 490 U.S. 805, 824 (1989) (SCALIA, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity."), overruled by *Payne*, *supra*; *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 209 (1994) (SCALIA, J., concurring in the judgment) (deciding on *stare decisis* grounds to enforce "negative Commerce Clause" in certain situations where the Court "adopted the doctrine * * * 121 years ago,* * * engendering considerable reliance interests") (citation omitted).

Finally, the historical arguments now raised in support of incorporation are nothing new. The *Slaughter-House* Court—composed of Justices who witnessed firsthand the debates surrounding the ratification of the Fourteenth Amendment—rejected precisely the same understanding that Petitioners now advance. And the same arguments for incorporation—including the same quotations from the same speeches and congressional statements that are at the core of Petitioners' pro-incorporation case—were again thoroughly debated, analyzed and rejected by this Court decades later in *Adamson*. The proponents of total incorporation have had more than one bite at the constitutional apple, and each time their position has been rejected.

Given the force of *stare decisis*, Petitioners must do more than show that their reading of the Privileges or Immunities Clause is historically plausible (though they fail to do even that). They must convincingly demonstrate that more than 135 years of unbroken precedent was "wrongly decided" and is "unworkable." *Payne*, 501 U.S. at 843–844 (SCALIA, J., concurring). This Court has cautioned against overruling "major decisions of the Court" on the basis of "ambiguous historical evidence." *Welch* v. *Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 479 (1987). As we will show below, ambiguous historical evidence is, at most, what Petitioners present.

II. The historical record does not support Petitioners' argument about total incorporation under the Privileges or Immunities Clause.

A. The plain language of the Clause does not support total incorporation.

As discussed above, total incorporation of the Bill of Rights against the States would have worked a radical constitutional transformation. If the text of the Privileges or Immunities Clause clearly effectuated the "seismic shift" of incorporating the Bill of Rights *in toto*, then there would be no need for detailed review of the historical record. But it does not.

The Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. xiv, § 1. This is a strange formulation if its purpose was incorporation: the Clause does not refer to the [illegible] of Rights, and nothing in its text suggests that it applies those provisions to the States. Incorporation would have been "crystal clear" if the drafters

> "had added a simple clause, as follows: 'No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, *including those defined in the first eight amendments to the Constitution*.'"

Thomas, *Riddle*, at 1629–1630 (emphasis in original). But they did not. If the Fourteenth Amendment's drafters "really did intend to incorporate the Bill of Rights, it is obvious that they chose language which was designed to conceal their purpose, not to express it." Stanley Morrison, *Does the Fourteenth Amend-*

ment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 140, 159 (1949).

Petitioners spill much ink arguing that during the framing, the terms "privileges" and "immunities" were widely used as synonyms for "rights," including constitutional rights. McDonald Br. 15–22. That is true, but it dodges the important question: *which* rights? As an examination of framing-era newspaper records discovered, the term "privileges and/or immunities" regularly appeared "in several different contexts—created by treaties, rights of railroads, rights of corporations, even the benefits of peace and of our republican form of government." George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. Contemp. Leg. Issues (forthcoming) (hereinafter Thomas, *Newspapers*). Section One of the Fourteenth Amendment "simply fails to specify at all the particular rights to which it applies." William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 60 (1988).

As a matter of original meaning, there is little lexical support for an incorporationist understanding of "privileges or immunities." Framing-era legal norms simply did not recognize any constitutional "privilege or immunity" of national citizenship against state legislation restricting free speech, abrogating jury rights, or otherwise abridging any of the provisions of the first eight amendments. "Under *Barron*, citizens had no right to be free from state legislation inconsistent with the Bill of Rights—the privileges and immunities described in the first eight amendments only applied to federal legislation." Lawrence Rosenthal, *Second Amendment Plumbing*

After Heller: *Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. L. 1, 55 (2009) (hereinafter Rosenthal, *Second Amendment*). As Professor Rosenthal has explained:

> "Even though the drafters utilized the 'No State shall abridge' formulation, the rest of the Privileges or Immunities clause did not purport to alter any of the preexisting privileges and immunities of citizenship, or to create new ones. And, since the first eight amendments, under *Barron*, were not understood to afford privileges and immunities against state laws inconsistent with the Bill of Rights, nothing in the text of the Fourteenth Amendment could change the meaning of the 'privileges and immunities' of citizenship, which went unaltered by the Fourteenth Amendment."

Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. Contemp. Leg. Issues (forthcoming).

Moreover, the phrase's closest analog in the antebellum Constitution was never understood to embrace the Bill of Rights. The Privileges and Immunities Clause of Article IV, § 2[7]—which itself pre-dated the Bill of Rights—has never been read to include the guarantees set forth in the first eight amendments. The leading nineteenth-century opinion interpreting that provision, *Corfield* v. *Coryell*, 6 F. Cas. 546, 551–552 (C.C.E.D. Pa. 1823), set forth a list of "fundamental" rights implicated by the Clause (including, for example, the right to "pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise"), but made no reference to the Bill of Rights.

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[7] "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." U.S. Const., art. IV, § 2. The framers of the Fourteenth Amendment specifically referenced the Article IV provision as providing insight into the "privileges or immunities" covered by the proposed Amendment. See Cong. Globe, 39th Cong., 1st Sess. 1089, 2542 (1866) (Rep. Bingham), 2765 (Sen. Howard); see also *id.* at 1054 (Rep. Higby), 1057 (Rep. Kelley).

Throughout the framing period, this understanding of "privileges and immunities" never expanded to include the first eight amendments. Only months after the Fourteenth Amendment's ratification, this Court construed the Article IV clause as forbidding discrimination with respect to state law rights like the "right of free ingress into other States" and "the acquisition and enjoyment of property." *Paul* v. *Virginia*, 75 U.S. 168, 180 (1868), overruled in part on other grounds, *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Again, there was no mention of the Bill of Rights.

In short, there is little evidence that the term "privileges or immunities," when viewed in the legal environment of the framing era, would have been widely understood as shorthand for the guarantees set forth in the Bill of Rights.

B. Legislative intent, to the extent that it is relevant, does not support total incorporation through the Clause.

Petitioners' historical argument (which largely recycles Justice Black's rejected argument in *Adamson*) relies heavily on congressional floor statements by proponents of the Fourteenth Amendment—in particular, Senator Howard and Representative Bingham—to the effect that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights against the States. See, *e.g.*, McDonald Br. 26–32; Academics for the Second Amendent Br. 24–26; Calguns Br. 6–12. But this "evidence" of congressional intent is at best ambiguous and at worst irrelevant.

1. Petitioners' evidence is insufficient to establish even Congress's intent, much less any public understanding. The Congress that debated the Fourteenth Amendment comprised 52 Senators and 192 Representatives. Benjamin Vincent, *Haydn's Dictionary of Dates* 18 (American ed. 1867). Only a handful—by a generous count, one Senator and five Representatives—spoke in favor of total incorporation. See Thomas, *Riddle*, at 1640–1647 (citing statements of Senator Howard and Representatives Bingham, Price, Wilson, Hale and Thayer).[8] The remaining members of Congress "'simply did not speak to the point, either one way or another, and neither did they say anything from which their views on the subject can be inferred.'" *Id.* (quoting William Winslow Crosskey, *Charles Fairman, "Legislative History,"*

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[8] There are doubts about even these members' views. Representative Price spoke only of incorporating the freedom of speech, and his concern might have been equal treatment rather than substantive protection. See Thomas, *Riddle*, at 1643. And Representative Thayer said only that the Amendment would "bring[] into the Constitution what is found in the bill of rights *of every State of the Union.*" Cong. Globe, 39th Cong., 1st Sess. 2465 (1866) (emphasis added). At the time of that comment, the States were not bound by the federal Bill of Rights, and not all state constitutions provided protections coterminous with the first eight amendments. See Thomas, *Riddle*, at 1644.

and Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1, 71 (1951)).[9]

Indeed, "[u]ncertainty about what the new provision meant, as well as its application and scope, characterized both congressional debates and contemporary commentary." Ronald Labbe & Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* 2 (2003). Even after Senator Howard's speech, Senators Hendricks and Johnson each complained that the meaning of "privileges or immunities" was unclear; no proponent of the Amendment responded by expounding the incorporation theory. Cong. Globe, 39th Cong., 1st Sess. 3040 (1866) (Sen. Hendricks), 3041 (Sen. Johnson); see also *id.* at 2467 (statement of Rep.

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[9] Many of the statements relied on by Petitioners make no mention at all of the Bill of Rights—much less of its total incorporation. Representative Rogers defined "privileges and immunities" to include rights such as "[t]he right to marry" and "[t]he right to contract." McDonald Br. 25. Representative Raymond also viewed it as protecting unenumerated rights like "the right of free passage." *Id.* at 27. Representative Broomall cited the *Corfield* definition, which, as discussed above, did not reference the Bill of Rights. *Ibid.* Representatives Donnelly and Woodbridge vaguely suggested that the Fourteenth Amendment would protect against some state interference with "natural rights" or "guarantees of the Constitution," but did not address whether it incorporated the full protections of the Bill of Rights. *Id.* at 32. Finally, Senator Stevens' statement about the Amendment remedying the fact that "the Constitution limits only the action of Congress," *ibid.*, was followed by explication painting the Fourteenth Amendment simply as an anti-discrimination measure: "This amendment * * * allows Congress to correct the unjust legislation of the states, *so far that the law which operates upon one man shall operate equally upon all.*" Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (emphasis added).

Boyer that section one was "open to ambiguity and admitting of conflicting constructions"); Thomas, *Riddle*, at 1633, 1646.

In short, as William Crosskey—an early academic proponent of incorporation—conceded, "it would be idle to pretend that the debate on the amendment, standing by itself, was very informative as to what the House thought the Privileges and Immunities Clause of the amendment meant." Crosskey, *supra*, at 70.

2. The incorporation theory was not the only—or even the most prominent—view of the Amendment's scope that was expressed in Congress. During the debates, several Republican members of Congress argued that "the amendment did not protect specific fundamental rights or give Congress and the federal courts power to interfere with state lawmaking that either created or denied rights," but rather was intended only to "prevent the states from discriminating arbitrarily between different classes of citizens." Nelson, *supra*, at 115.

"On this account, states were required to give everyone the same set of substantive privileges and immunities and to enforce those privileges and immunities in an even-handed way." Thomas, *Riddle*, at 1640. As one scholar put it, "in 1866, when people discussed abridgements of the privileges or immunities of citizens, they mainly were talking about laws that deprived certain classes of citizens of the civil rights accorded to everyone else." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1388 (1992). See also David P. Currie, *The Constitution in the Supreme Court: The*

First Hundred Years, 1789–1888 at 342–351 (1985) (detailing anti-discrimination view).

Representative Thaddeus Stevens, a leading proponent of the Fourteenth Amendment, described its purpose as "allow[ing] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate *equally* on all." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Representative Hotchkiss understood the "object" of the proposed amendment to be that "no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another." *Id.* at 1095. Representative Wilson explained that the word "immunities" would "merely secure to citizens of the United States equality in the exemptions of the law." *Id.* at 1117. Senator Morrill emphasized that the "principle of equality before the law * * * does not prevent the State from qualifying the rights of the citizen according to the public necessities." Cong. Globe, 39th Cong., 2d Sess. 40 (1866). Even Representative Bingham at one point defined "immunity" as "[e]xemption from unequal burdens." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

Other members of Congress characterized the Amendment as simply constitutionalizing the Civil Rights Act of 1866.[10] That statute was an anti-discrimination measure that neither mentioned the

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[10] *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess., at 2462 (1866) (Rep. Garfield), 2465 (Rep. Thayer), 2501 (Rep. Raymond), 2549 (Rep. Stevens), 2462 (Rep. Garfield), 2467 (Rep. Boyer), 2468 (Rep. Kelley), 2498 (Rep. Broomall), 2501 (Rep. Raymond), 2509 (Rep. Spaulding), 2511 (Rep. Eliot), 2534 (Rep. Eckley), 2538 (Rep. Rogers), 2539 (Rep. Farnsworth), 2883 (Rep. Latham), 2961 (Sen. Poland), 3031 (Sen. Henderson), 3069 (Rep. Van Aernam).

Bill of Rights nor created any new substantive rights.[11] See Rosenthal, *Second Amendment*, at 58–59.

Still other legislators defined the scope of the Clause with reference to its Article IV counterpart, which—as this Court was shortly to confirm in *Paul* v. *Virginia*—was widely viewed as a nondiscrimination measure. See p. 16, *supra*. Senator Poland, for example, opined that the proposal "secures nothing beyond what was intended" by Article IV's Privileges and Immunities Clause. 39th Cong., 1st Sess. 2961 (1866); see also *id.* at App. 240 (statement of Sen. Davis). Even after the Amendment's ratification—and this Court's decision in *Paul*—Senator Trumbull mused that the Privileges or Immunities Clause "amounts to the same thing" as Article IV and that "[i]t is a repetition of a provision in the Constitution as it before existed," though "stat[ing] it in a little different language." Cong. Globe, 42d Cong., 1st Sess. 576–77 (1871). By that time, the *Paul* Court had already definitely interpreted Article IV as an antidiscrimination rule. If the Fourteenth Amendment was widely known to have *substantively* incorporated the Bill of Rights, the difference between the provisions would have been obvious.

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[11] The Act provided that:

> "[C]itizens, of every race and color, without regard to previous condition of slavery or involuntary servitude * * * shall have *the same right* * * * to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to *full and equal benefit* of all laws and proceedings for security of person and property, as is enjoyed by white citizens."

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added).

Many members of Congress stressed the antidiscrimination aspects of the Fourteenth Amendment, while relatively few suggested that it was intended to incorporate the substantive guarantees of the Bill of Rights. The handful of floor statements cited by Petitioners does not establish a critical legislative mass in favor of incorporation. The most generous conclusion that can be drawn is that legislative intent was ambiguous: that Congress "never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well." Nelson, *supra*, at 123. In light of both the sea change in the constitutional framework that total incorporation would work, and this Court's unbroken line of precedent rejecting the total incorporation theory, Petitioners need more than ambiguity to prevail.

3. In many ways, however, the search for congressional intent is a red herring. Even if Petitioners' handful of sponsors' statements could establish that Congress intended incorporation, that would not end the inquiry. As this Court made clear in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), the important question is not the intention of the drafters, but the meaning of the text as it would have been originally understood by the ratifying public. An enactment's "[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to *ordinary citizens in the founding generation*." *Id.* at 2788 (emphasis added). The Court further rejected the use of "statements of those who drafted or voted for the law that are made after its enactment" in favor of "examination of a variety of legal and other sources to

determine the *public understanding* of a legal text." *Id.* at 2805 (emphasis in original).[12]

When Petitioners' case for total incorporation is considered in terms of the original *public understanding* of the Privileges or Immunities Clause, it becomes even weaker. Regardless of whether a handful of congressional sponsors had the subjective intent to incorporate the Bill of Rights, there is no persuasive evidence that the framing-era public shared that understanding. In the following section, we examine the framing-era public's understanding of the Clause's meaning in light of the same types of historical sources that the Court relied upon in *Heller*.

C. The framing-era public did not understand the Clause to incorporate the full Bill of Rights.

1. *State ratification debates.* If the public had understood the proposed Privileges or Immunities Clause to incorporate the Bill or Rights wholesale, the issue would presumably been widely aired during the ratification debates. But the historical record is silent.

The ratification debates took place amidst the heated elections of 1866; yet despite the popularity "of the notion that the federal government was intervening too much in local matters," there "was no vigorous discussion of the idea that * * * state judiciaries were going to be subservient to Congress and the federal courts." Thomas, *Newspapers*; see also Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 84-126 (1949). As one academic proponent of incorporation has acknowledged, "the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights." Wildenthal, *supra*, at 1601.

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[12] Accord Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 38 (Amy Gutmann ed., 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.")

A study of the ratification debates in Illinois, Ohio, and Pennsylvania concluded that there is "no record" in those States "of any advocate of the 14th Amendment explaining that the privileges and immunities clause guaranteed those rights enshrined in the Bill of Rights." James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 450 (1985). Rather, the evidence suggests that in those States, the Amendment was generally understood to constitutionalize the non-discrimination provisions of the Civil Rights Act. See *id.* at 445–454. Professor Bond's study of the ratification process in the southern States similarly uncovered no evidence of an incorporationist understanding, but considerable evidence that the Amendment was understood as a non-discrimination provision. James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* (1997); see also James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89, 112–16 (1984). Had Democratic candidates in the former Confederate States been aware of the incorporation thesis, they would likely have "campaigned ferociously against turning control over their rights to the Radical Republicans and federal judges." Thomas, *Riddle*, at 1648–1649. But they did not.

Republican Congressmen who campaigned in favor of ratification "argu[ed] that the Fourteenth Amendment did nothing more than require the states to treat their citizens equally." Saul Cornell, *A Well-Regulated Militia* 174 (2006). For example, Representative Bingham emphasized "that the amendment simply forced the States to abide by the principle of equality before the law." *Ibid.*

One *amicus* searched ratification-period newspaper and magazine archives for mentions of the Privileges or Immunities Clause. Of 102 articles referencing the provision, only four "put the reader on notice that Section 1 incorporated the Bill of Rights." Thomas, *Newspapers*. In contrast, he found "a large number of accounts of 'privileges and immunities' as including equality of rights and natural law rights such as the right to contract or to sue." *Ibid.* With respect to incorporation, the loudest noise from the state ratification process is the sound of silence. See Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–1869*, at 117 (1990) (characterizing Republican silence as a "puzzling anomaly" that means incorporation is "not proven beyond a reasonable doubt").

Against this compelling evidence of public indifference to incorporation, Petitioners throw up a handful of isolated statements—an pseudonymous column in the *New York Times*; a book review in *The Nation*; ambiguous statements by a state legislative committee and two other officeholders; and a statement by the Secretary of the Interior. McDonald Br. 35–40. But *none* of the sources quoted by Petitioners even mentions the Bill of Rights—much less advocates its total incorporation. Rather, these snippets speak in generalities that, at the most, suggest an embrace of *Corfield*-style unenumerated rights. See McDonald Br. 35–36 ("Madison" column paraphrasing *Corfield's* list of "fundamental" rights), 36–37 (*The Nation* review arguing generally that amendment would "give to liberty of the individual inhabitant the will of the nation as its basis, instead of the will of a State"); 37 (Texas House Committee suggesting that "privileges and immunities" embody rights outside the Bill of Rights, including "suffrage at the polls" and "other matters which need not be here enumerated"), 38 (statements of Sec. Browning, Rep. Delano and Gov. Hawley failing to mention Bill of Rights).

Perhaps most strikingly, Petitioners cite Horace Flack's early twentieth-century study of the Fourteenth Amendment's framing. McDonald Br. 40. But they omit from their quotation the very next sentence, which acknowledges that "[t]here does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not. * * *" Horace E. Flack, *The Adoption of the Fourteenth Amendment* 154 (1908). That observation remains as true today as it was a hundred years ago.

2. *Post-ratification enactments.* Many of the States that ratified the Fourteenth Amendment had on their books—and did not repeal—constitutional and statutory provisions incompatible with the Bill of Rights. See Fairman, *supra*, at 84–132. This discrepancy is especially notable in the case of former Confederate States, which were required to "have formed a government in conformity with the Constitution of the United States in all respects" and whose

constitutions were submitted to Congress "for examination and approval" as conditions for re-admission to the Union. 14 Stat. 428 (1867). Several of those States had laws incompatible with the Bill of Rights, if it were indeed incorporated. For example, Louisiana permitted prosecution by information for certain non-capital felonies, and Georgia permitted non-jury trial in certain civil contract cases. Fairman, *supra*, at 127–128. Yet their laws were determined to be "in conformity with the Constitution" and they were readmitted even *after* ratification of the Fourteenth Amendment. *Id.* at 130–131.

Moreover, five States took action to modify or eliminate their grand jury requirements in the years *after the Fourteenth Amendment was ratified*—inexplicable decisions if state legislators had understood the Privileges or Immunities Clause to incorporate the Fifth Amendment and other provisions of the Bill of Rights.[13] Indeed, in the years after ratification, many States changed their criminal laws in ways "incompatible with the Fifth Amendment's indictment and self-incrimination clauses," and contemporary jurists did not argue that such changes were prohibited by the Fourteenth Amendment. Donald J. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure*

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[13] See Calif. Const. art. I, § 8 (1879) (requiring abolition of grand jury); Colo. Const. art. II, § 23 (1876) (permitting legislature to abolish grand jury requirement); Ga. Const. of 1868 (not mentioning grand juries); Wis. Const. § 8 (1870) (replacing requirement of grand juries with general due process requirement); Kan. Stat. Ann. § 82 (1868) (permitting prosecutors to proceed by information). See generally Thomas, *Riddle*, at 1654 & n.131.

Revolution, 18 J. Contemp. Leg. Issues (forthcoming).

States also adopted post-ratification laws regulating firearms that were arguably inconsistent with the understanding that they were bound by the Second Amendment. Spurred by racial violence after the Civil War, several southern States amended their constitutions to grant their legislatures the power to regulate firearms in terms broader than the Second Amendment's.[14] Others enacted post-ratification laws banning the carrying of handguns or other categories of arms.[15] There is no evidence of opposition based on the argument that the Fourteenth Amendment precluded such laws.

3. *Legal treatises.* Leading treatise writers during Reconstruction also failed to contemplate total incorporation. Judge Thomas Cooley, who published a "massively popular" treatise the year the Fourteenth Amendment was ratified, *Heller*, 128 S. Ct. at 2811, was silent about total incorporation. Thomas M. Cooley, *Constitutional Limitations* 19 (1868) (Da Capo Press 1972). Rather, Cooley favorably cited *Barron*, which held that the Bill of Rights did not constrain the States, as good law. *Ibid.*

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[14] See, *e.g.*, Fla. Const. of 1885, art. I, § 20; Ga. Const. of 1877, art. I, § 22; Tex. Const. of 1876, art. I, § 3; Tenn. Const. of 1870, art. I, § 26.

[15] See, *e.g.*, 1879 Tenn. Pub. Acts ch. 186 (criminalizing carrying any "belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol"); 1876 Wyo. Comp. Laws ch. 52, § 1 (criminalizing carrying "any fire-arm or deadly weapon within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881 (same); Tex. Act of Apr. 12, 1871 (same).

John Dillon, another influential legal scholar of the period, also showed no awareness of total incorporation. In his 1874 survey on the right to bear arms, he concluded that "none of the first amendments apply to the States, but that all of them are merely restrictive on the federal power." *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L.J. 259, 295 (1874).

Bishop and Wharton, authors of leading treatises on criminal law, also failed to discuss total incorporation. See 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* (2d ed. rev. 1872); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* (7th ed. 1874). And while Pomeroy and Bateman touched on the Fourteenth Amendment's impact on the States, both authors suggested anti-discrimination interpretations of the Privileges or Immunities Clause. See John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 150–151 (1868) (then-pending Fourteenth Amendment would "remedy" the situation where a "certain state contains clauses securing to the people the right of keeping and bearing arms" but "the legislature of the same state passes statutes by which certain classes of inhabitants—say negroes—are required to surrender their arms"); William O. Bateman, *Political and Constitutional Law of the United States of America* 259 (1876) (Fourteenth Amendment "*prohibits* the denial or abridgement of such right as was *previously vested*, 'on account of race, color, or previous condition of servitude.'").

In short, most prominent commentators (including Cooley) expressed no awareness of total incorporation. Others (including Pomeroy, on whom Petitioners attempt to rely) appear to have embraced an

This Court recognized as much in *Presser v. Illinois*, explaining that the Militia Clauses limit the States' ability to disarm their citizens:

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, ***the States cannot***, even laying the [Second Amendment] out of view, ***prohibit the people from keeping and bearing arms***, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."

116 U.S. 252, 265 (1886) (emphasis added). Even a cursory review of the Second Militia Act of 1792 confirms the correctness of *Presser*'s conclusion. The Second Militia Act prescribed in considerable detail the types of weapons that citizens then eligible for the militia were to bring with them when called to assemble. *See* 1 Stat. 264, 271-72 (1792). If the States were free to ban possession of these same firearms, the congressional exercise of the militia power would be directly frustrated.

Although *Presser* reiterated *Cruikshank*'s holding that the Second Amendment does not apply directly to the States, the above passage plainly reasoned that the constitutional design imparts some limits on a State's ability to restrict the right to keep and bear arms. And it always has.

The Militia Clauses narrow considerably the issue before the Court today. It is unquestionably the case that the right to keep and bear arms limits the States in some fashion. The only remaining question is to what degree. Incorporation against the States of the right to keep and bear arms as reflected in the Second Amendment would have the salutary effect of obviating the development of two different rights to keep and bear arms of different scope. The development of a unified Second Amendment jurisprudence is of particularly practical benefit in light of the relatively nascent state of the jurisprudence due to the confusion sown by *United States v. Miller*, 307 U.S. 174 (1939). Moreover, incorporation would properly treat the Militia Clauses, the Second Amendment, and the Fourteenth Amendment as a unified whole, codifying the fundamental right to keep and bear arms that the Founders believed pre-dated the Constitution.

C. Under Any Theory Of Incorporation, The Right To Keep And Bear Arms Should Apply To The States.

The Court has chosen the Due Process Clause of the Fourteenth Amendment as the vehicle for incorporation. Even Members of the Court who may not have agreed with this approach as an original matter have accepted that it is by now well established. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment). Given that nearly every other individual right guaranteed by the Bill of Rights has been held to apply against the States, the operative question in this case is whether there is a special reason *not* to incorporate the right to keep and bear arms. Not only is a special reason to reject incorporation lacking, but the case for incorporation is especially strong.

1. This Court has held that the Fourteenth Amendment incorporates many rights that are considered "fundamental." *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Under that standard, the Second Amendment has a powerful case for incorporation. To support this conclusion, the Court need look no further than its opinion in *Heller*. *See* 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."); *see also Nordyke*, 563 F.3d at 451-53 (comparing *Heller*'s analysis of the fundamental nature of the right to keep and bear arms with the analysis in *Duncan v. Louisiana*, 391 U.S. 145 (1968), of the jury trial right in serious criminal cases).

Early constitutional scholars agreed. The right to keep and bear arms was frequently extolled as the "palladium" of liberty. William Blackstone, COMMENTARIES, app. at 300 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803); 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897 (1833); Rawle, at 125. A well-armed citizenry was considered a bulwark against tyrannies from without and within. *Heller*, 128 S. Ct. at 2800-01. The right to keep and bear arms was vital to personal security as well. *Id.* at 2805. In short, the right to keep and bear arms "was a right crucial to safeguarding all other rights." *Nordyke*, 563 F.3d at 452.

2. The Second Amendment also bears several objective characteristics that strongly favor incorporation. Most obviously, the first Congress dedicated an entire amendment to the protection of the right to keep and bear arms. While other amendments protect a cluster of substantive rights or an admixture of procedural and substantive rights, the right to keep and bear arms stands alone. It would be odd to leave this substantive right completely unprotected against state action. In addition, as this Court noted in *Heller*, the Second Amendment employs the same key term, "the people," that the Framers used to protect fundamental, individual rights in the First and Fourth Amendments. 128 S. Ct. at 2790. Given that this Court has incorporated the fundamental substantive guarantees of the First and Fourth Amendments, *see, e.g.*, *De Jonge,* 299 U.S. at 364; *Wolf v. Colorado,* 338 U.S. 25, 27-28 (1949), it would be odd indeed to single out the Second Amendment for exclusion.

Moreover, the text of the Amendment has no limiting language of the kind contained in the First Amendment. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . ."). Incorporation of the Second Amendment thus does not face the same interpretive difficulties associated with the First Amendment's textual reference to Congress. *See Silveira v. Lockyer*, 328 F.3d 567, 576 n.46 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

The centrality of the right to keep and bear arms is underscored by the fact that even the unamended Constitution limited state regulation of the right. As noted above, the States may not restrict the right to keep and bear arms in a way that undermines Congress' ability to call forth the militia. *See Presser*, 116 U.S. at 265. The Constitution does not similarly restrict the States with respect to any other right in the first eight amendments. It would be highly anomalous to reject incorporation of the one right that the original Constitution protected, at least to some degree, against state action. *Cf. Duncan*, 391 U.S. at 153 n.20 (incorporating Sixth Amendment jury trial right despite "relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States").

Finally, the historical background of the Fourteenth Amendment uniquely exhibits its Framers' efforts to protect the right to keep and bear arms. The Freedmen's Bureau Act and the Civil Rights Act evidenced a concerted effort by Congress to restore the right to keep and bear arms to freedmen. The Fourteenth Amendment provided constitutional protection for the same right and through the Enforcement Clause ensured that Congress had the power to protect and enforce it. If the Court were to find the Second Amendment not to be incorporated, it would likely frustrate Congress' intent by putting Second Amendment rights beyond the scope of the Enforcement Clause. *Cf. City of Boerne v. Flores*, 521 U.S. 507 (1997).

This history must matter lest the Court's incorporation doctrine become completely anti-historical. To be sure, this Court has incorporated other rights based solely on their fundamental nature, even without evidence that the Fourteenth

Amendment was intended to restore or protect them. For example, the Court held in *Benton*, 395 U.S. at 794, that the right against double jeopardy applied to the States through the Fourteenth Amendment, without inquiring whether the States were subjecting citizens to double jeopardy or whether such concerns motivated Congress to propose the Fourteenth Amendment. In contrast, it is clear that States' disarming of freedmen was a principal concern of Congress. It is one thing for incorporation doctrine to be ahistorical in the sense of permitting incorporation of a right even without a showing that the Fourteenth Amendment was intended to protect that specific right. It would be quite another thing, and entirely unjustifiable, to make incorporation doctrine anti-historical by rejecting incorporation of a right that the Fourteenth Amendment was specifically intended to protect.

3. To decide this case, the Court does not need to revisit whether incorporation of individual rights through the Due Process Clause is the, or an, appropriate approach as an original matter. As Justice Scalia has observed, the doctrine that "explicit substantive protections of the Bill of Rights" can be "included within the Fourteenth Amendment" is "both long established and narrowly limited . . . ." *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring). That observation would be no less true following incorporation of the Second Amendment's "explicit substantive protections."

In addition, the Second Amendment does not suffer from concerns that may attend the incorporation of other Bill of Rights provisions. Some have read the Establishment Clause, for example, as a federalism provision as opposed to an individual right. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-50 (2004) (Thomas, J., concurring in judgment).[5] Before *Heller*, some had interpreted the Second Amendment in similar fashion, but *Heller* definitively rejected that view.

Indeed, incorporation of the right to keep and bear arms as reflected in the Second Amendment would have significant virtues. First, incorporation would obviate reliance on vague notions of substantive due process. When the Court has not incorporated a right contained in the Bill of Rights, it has often crafted a substantive due process restriction on the States that mirrors but ultimately dilutes the right. For example, before *Benton* fully incorporated the Fifth Amendment's Double Jeopardy Clause, *Palko v. Connecticut*, 302 U.S. 319 (1937), held that it did not apply to the States. Instead of incorporating the Fifth Amendment, the Court fashioned a narrower prohibition capturing only a subset of the double jeopardy prohibited by the Fifth Amendment. The Court asked: "Is *that kind* of double jeopardy to which the [state] statute has subjected [Palko] a hardship so acute and shocking that our polity will not endure it?" *Id.* at 328 (emphasis added).

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[5] Of course, the Court has already held that the Establishment Clause applies to the States through the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

This bifurcation of a right into its full-bodied federal version and its conscience-shocking subset has little to recommend it. Justice Scalia, joined by Justice Thomas, has explained that incorporating enumerated Bill of Rights protections is far different from recognizing new rights through substantive due process:

> I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights . . . .

TXO Prod. Corp., 509 U.S. at 470 (Scalia, J., concurring in judgment); *see also Duncan*, 391 U.S. at 171 (Black, J., concurring).

A related virtue of incorporation is that if the States are bound by the Court's Second Amendment jurisprudence, it is unnecessary to develop a separate body of law to identify state restrictions that impermissibly conflict with either less-adumbrated concepts of substantive due process or Congress' Militia Clauses authority. "Second Amendment law remains in its infancy," *Nordyke*, 563 F.3d at 459, and complex questions will be presented by the variety of restrictions placed on the right to keep and bear arms. The Court should not compound the problem by requiring courts to develop multiple bodies of law relating to this right.

4. The court of appeals rested its decision on stare decisis. Pet. App. 2-4. Putting aside questions about the proper role of a court of appeals, *see id.* at 3-5, the stare decisis principles applicable to this Court reinforce that this Court should hold that the right to keep and bear arms is incorporated against the States through the Fourteenth Amendment. This Court has never addressed *that* precise question, and its precedents interpreting the Second Amendment and applying the selective incorporation doctrine bolster the arguments for incorporation.

Following *Barron*, this Court has twice held that the Second Amendment does not apply *directly* to the States. *See Cruikshank*, 92 U.S. at 553; *Presser*, 116 U.S. at 265. Critically, though, neither *Cruikshank* nor *Presser* addressed the Fourteenth Amendment. The concept of incorporation—particularly through the Due Process Clause—simply had not been developed at the time. This point is confirmed by *Miller v. Texas*, 153 U.S. 535 (1894), in which the petitioner attempted to argue that the Second Amendment applied to the States through the Fourteenth Amendment. This Court rejected that argument solely because it had not been preserved. *Id.* at 538-39. The Court did *not* suggest that *Cruikshank* and *Presser* foreclosed the argument.

Of course, in later decades, the Court increasingly applied Bill of Rights guarantees to the States through the Fourteenth Amendment's Due Process Clause. *De Jonge* illustrates that the incorporation question may be resolved differently from the direct application question in cases like

Cruikshank. *De Jonge* superseded one of the holdings in *Cruikshank* and held that the First Amendment's "right of peaceable assembly" does apply to the States, albeit via the Fourteenth Amendment. 299 U.S. at 364. It would be striking if this Court were to find that the same reasoning does not apply to the right to keep and bear arms.

Incorporation through the Due Process Clause has been the accepted methodology for decades. Nearly all of the individual rights in the first eight amendments to the Constitution have been applied to the States through the Due Process Clause. In light of this precedent, there should be a heavy presumption that the individual right to keep and bear arms is also incorporated. The central question in this case thus reduces to whether there is a special reason to single out the right to keep and bear arms for *exclusion* from incorporation. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1989) ("The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception."). As shown, however, nothing justifies its exclusion; quite the opposite is true.[6]

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[6] As explained at length in Petitioners' opening brief, the Privileges or Immunities Clause also may provide a foundation for applying the right to keep and bear arms to the States. *See* Pet. Br. at 9-65. The critical fact is that the Framers of the Fourteenth Amendment wanted to guarantee that the States would respect citizens' right to keep and bear

II. Congress Has A Strong Interest In Preserving The Right To Keep And Bear Arms That Would Be Undermined If The Second Amendment Does Not Apply To The States.

Congress has a unique interest in preserving the right to keep and bear arms. Throughout the Nation's history, Congress has consistently stated its view that the Second Amendment codifies an individual right. Congress' intent in proposing the Enforcement Clause of the Fourteenth Amendment was to ensure that it had an adequate constitutional basis to protect, *inter alia*, the right to keep and bear arms. More recently, Congress has enacted legislation designed to preserve this right and to encourage citizens to exercise it. Incorporation would clarify Congress' authority in this area, including by confirming Congress' power to enforce the right to keep and bear arms through Section 5. Moreover, incorporation would help to preserve Congress' enumerated war powers.

A. Congress Has Consistently Recognized The Importance Of The Right To Keep And Bear Arms In Numerous Contexts.

Congress has a long history of recognizing and protecting individuals' right to keep and bear arms. *See generally* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 Tenn. L. Rev. 597, 618-31

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arms. Any uncertainty about which clause of the Fourteenth Amendment was the primary vehicle for guaranteeing that respect should not obscure their intent to safeguard the right.

(1995). Congress acknowledged the right to keep and bear arms in the Nation's first century by protecting the right when threatened during Reconstruction and by refraining from efforts to restrict it on the federal level. Congress did not enact its first comprehensive firearms law until 1932. Act of July 8, 1932, Pub. L. No. 72-275, 47 Stat. 650. The Senate Report made clear that "[t]he right of an individual to possess a pistol in his home, or on land belonging to him, is not distrubed [sic] by the bill." S. Rep. No. 72-575, at 3 (1932).

At the outset of World War II, Congress authorized the President to seize certain property for the national defense under the Property Requisition Act. The Act explicitly excluded "the requisitioning or . . . registration of any firearms possessed by any individual for his personal protection or sport" and further denied that the Act could be used "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ." 55 Stat. 742, 742 (1941). The exclusion is remarkable. Even during a time when private supplies of firearms would have been useful for national defense, Congress emphasized the importance of citizens' right to keep and bear arms.

Similar statements of congressional support for Second Amendment rights are found in numerous pieces of legislation. *See, e.g.*, Gun Control Act of 1968, Pub. L. 90-618 § 101, 82 Stat. 1213 ("[T]his title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."); Firearms Owners' Protection Act of 1986, Pub. L. 99-308 § 1(b)(1)(A), 100 Stat. 449 (expressing support for citizens' right "to keep and bear arms under the second amendment to the United States Constitution").

In fact, for nearly a century, Congress has encouraged firearms safety and familiarity through the Civilian Marksmanship Program ("CMP"). 36 U.S.C. §§ 40701-33. The CMP promotes marksmanship among the citizenry and sells surplus army rifles and ammunition to the public. Programs like the CMP demonstrate that Congress does not merely support Second Amendment rights in words but with actions as well.

B. Incorporation Would Confirm Congress' Authority To Enforce The Second Amendment Through Section 5 Of The Fourteenth Amendment And Affirm Congress' Original Intent.

Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." If the Second Amendment applies to the States through the Fourteenth Amendment, then, consistent with Congress' initial intent in proposing the Fourteenth Amendment, Section 5 authorizes Congress to pass legislation that enforces the right to keep and bear arms.

In part because of the ineffectiveness of the Freedmen's Bureau and Civil Rights Acts, and in part to eliminate concerns that Congress lacked (or would lack after the exigencies of the immediate aftermath of the Civil War passed) adequate power to enact such laws, Section 5 of the Fourteenth Amendment was proposed and ratified to permit enforcement by Congress. Congress then enacted other laws designed to further protect the rights protected in the earlier Civil Rights Act, such as the provisions now codified in 42 U.S.C. § 1983. *See* Civil Rights Act of 1871, 17 Stat. 13. Finding that the Second Amendment is not incorporated against the States would directly frustrate Congress' intent and leave Second Amendment rights unprotected by § 1983 contrary to the intent of the current Congress.

In recent years, Congress has sought to preserve Second Amendment rights through legislation specifically directed at lawful firearm use. After attempts to ban handguns through civil litigation, Congress responded in 2005 by enacting the Protection of Lawful Commerce in Arms Act, Pub. L. 109-92, 119 Stat. 2095. The Act prohibits imposition of liability on manufacturers and distributors of firearms for the misuse or unlawful use of firearms by others. 15 U.S.C. § 7902. Congress specifically invoked its power under the Enforcement Clause, observing that the law was designed "[t]o guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment." 15 U.S.C. § 7901(b)(3).

Congress has also prohibited the seizure or forced registration of lawfully possessed firearms by any "officer or employee of the United States . . . or person . . . receiving Federal funds . . . while acting in support of relief from a major disaster or emergency." 42 U.S.C. § 5207(a). Originally part of the Disaster Recovery Personal Protection Act, the statute was passed by the House of Representatives with specific findings that "[i]n the wake of Hurricane Katrina, certain agencies confiscated the firearms of [citizens] in contravention of the Second Amendment, depriving these citizens of the right to keep and bear arms and rendering them helpless against criminal activity." 152 Cong. Rec. H5755 (2006); *id.* at H5814.[7]

In other legislation, Congress eliminated some restrictions on interstate travel with lawfully owned firearms. *See* 18 U.S.C. § 926A(a). Individuals may transport a firearm from one State to another as long as possession is lawful at both the origin and destination. The legislation prevents States from restricting what would otherwise be lawful ownership and possession of the firearm and is yet another example of Congress' efforts to enforce the Second Amendment guarantee. Finding that the Second Amendment is not incorporated would allow the States to frustrate Congress' effort to protect interstate travel with firearms.

In each of these enactments, Congress has expressed its desire to enforce Second Amendment rights. Incorporation of the Second Amendment would ensure that Section 5 is an available tool to vindicate the right to keep and bear arms. *Cf. Wolf*, 338 U.S. at 33 (reserving question whether Congress could make the then-unincorporated

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[7] This legislation ultimately was enacted as part of a larger appropriations bill, and the findings were removed (as is customary) when it was added to the appropriations bill.

Fourth Amendment exclusionary rule "binding upon the States" under Section 5). Recent legislation aside, it would be profoundly ironic if Section 5 were construed not to permit protection of the right to keep and bear arms that Congress attempted to achieve through the Freedmen's Bureau and Civil Rights Acts and in the Fourteenth Amendment itself.

C. State Restrictions On The Right To Keep And Bear Arms Would Threaten To Impede Congress' War Powers.

The Constitution vests Congress with authority to raise a standing army and to call forth and regulate the militia. U.S. CONST. art. I, § 8, cl. 12, 15-16. If many States and local governments followed respondents' example, Congress' ability to exercise its enumerated martial powers would be undermined. Soldier's with previous firearms experience require less training and make better marksmen. *See* Arthur D. Little, Inc., *A Study of the Activities and Missions of the National Board for the Promotion of Rifle Practice* 47, 58, 64 (1966), *reprinted in* James B. Whisker, THE CITIZEN SOLDIER AND UNITED STATES MILITARY POLICY (1979). And in time of war, the period for training is reduced and pre-existing familiarity with firearms becomes even more important. No less an authority than President Eisenhower made this point in advising that a prospective soldier "will do well to learn all he can about the American military rifle" because "he will find the time all too short to learn the many things he should know, for his own self-preservation, before he is called upon to meet the enemy." Stephen P. Halbrook, *Nazism, the*

Second Amendment, and the NRA: A Reply to Professor Harcourt, 11 Tex. Rev. L. & Pol. 113, 129 (2006) (citation omitted). These considerations apply equally to the regular armed forces and the National Guard. Strict state gun-control laws thus could impede Congress' exercise of its war powers, just as this Court recognized long ago in *Presser*. *See* 116 U.S. at 265.

Similar concerns attend Congress' militia powers. It remains the law of the land that the reserve or unorganized militia constitutes all able-bodied males between 17 and 45. 10 U.S.C. § 311; *see also Silveira*, 328 F.3d at 581 (Kleinfeld, J., dissenting from denial of rehearing en banc) ("Those of us who are male and able-bodied have almost all been militiamen for most of our lives whether we know it or not . . . ."). Congress does not provide arms, ammunition, or uniforms for the reserve militia.[8] Implicit in the statute is an understanding that a substantial portion of the reserve militia will keep their own arms. The same understanding likely inheres in the Militia Clauses. State laws restricting firearm possession, by preventing the reserve militia from keeping firearms and thus being prepared, could seriously threaten the effectiveness of any attempt by Congress to call forth the militia.

Lest the suggestion that Congress might call forth the militia sound antiquated, it bears emphasis that the reserve militia has served nobly within living memory. During World War II, with the regular armed forces engaged in two far-flung theaters, citizen-soldiers performed important duties on the homefront. *See* Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 76-77 n.52, 91-92 (1983) (describing militia duties in Maryland, Virginia, and other States). These citizen-soldiers provided their own arms and ammunition, performing civil defense duties without pay and while keeping their regular jobs. *Id.* The Maryland Minute Men, for example, were tasked by the Governor with securing their local towns and coastlines from saboteurs. 3 *State Papers and Addresses of Governor Herbert R. O'Conor* 616-20 (March 10, 1942). Similarly faded from the popular memory is the invasion and occupation of several Aleutian Islands in World War II. In the campaign to contain and evict Japanese forces, the Army drafted local citizens into a special, irregular unit. Murray Morgan, BRIDGE TO RUSSIA – THOSE AMAZING ALEUTIANS 153-54 (1947). Though not a militia action per se, the episode highlights two critical points. First, invasion of American territory, particularly remote areas, is not impossible. Second, a citizen population familiar with firearms remains relevant to our defense.

---

[8] From 1792 until 1903, every member of the reserve militia was required to possess his own firearm and ammunition. 1 Stat. 264 (1792).

The argument that lightly armed citizen-soldiers stand no chance against modern military technology is a common retort to invocation of Congress' militia powers. Yet it is a straw man. Even in the days of less technologically advanced warfare, the militia was never considered the first *and* last line of defense. Rawle, 125 ("[I]n the commencement of a war *before a regular force can be raised*, the militia form the palladium of the country." (emphasis added)).

The technology straw man also mistakes the nature of at least some modern enemies. Present-day security threats are markedly different from Nazi Germany and Imperial Japan (and the Cold-War Soviet Union, for that matter). Terrorist organizations pose unique defense problems. Their attacks are unlikely to come via T-72 tank or Typhoon-class submarine. Some have suggested that a reinvigorated constitutional militia would be an effective means to address such asymmetrical warfare. David A. Klinger & Dave Grossman, *Who Should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 Harv. J.L. & Pub. Pol'y 815, 831-34 (2001); *see also Nordyke*, 563 F.3d at 464 (Gould, J., concurring) (noting recent terrorist attack on Mumbai and stating that "a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived").

For purposes of this case, it should suffice that such options are constitutionally permissible, even if they are deemed unlikely. Congress' constitutional options should not be compromised by firearms restrictions imposed by the States. "However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once." *Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of rehearing en banc).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

No. 08-1521

In the
Supreme Court of the United States

OTIS MCDONALD, ET AL.,
PETITIONERS,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, MARYLAND, AND NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Due Process or Privileges or Immunities Clause.

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INTEREST OF THE *AMICI CURIAE*

For more than two hundred years, the States have used their police powers to enact and enforce laws governing firearms. These laws, and more local ordinances, often differ from one State to the next, reflecting conscientious democratic responses to a spectrum of diverging local conditions and challenges. Until now, it was well-settled that the Second Amendment did not interfere with state and local efforts to balance competing interests and formulate proper limits on the possession and use of firearms. The question before the Court is whether States should continue to define these limits in tune with local conditions, as they have since the Founding, or whether federal courts should expound and enforce a national standard with which every State and locality must comply, regardless of popular will or circumstance. If petitioners prevail, nearly every firearms law will become the subject of a constitutional challenge, and even in cases where the law ultimately survives, its defense will be costly and time-consuming. In addition, incorporation via the Privileges or Immunities Clause, as petitioners primarily urge, would have the further effect of applying a host of new rights, both enumerated and unenumerated, against the States.

For these reasons, *amici* States urge the Court to affirm the decision below and confirm their ability to protect the health and safety of their residents by regulating firearms within their borders.

STATEMENT

1. In Illinois, a political subdivision with home rule authority (including the City of Chicago and the Village

of Oak Park) is empowered, within its borders, "to regulate for the protection of the public health, safety, morals and welfare." Ill. Const. art. VII, § 6(a). Home rule units may exercise this power "concurrently with the State" unless the Illinois General Assembly has "specifically" limited this concurrent exercise or declared that the State has exclusive regulatory authority in a given area. *Id.* at § 6(i). The General Assembly has not preempted local firearms laws and has left firearms regulation "open to local solution and reasonable experimentation to meet local needs." *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984).

2. In the absence of preemption, Chicago and Oak Park enacted laws prohibiting most handguns (but not most rifles and shotguns). Chicago's ordinance provides that "[n]o person shall within the City of Chicago * * * possess * * * any firearm unless such person is the holder of a valid registration certificate for such firearm." Municipal Code of Chicago, Ill. § 8-20-040(a) (2008). Although the ordinance makes most handguns unregisterable (and thus unlawful), see *id.* § 8-20-050(c), there are exceptions. Chicago residents may register a handgun if it was "validly registered to [the] current owner * * * prior to the [ordinance's] effective date," or if it is owned by a peace officer, security officer, or private detective agency. *Ibid.* In addition, the registration requirement does not apply to certain nonresidents, including those participating in or traveling to "any lawful recreational firearm-related activity" if the firearm is lawfully possessed in another jurisdiction and kept "unloaded and securely wrapped." *Id.* § 8-20-040(b). Oak Park's ordinance makes it "unlawful for any person to possess

or carry, or for a person to permit another to possess or carry on his/her land or in his/her place of business any" handguns. Municipal Code of Oak Park, Ill. §§ 27-1-1, 27-2-1 (1995).

3. After *District of Columbia v. Heller*, 128 U.S. 2783 (2008), held that the Second Amendment required invalidation of a handgun ban enacted by the District, a federal enclave, petitioners filed suit to enjoin Chicago's ordinance. Pet. App. 1. Petitioners argued that the ordinance violates the Second Amendment, allegedly incorporated against the States by either the Due Process or Privilege or Immunities Clause of the Fourteenth Amendment. J.A. 26-27. Respondent National Rifle Association filed a similar lawsuit and a second suit challenging Oak Park's handgun ban. Pet. App. 11-13.

4. The three cases were before the same district court judge, who, after rejecting plaintiffs' invitation to depart from this Court's cases refusing to incorporate the Second Amendment, *id.* at 13-16, granted defendants judgment on the pleadings, J.A. 4.

5. The Seventh Circuit, affirming, also adhered to this Court's prior decisions. Pet. App. 1-3. The court noted that the question of Second Amendment incorporation is hardly "straightforward," even after *Heller*. *Id.* at 5. Because the Second Amendment "creat[es] individual rights" "to prevent the national government from interfering with state militias," "those rights may take a different shape when asserted against a state than against the national government." *Id.* at 7. Moreover, any argument for incorporation must consider principles of "[f]ederalism"—specifically, the view that "local differences are to be cherished as

elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Id.* at 9. This "is an older and more deeply rooted tradition than is [the] right to carry any particular kind of weapon" recognized in *Heller*. *Ibid.*

SUMMARY OF ARGUMENT

Pursuing a variety of approaches to gun-control legislation, the individual States have balanced the legitimate interests of gun owners against the need, which varies with locale, to protect their residents from the devastating effects of gun violence. In this manner, the States capably have performed their role as "'laboratories for experimentation'" in an arena "'where the best solution is far from clear.'" *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, *J.*, concurring)).

Incorporating the Second Amendment would undermine these efforts, and neither that provision nor the Fourteenth Amendment was understood to demand such interference with state prerogatives. The Second Amendment was codified to protect the militia from elimination by the federal government, not from overreaching by the States. And the Fourteenth Amendment was designed to prevent discriminatory disarmament of Southern blacks, not restrict the States' traditional authority to pass generally applicable gun laws.

The Second Amendment resists incorporation for the additional reason that—as the only Bill of Rights provision conferring a right to possess an item designed to kill—the right to bear arms uniquely requires government oversight, and the democratic process in the States is far better suited than the federal courts to set limits on firearm possession and use.

Finally, because the States have long regulated firearms without federal interference, they have a considerable reliance interest in this Court's decisions refusing to incorporate the Second Amendment. This interest is especially acute here, where petitioners urge the Court to incorporate the Amendment via the Privileges or Immunities Clause, a holding that would apply myriad new rights against the States. The States would need to modify their practices dramatically to address the requirements of the grand jury and civil jury trial rights, and they would be inundated with new claims to economic rights and rights to life "essentials" not currently recognized.

ARGUMENT

This Court consistently has approved the view that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the county." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, *J.*, dissenting); accord, *e.g.*, *Oregon v. Ice*, 129 S. Ct. 711, 718-719 (2009); *Chandler v. Florida*, 449 U.S. 560, 579-580 (1981); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). But the States may perform their role as laboratories only if given "'great latitude under their police powers to legislate as to the protection of the lives, limbs, heath, comfort, and quiet of all persons,'" *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) (internal punctuation omitted), and left free to engage in regulation "that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be," *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 546 (1985).

"[I]n keeping with * * * [its] status as a court in a federal system," the Court accordingly has sought "to avoid imposing a single solution on the States from the top down." *Smith v. Robbins*, 528 U.S. 259, 275 (2000); accord *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, *J.*, dissenting). The Court similarly has articulated a "'special concern * * * with the autonomy of the individual States within their respective spheres,'" and precluded individual States from imposing their policy choices on others. *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 571-572 (1996) (quoting *Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989)).

This reluctance to interfere with state prerogatives—always "[t]he essence of our federal system," *Garcia*, 469 U.S. at 546—must weigh heavily in this case, for incorporation of the Second Amendment would reverse more than a century of precedent holding that the Amendment "applies only to the Federal Government," *Heller*, 128 S. Ct. at 2812-2813 & n.23 (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894)), and more than two centuries of unfettered firearms regulation by the States, see, *e.g.*, Br. for *Amici Curiae* Brady Center to Prevent Gun Violence, et al. in Support of Neither Party ("Brady Br.") 19-22 (describing long tradition of firearms regulation by States). While "any departure from the doctrine of stare decisis demands special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), this is never more true than when a reversal of course undermines "practices and assumptions followed * * * in many States," *Jones v. United States*, 526 U.S. 227, 254 (1999) (Kennedy, *J.*, dissenting); accord *Arizona v. Gant*, 129 S. Ct. 1710, 1728-1729 (2009) (Alito, *J.*, dissenting); see also *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785 (1992). This "intrudes upon legitimate and vital state interests, upsetting the proper federal balance." *Jones*, 526 U.S. at 254 (Kennedy, *J.*, dissenting).

For three additional reasons, it would be especially problematic to change course here. First, the history of the Second and Fourteenth Amendments shows that the framers viewed the right to bear arms as a check on federal, not state, power. Second, incorporation would strip decision-making from state legislatures and courts and place it in the hands of federal courts, which would have to address a host of new challenges with little guidance from constitutional text or history. Finally, if the Court were to incorporate the Second Amendment via the Privileges or Immunities Clause, as petitioners seek, it would open the door to incorporation of still more rights, contrary to longstanding practice and the States' well-founded reliance to the contrary.

I. UNLIKE PURELY PRIVATE RIGHTS THAT HAVE BEEN INCORPORATED, THE RIGHT TO BEAR ARMS ANTICIPATES A CONTINUED ROLE FOR STATE SOVEREIGNTY.

1. The framers understood the Second Amendment to preserve a role for state sovereignty, as the Seventh Circuit explained, see Pet. App. 7 ("One function of the

second amendment is to prevent the national government from interfering with state militias."), and the passage of the Fourteenth Amendment did nothing to upset this understanding. The Second Amendment therefore stands apart from provisions in the Bill of Rights that were motivated primarily by the protection of private rights. It is a "federalism provision" and, as such, "resists incorporation." Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-46 (2004) (Thomas, *J.*, concurring in judgment); see also *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, *J.*, concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 727-728 (2005) (Thomas, *J.*, concurring). Thus, respect for the Second Amendment's origins requires the Court, not to apply a "heavy presumption" favoring incorporation, Brief for *Amici Curiae* Senator Kay Bailey Hutchison, et al. ("Hutchison Br.") 27, but to assume the opposite and ultimately to reject incorporation.

In *Perpich v. Department of Defense*, 496 U.S. 334 (1990), a unanimous Court held that "the text of the Constitution" resulted from "a compromise" between the opponents and proponents of a national standing army (the former reflecting the "widespread fear" that such an institution would "pose[] an intolerable threat to individual liberty and to the sovereignty of the separate States"). *Id.* at 340. Likewise, the individual right recognized in *Heller* "was codified" out of concern that "the new Federal Government would destroy the citizens' militia by taking away their arms." 128 S. Ct. at 2801. This was "*the* reason" for the right. *Ibid.* (emphasis added). In short, while it codifies an individual right, the Second Amendment exists to protect the militia from elimination by the federal government.

The history of the Second Amendment confirms that its framers aimed to prevent overreaching by federal authority, not the States. The Amendment "codified a right inherited from our English ancestors," specifically, the right to bear arms contained in the English Bill of Rights. *Id.* at 2801-2802 (internal quotations omitted); see also *id.* at 2798. Following the removal of King James II—a Catholic, who alienated mostly-Protestant England by ignoring Parliament's laws and packing the courts, ministries, and army with Catholic royalists, as well as disarming Protestant gentlemen—the English Bill of Rights sought to restore Parliament's place as the supreme source of lawful authority. See, *e.g.*, George Macaulay Trevelyan, Illustrated History of England 466-476 (1956); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 44 (2000). Thus, the Bill included a right to bear arms assertable only against the authority that posed the greatest threat of tyranny—the King. See *Heller*, 128 S. Ct. at 2798 ("[L]ike all written English rights [the right to bear arms] was held only against the Crown, not Parliament.") (citing Schwoerer, *To Hold and Bear Arms: The English Perspective*, in The Second Amendment in Law and History (C. Bogus, ed. 2000)). Parliament's authority to regulate firearms for the good of the people was unfettered. Indeed, Parliament exercised this power to such a degree that as little as three percent of the English population could possess firearms after the Bill was passed. See Schwoerer, *supra*, 76 Chi.-Kent L. Rev. at 48. In short, the English common law recognized a need to regulate firearms only as a check against royal power. The people, acting through Parliament, retained plenary authority over firearm use and possession.

The early American understanding of the right to bear arms reflects its British origins. Americans were outraged when King George III attempted to disarm state militias, see *Heller*, 128 S. Ct. at 2799, as the English had objected when James II endeavored to disarm Protestants. But just as the English saw little threat from parliamentary regulation, Americans did not fear oppression by regulation from the States. To the contrary, both Federalists and Antifederalists agreed that the way to avoid tyranny was to empower the States. Compare Richard Henry Lee, Letters from The Federal Farmer III (Oct. 10, 1787), reprinted in The Antifederalists 227-228 (Cecelia M. Kenyon ed., N.E. Univ. Press 1985) (criticizing concentration of military power in federal hands because it is "[i]n the state governments [that] the great body of the people, the yeomanry, etc. of the country, are represented"), with Federalist No. 46 (James Madison), reprinted in The Federalist Papers 296 (Clinton Rossiter ed., Signet 2003) (arguing that federal government's power to call out the militia would not endanger liberty because any tyrannical federal authority "would be opposed by a militia amounting to near half a million of citizens with arms in their hands, . . . united and conducted by [state] governments possessing their affections and confidence"). For the framing generation, it was the federal government, not the States, that threatened liberty through a monopoly on firepower.

That this was the framers' perspective is confirmed by the Second Amendment's use of the phrase "well regulated militia." Article I, § 8 of the Constitution entrusts Congress with the power of "organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States[.]" Article II, § 2 similarly grants the president the power to act as commander in chief "of the militia of the several states, when called into the actual service of the United States[.]" Nowhere, however, does the Constitution grant Congress or the president the power to "regulate" the militia.[1] And with good reason, for the power to "regulate" elsewhere in the Constitution always indicates broad, discretionary, and even plenary governmental powers. See U.S. Const. art. I, § 8 (Congress empowered to "regulate" commerce and the value of currency, and to "make rules for the government and regulation of the land and naval forces"); art. III, § 2 (Congress may make "regulations" regarding Supreme Court's appellate jurisdiction); art. IV, § 3 (Congress empowered to "make all needful rules and regulations" regarding U.S. territories and property). Thus, the term "well regulated" in the Second Amendment denotes a broad degree of governmental control.[2] And the fact that the right to

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[1] This omission is particularly striking given that Article I, § 8 also grants Congress the power "[t]o make rules for the government *and regulation* of the land and naval forces." U.S. Const. art I, § 8 (emphasis added).

[2] In *Heller*, the Court stated in passing that "the adjective 'well regulated' implies nothing more than the imposition of proper discipline and training." 128 S. Ct. at 2800. But the definition of "well regulated" was not before the Court in *Heller*, and thus the Court did not engage in the same searching analysis that it used to determine the meaning of other words in the Second Amendment. Now that the question is more squarely presented, the Court should look to the meaning of "regulate" in other portions of the Constitution to determine its meaning in the Second Amendment. See *Heller*, 128 S. Ct. at 2790-91, 2799-2800 (analyzing the use of "right," "people,"

"regulate" the militia is not within the federal government's enumerated powers demonstrates that the Constitution leaves this right to the States. See U.S. Const. amend. X.

In fact, at the time of the Second Amendment's ratification, the States robustly exercised their police power to regulate firearms. Thus, in the 1770s and 1780s, after independence, Connecticut, Maryland, Massachusetts, North Carolina, Pennsylvania, and Virginia all passed "test acts" that disarmed any white male who would not swear a loyalty oath to the State. See Robert H. Churchill, *Gun Regulation, The Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 158-160 (2007). Pennsylvania's law is particularly instructive. That State was one of only a handful to recognize any right to bear arms. See *Heller*, 128 S. Ct. at 2802-2803. Yet even there, legislative practice demonstrates that the right did not limit the State's police power. In 1777, the same Pennsylvania legislature that had declared that "the people have a right to bear arms for the defence of themselves and the state," 1776 Pa. Const., Decl. of Rights, § XIII, passed a law disarming men who would not swear their allegiance to the State, see An Act Obliging the Male

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"militia," and "state" in other parts of Constitution to determine their meaning in Second Amendment). Moreover, had the framers wanted to refer only to "discipline and training," they could have so specified, as they did elsewhere in the Constitution. See U.S. Const. art. 1, § 8 (Congress has powers for "organizing, arming, and disciplining, the militia"). The framers therefore must have intended the phrase "well regulated" to mean something more than mere discipline and training.

White Inhabitants of this State to Give Assurances of Allegiance to the Same and for Other Purposes Therein Mentioned, ch. 756, 9 The Statutes at Large of Pennsylvania 110-114 (James T. Mitchell & Henry Flanders, eds., 1903). And while the act stripped recusants of other civic rights as well, see *id.* at 112-113, it did *not* deny any of the rights enumerated in the Bill of Rights that are now incorporated against the States, including the rights to speech, conscience, and trial by jury, see *ibid.*; see also Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 670-673 (2002). Pennsylvania's practice thus confirms that the right to bear arms is different from those enumerated rights that the framers codified chiefly to protect individual freedoms.

To be sure, *Heller* instructs that the Second Amendment "did nothing to assuage Antifederalists' concerns about federal control of the militia," and ultimately concluded that the "concern that the Federal Government would abolish the institution of the state militia" "found expression" in structural provisions of the Constitution but not in the Second Amendment. 128 S. Ct. at 2804; see also Brief of the States of Texas, et al. in Support of Petitioners ("Texas Br.") 21-22. But *Heller* also rejected "'[t]he claim that the best or most representative reading of the language of the amendments would conform to the understanding and concerns of the Antifederalists'" as "'highly problematic.'" 128 S. Ct. at 2796 n.12 (quoting Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, in Bogus 74, 81) (internal punctuation omitted). "Federalists did not cave in to their opponents' demands"; rather, they sought to "conciliate those moderate Antifederalists who sincerely if misguidedly believed that a constitution lacking a bill of rights was defective." Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi-Kent L. Rev. 103, 116 (2000).

It is therefore unsurprising that the Second Amendment did not assuage hard-line Antifederalist concerns. That would have required the Constitution's defeat. See Joseph Story, A Familiar Exposition of the Constitution of the United States § 439 (1847) ("Doubtless the want of a formal Bill of Rights in the Constitution was a matter of very exaggerated declamation and party zeal, for the mere purpose of defeating the Constitution."). The Second Amendment instead appealed to those in the middle—the moderate Antifederalists who did not reject the Constitution outright but were concerned that structural provisions alone were inadequate to protect state sovereignty. See Rakove, *supra*, 76 Chi-Kent L. Rev. at 116. It provided them a clear textual guarantee that the federal government would not undercut the "inherent right" of the States to regulate the militia. Joseph Story, Commentaries on the Constitution of the United States § 1202 (1833); see also *ibid.* ("the amendments proposed to the constitution (some of which have been since adopted)" were written to reassure the Constitution's critics that the federal government would not usurp state militia powers).

2. The Fourteenth Amendment did not upset this understanding that the right to bear arms was assertable only against the federal government. Petitioners and their *amici* devote considerable attention to the uncontroversial proposition that the nineteenth century Congress was deeply concerned

about the selective disarmament of freed Southern blacks. See, *e.g.*, Pet. Br. 10-14; NRA Br. 10-21; Hutchison Br. 6-9; Tex. Br. 17-20. But the framers of the Fourteenth Amendment did not think that stripping States of their traditional power to regulate firearms was the solution to that problem. Rather, they thought the proper remedy was to force Southern States to treat all of their citizens with equal dignity. They understood that "[t]he way to stop discrimination on the basis of race" is simply "to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality op.).

"[T]he Fourteenth Amendment was designed to place the constitutionality of the Freedman's Bureau and the civil rights bills, particularly the latter, beyond doubt." *Saenz v. Roe*, 526 U.S. 489, 526 n.6 (1999) (Thomas, *J.*, dissenting); see also Hutchison Br. 8 ("It has long been recognized that the Fourteenth Amendment provided constitutional protection for the rights protected by the Civil Rights Act of 1866[.]"). But the Second Freedman's Bureau Act and the Civil Rights Act focused not on new, substantive gun rights but on equality. The Bureau Act provided that "the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district *without respect to race or color, or previous condition of slavery*." An Act to continue in force and to amend "An Act to establish a Bureau for the Relief of Freedmen and Refugees" and for other Purposes (Second Freedmen's Bureau Act), ch. 200, § 14, 14 Stat. 173, 176-17777 (1866) (emphasis added). As its text makes clear, the Act granted no new right to bear arms. Rather, it provided that any right to bear arms must extend equally to all citizens. The Civil Rights Act of 1866 did the same. See An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, ch. 31, § 1, 14 Stat. 27 (1866) (citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude * * *shall have the same right [to various legal activities] and to full and equal benefit of all laws * * * as is enjoyed by white citizens").[3] Equality, not arms, was the idea of the day, and this need for equality did not translate into a restriction on the States' traditional authority to pass universally applicable gun laws.

The scope of the Bureau Act further confirms this understanding. The Act did not apply to every State in the Union; it applied only to States "where the ordinary course of judicial proceedings [had] been interrupted by the rebellion, and until the same shall be fully restored," and "whose constitutional relations to the government [had] been practically discontinued by the rebellion, and until such State shall have been restored in such relations[.]" 14 Stat. at 176. In other words, the Bureau Act continued the same Anglo-American tradition that gave rise to the Second Amendment. The framers of the Fourteenth Amendment expressed deep concerns about non-republican governments implementing unfair arms restrictions. But they also trusted still-functioning state governments to use their traditional police powers responsibly.

Indeed, the post-Civil War generation would never have granted a blanket right to firearms to Southerners who had so recently waged war against the Union, and who continued to oppress free blacks. See An Act making Appropriations for the Support of the Army for the Year ending June thirtieth, eighteen hundred and sixty-eight, and for other Purposes, ch. 170, § 6, 14 Stat. 485, 487 (1867) (disbanding militia in former Confederate states). Throughout the South, Reconstruction state governments used newly organized black militias to combat and disarm white racist mobs and paramilitary groups. See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 622-624 (2006). Such efforts would have been difficult, if not impossible, if the Fourteenth Amendment were popularly construed to create new gun rights rather than to bar discrimination.

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[3] Unlike the Second Freedmen's Bureau Act, the Civil Rights Act did not specifically mention the right to bear arms as a protected right.

Thus, the States retained—and exercised—their traditional discretion to regulate firearms after ratification of the Fourteenth Amendment. Throughout the remainder of the nineteenth century, state legislatures passed a series of firearms laws, each tailored to local needs and circumstances. See, *e.g.*, An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons, ch. 52, § 1, 1876 Wyo. Comp. Laws 352 (banning "concealed or open[]" bearing of "any fire arm or other deadly weapon" within cities and towns); An Act to Preserve the Public Peace and Prevent Crime, ch. 96, § 1, 1881 Ark. Acts. 191 (banning "wear[ing] or carry[ing]" pistols other than army and navy pistols); An Act to regulate the keeping and beariing [sic] of deadly weapons, ch. 34, § 1, 6 The Laws of Texas 1822-1897, 927 (H.P.N. Gammel, ed. 1898) (banning carrying pistols except for militia service or where bearer had "immediate and pressing" reasonable grounds to fear attack); see also Francis Wharton, 2 A Treatise on Criminal Law § 1557 (1880) (collecting state laws banning concealed weapons).

Thus, the historical, common law right to bear arms was a limited one, and the Second Amendment was uniquely interested in maintaining state prerogatives. Nothing in the Fourteenth Amendment changed this underlying structure. Accordingly, the Second Amendment should not be incorporated against the States.

II. THE STATES ARE BETTER POSITIONED THAN THE FEDERAL COURTS TO SET LIMITS ON THE RIGHT TO BEAR ARMS.

The decision whether to incorporate the federal right to bear arms must consider not only its origins but also its uniquely dangerous character. The Second Amendment is different from other enumerated rights because it protects conduct that by its nature may injure or kill others. And the States have proven themselves capable at addressing the dangers inherent in the right to bear arms while protecting legitimate interests of gun owners. Holding that the Second Amendment is incorporated would "interfere significantly" with each "State's ability to structure relations exclusively with its own citizens," and "threaten the future fashioning of effective and creative programs for solving local problems." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). "A healthy regard for federalism and good government" favors "reluctan[ce] to risk these results." *Ibid.* And the suggestion, see Texas Br. 21-24, that incorporation of the Second Amendment raises no federalism concerns is absurd.

A. The States Have Proven Themselves Capable Of Adopting Appropriate Gun-Control Regulations.

Public health and safety regulation presents "'primarily, and historically, matters of local concern,'" *Medtronic*, 518 U.S. at 475 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)) (elipses and brackets omitted), and such concern is at its apex where firearms are involved. The States have adopted a variety of approaches to gun regulation, each reflecting the particular needs and concerns of their residents. For example, while federal law does not specifically address assault weapons, which have been used in many well-known shooting incidents (including the massacre at Colorado's Columbine High School) and pose a particular threat to law enforcement, several States have determined these guns warrant more stringent regulation. See *Regulating Guns in America*, 2008 ed. (Legal Community Against Violence) ("*Regulating Guns*"), at 19-20, available at http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf (last visited Dec. 30, 2009). Five States (California, Connecticut, Massachusetts, New Jersey, and New York) ban assault weapons, two (Hawaii and Maryland) ban assault pistols, and three (Maryland, Minnesota, and Virginia) regulate assault weapons. See *id.* at 20-23.

Similarly, most States have laws regulating the sale of firearms and ammunition that are more stringent than federal law. Unlike the federal government, 23 States prohibit persons convicted of certain misdemeanor offenses from purchasing or possessing some or all firearms, 18 limit access to firearms by alcohol abusers, 27 prohibit juvenile offenders from purchasing firearms, 12 have waiting periods for firearm purchases, and three restrict multiple firearm purchases. See *id.* at vii-ix, 72, 74-76, 134-135, 139-141. In addition, 37 States impose a stricter minimum age for purchase or possession of firearms than federal law, 30 make it more difficult for domestic abusers to purchase or possess firearms, and 31 have laws regulating the sale of ammunition—including certain highly dangerous types—that are stricter than federal law. See *id.* at viii, 52-60, 81-85, 93-103.

At the same time, States have given due weight to the legitimate interests of gun owners. Indeed, many States recognize robust gun rights. Forty-four States have a right-to-arms provision in their state constitutions. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 192 (2006). Some were enacted more than a century ago, others within the past few decades. See *ibid.* Nine of the original 13 state constitutions had no arms provision, see *id.* at 208; 22 of 37 state constitutions had arms provisions when the Fourteenth Amendment was ratified, see Steven Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition*, 87 Tex. L. Rev. 7, 50 (2008); and the remaining state gun-rights provisions were enacted subsequent to 1868. Even prior to *Heller*, 40 state constitutions had been read to protect an individual right to possess a firearm. See Volokh, *supra*, at 205. Thus, while "state courts have routinely upheld reasonable regulations on the possession of firearms" under state constitutions, the States also, as their particular circumstances permit, have readily recognized "the central importance of their citizens' right to arms." Texas Br. 28.[4]

In addition, although many States with substantial urban centers provide their local governments with broad authority to regulate firearms, 43 States have preempted all, or substantially all, local gun regulation. See *Regulating Guns*, *supra*, at 15. Five States (Connecticut, Hawaii, Illinois, Massachusetts, and New York) have declined to preempt local regulation expressly; another two (California and Nebraska) have only limited preemption, permitting substantial regulation at the local level. See *id.* at 11-15. Thus, although petitioners' *amici* raise the specter that, absent incorporation, "millions of Americans will be deprived of their Second Amendment right to keep and bear arms as a result of actions by *local* governments," Texas Br. 1 (emphasis added), there is no reason to believe that incorporation is necessary to police municipal gun regulations. The States are already doing this themselves.

And as for *amici*'s claim that in this case political "factionalism" gave rise to "gun control that would not be adopted by a larger political unit (the State of Illinois)," Br. of *Amicus Curiae* Eagle Forum Education & Legal Defense in Support of Petitioners 9, if the Illinois General Assembly wished to preclude Chicago's ordinance, it need only enact a preemptive statute, see *supra* p. 2. That the General Assembly has not done so demonstrates that the legislature approves rather than disapproves of the law.

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[4] Because the States have exercised and continue to exercise judiciously their authority to regulate firearms, there is no cause for *amici*'s concern that a non-incorporation holding could impair an attempt by Congress to "call forth the militia" "by preventing the reserve militia from * * * being prepared." Hutchison Br. 34. Moreover, in the unlikely event that a State were to enact a law that actually interfered with Congress' plans for the militia, Congress has ample constitutional authority "[t]o provide for * * * arming * * * the militia," U.S. Const. art. 1, § 8, and thus to preempt such a law, see *Presser*, 116 U.S. at 268-269.

In short, there is no reason to fear that the democratic processes at work in the States will not strike the proper balance between the legitimate interests of gun owners and public safety. Gun owners are not a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be relied upon to protect" their interests. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). To the contrary, gun owners long have been treated in the legislative arenas with full concern and respect. Absent any "'reason to infer antipathy'" against gun owners, the Court should "presume[] that 'even improvident decisions will eventually be rectified by the democratic process,'" *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)), and decline to incorporate the Second Amendment. In this way, "our tradition of political pluralism"—"predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare"—will continue to thrive. *Brown v. Hartlage*, 456 U.S. 45, 56 (1982).

B. Incorporation Of The Second Amendment Will Require Federal Courts To Engage In Difficult Line-Drawing.

Application of the Second Amendment to the States will subject firearm regulations duly enacted by state legislatures to federal court review. See Resp. Br. 17-20 (collecting examples). We explain above that the States are adept at balancing the legitimate interests of gun owners against the need for reasonable regulation of firearms. Interjecting a federal standard into this calculus will "inevitably invit[e] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia*, 469 U.S. at 546.

And the path for judicial involvement is poorly marked. The origins of the individual right recognized in *Heller* are historical, yet this history provides few hints as to its scope. A right that protects "those weapons * * * typically possessed by law-abiding citizens for lawful purposes" will evolve as circumstances change, 128 S. Ct. at 2816, as *Heller* recognized, see *id.* at 2791 (Amendment not limited to "those arms in existence in the 18th century"). Accordingly, although *Heller* indicated that many firearms regulations would survive Second Amendment scrutiny, see *id.* at 2799, 2816-2817, divining which laws pass muster will thrust federal courts into a morass of standardless line-drawing, see Hutchison Br. 19 (conceding "nascent state" of federal jurisprudence); Brady Br. 3 (within eighteen months after *Heller*, 190 challenges to state and local firearms regulations were filed in federal court).

To make matters worse, the dangers that a gun law seeks to combat—presumably a critical consideration in any constitutional analysis—are highly location-specific. For example, handguns present their most serious threat to law enforcement and the community in urban areas plagued by criminal street gangs. See Resp. Br. 13-17. And as this Court has repeatedly recognized, such local conditions are better evaluated by state courts and legislators. See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (noting "great respect that we owe to state legislatures and state courts in discerning local public needs"); *Niemotko v. Maryland*, 340 U.S. 268, 287 (1952) (Frankfurter, *J.*, concurring in the result) (similarly urging deference to "State courts in light of their knowledge of local conditions").

Indeed, state *legislatures* are best qualified to assess the need for regulation in this context, as the Seventh Circuit noted below. See Pet. App. 8 ("The way to evaluate the relation between guns and crime is in scholarly journals and the political process[.]"); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005) ("The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established."); *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions with a flexibility of approach that is not applicable to the courts'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). And when state statutes are challenged, state courts are uniquely well placed to review these legislative determinations. Many States recognized an individual right to arms long before *Heller* held that the Second Amendment protected this right. See *supra* p. 20. Consequently, state courts have experience addressing state constitutional challenges to state and local firearms regulations. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 687 (2007) ("Since World War II, state courts have authored hundreds of opinions" in cases challenging gun-control laws).

Moreover, when it comes to gun rights, many state constitutions are more specific than the Second Amendment. Among the States, only Hawaii uses identical language to the Second Amendment. See Haw. Const. art. 1, § 17. Other state constitutions are more detailed. Some expressly guarantee an individual right to own a gun for specified purposes, such as "for the defense of self, family, home and State, and for hunting and recreational use." Del. Const. art. 1, § 20; see also Nev. Const. art. 1, § 11(1) ("for security and defense, for lawful hunting and recreational use and for other lawful purposes"); N.M. Const. art. II, § 6 (same); N.D. Const. art. 1, § 1 ("for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes"); W. Va. Const. art. III, § 22 ("for the defense of self, family, home and state, and for lawful hunting and recreational use"); Wis. Const. art. 1, § 25 ("for security, defense, hunting, recreation or any other lawful purpose").

Others permit some state regulation, such as limits enacted "with a view to prevent crime." Tex. Const. art. 1, § 23; see also Fla. Const. art. 1, § 8(a) ("except that the manner of bearing arms may be regulated by law"); Ga. Const. art. 1, § 1, ¶ VIII ("General Assembly shall have power to prescribe the manner in which arms may be borne"); Okla. Const. art. II, § 26 ("nothing herein contained shall prevent the Legislature from regulating the carrying of weapons"); Tenn. Const. art. I, § 26 ("Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime").

In fact, many States have amended their constitutions to address specific questions that may arise in response to gun laws. For example, since 1978, the Idaho Constitution has specified that its arms right

> shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm.

Idaho Const. art. 1, § 11. Similarly, as of 1990, the Florida Constitution requires a mandatory waiting period between the purchase and delivery of most guns. See Fla. Const. art. 1, § 8(b). And in 1986, New Mexico amended its constitution to provide that "[n]o municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." N.M. Const. art. II, § 6.

In short, thanks to the precision of state constitutions and hundreds of opportunities to interpret the rights to arms contained therein, the state courts are experienced, capable adjudicators of gun-rights challenges.

III. THE STATES HAVE A SUBSTANTIAL RELIANCE INTEREST IN AVOIDING INCORPORATION OF OTHER RIGHTS NOT CURRENTLY APPLICABLE TO THE STATES.

Petitioners' "primar[y]" argument is that the Court should overrule *The SlaughterHouse Cases*, 83 U.S. (16 Wall.) 36 (1873), and incorporate the Second Amendment via the Privileges or Immunities Clause. Pet. Br. 66. But this would mark a dramatic break from this Court's jurisprudence limiting that Clause to rights associated with federal citizenship. Petitioners' theory would open the door to the incorporation of myriad other rights, contrary to the States' well-entrenched and reasonable reliance.

A. The States Have Relied On This Court's Holdings Declining To Incorporate The Fifth Amendment's Grand Jury Right And The Seventh Amendment's Civil Jury Trial Right.

It is black letter law that neither the Fifth Amendment right to a grand jury nor the Seventh Amendment right to a jury trial in civil cases applies to the States. Were the Court to hold that the Second Amendment is incorporated via the Privileges or Immunities Clause, however, the grand jury and jury trial rights would have to be incorporated as well. Such a holding would likely upset long-standing practices in the state courts.

1. Most States Do Not Provide A Right To Indictment By Grand Jury.

The Fifth Amendment to the U.S. Constitution guarantees that, in non-military cases, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. More than a century ago, this Court held that the Grand Jury Clause was not incorporated through the Fourteenth Amendment's Due Process Clause, approving California's procedure of initiating criminal proceedings via information. See *Hurtado v. California*, 110 U.S. 516, 517-518, 538 (1884). The Court subsequently declined to incorporate the grand jury right via the Privileges or Immunities Clause. See *Maxwell v. Dow*, 176 U.S. 581, 594 (1900). Since then, it "consistently" has "held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions." *Beck v. Washington*, 369 U.S. 541, 545 (1962); accord, *e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972).

States have relied heavily on this rule. Only 15 States (Alabama, Alaska, Delaware, Maine, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia) require a grand jury indictment to initiate any felony charge. See U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Organization 2004*, at Table 38, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf (last visited Dec. 30, 2009). One State (Rhode Island) requires a grand jury indictment to initiate charges that could result in a capital sentence or life imprisonment, and another (Florida) requires a grand jury indictment to initiate charges in capital cases only. See *id.* at nn. 6, 11. Thus, 33 States have no grand jury requirement. Even in States that require a grand jury, its function may not be identical to that of its federal counterpart. In Connecticut and Pennsylvania, for example, the grand jury is purely an investigative body, without power to issue indictments. See *id.* at Note. In short, while many States retain the option of indicting by grand jury, few use it and instead initiate criminal proceedings by information, which is less costly and more efficient.

Indeed, the number of States requiring indictment by grand jury has declined steadily. Although at the Founding each original State adopted the grand jury as the principal method of initiating criminal prosecutions, see Sara Sun Beale, et al., 1 *Grand Jury Law & Practice*, 2d, § 1:4 at 15-16 (West 1997), by the middle of the nineteenth century the practice was criticized as expensive and inefficient, see *id.* § 1:5 at 21. In 1868, when the Fourteenth Amendment was ratified, only 19 of 37 States had constitutionalized a grand jury guarantee for felony defendants. See Calabresi, *supra*, at 78. Several States already had abolished their grand jury right, and others (including Illinois) adopted constitutional provisions authorizing their legislatures to do away with grand jury review. See Beale, *supra*, § 1:5 at 21-23. After grand juries briefly returned to favor, the movement against them accelerated in the 1970s, leading to a new round of eliminations. Thus, although in 1972 there were 32 States with a grand jury requirement, see *Branzburg*, 408 U.S. at 688 n.25, only 22 remained as of 1998, see *Campbell*, 523 U.S. at 398-399, and there are 15 today, see *supra* p. 28.

The use of grand juries has long been controversial, with its detractors arguing that the practice is inefficient, slow, and costly, especially in less populated areas. See Beale, *supra*, § 1:5 at 21. But whatever the merit of the competing arguments, the States have long relied on their authority to experiment with different solutions to this problem. And most States have concluded that a grand jury requirement does not suit their needs. Requiring the States to use grand juries now, contrary to more than one hundred years of precedent to the contrary, would upset this long-established practice.

2. The States Protect The Civil Jury Right In A Variety Of Forms.

As with the grand jury guarantee, this Court has long held that the Seventh Amendment's civil jury right is not incorporated under either the Due Process or Privileges or Immunities Clause. See *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875); see also *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). The States have relied on these holdings in structuring their court systems. Although every State protects some form of the civil jury right, the scope of that right rarely coincides precisely with the Seventh Amendment. Thus, incorporating the Seventh Amendment would require "a major restructuring of a large amount of litigation in the courts of the several states." Akhil Reed Amar, *Continuing the Conversation*, 33 U. Rich. L. Rev. 579, 597 (1999).

First, and most important, the Seventh Amendment requires juries to reach a unanimous verdict. See *Johnson v. Louisiana*, 406 U.S. 366, 369-370 n.5 (1972) (Powell, *J.*, concurring in the judgment); *Andres v. United States*, 333 U.S. 740, 748 (1948); *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 467-468 (1897). But many States have not adopted this rule. Twenty-five States permit verdicts by super-majorities. See *State Court Organization 2004*, *supra*, Table 42. Of the remaining 25, four permit non-unanimous verdicts under certain circumstances. See *ibid.*[5]

Like the grand jury requirement, the desirability of a unanimity rule is debatable. In the criminal context, the Court has observed that "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit." *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972). Thus, a unanimity rule may subject the jury to an unreasonable holdout juror, which in turn may undermine the quality of jury decisionmaking and increase the costs associated with retrials. See *Johnson*, 406 U.S. at 377 (Powell, *J.*, concurring) (unanimity requirement "often leads . . . to agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise"); but see *id.* at 397-399 (Stewart, *J.*, dissenting) (urging unanimity requirement). Thus, this Court has left it to the state "laboratories" to experiment with their own approaches to jury unanimity. And the divergent responses demonstrate that there is no "one size fits all" solution. Incorporating the civil jury right thus would interfere with the States' reliance interests and undermine state sovereignty.

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[5] Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wyoming require a unanimous verdict in civil cases. See *State Court Organization*, *supra*, Table 42. Among these, Iowa applies a seven-eighths rule after six hours of deliberation, Kansas applies a five-sixths rule for 12-member juries, and Minnesota and Nebraska apply a five-sixths rule after six hours of deliberation. See *id.* at nn. 16, 18, 23, 25.

In some States, the civil jury right also is qualified by a subject matter or amount in controversy requirement that federal law does not impose. Many States guarantee a jury trial in any action in which a jury would have been available under existing law when that State's constitution was adopted. Thus, New Jersey citizens are entitled to a jury trial if their claim (or an analogous one) would have warranted a jury when the New Jersey Constitution was adopted in 1776, see *State v. Anderson*, 603 A.2d 928, 936 (N.J. 1992); 1784 is the relevant date in New Hampshire, see *Gilman v. Lake Sunappe Props. LLC*, 977 A.2d 483, 487 (N.H. 2009); 1820 in Maine and Missouri, see *Thermos Co. v. Spence*, 735 A.2d 484, 486-487 (Me. 1999); *Hammons v. Ehney*, 924 S.W.2d 843, 848-849 (Mo. 1996); and 1912 in New Mexico, see *Las Campanas Ltd. P'ship v. Pribble*, 943 P.2d 554, 557 (N.M. 1997). Similarly, while most States reject an amount in controversy requirement, at least six have requirements that exceed the U.S. Constitution's twenty dollars. See Alaska Const. art. I, § 16 ($250); Haw. Const. art. 1, § 13 ($5000); La. Code Civ. Proc. Ann. art. 1732(1) (2009) ($50,000); Md. Const., Decl. of Rights, art. 23 ($10,000); N.H. Const. pt. 1, art. 20 ($1,500); Okla. Const. art. II,

§ 19 ($1,500). Here again, incorporating the Seventh Amendment would work a dramatic change in the States' civil jury systems.

B. The States Have Relied On This Court's Holdings Declining To Incorporate "Non-Fundamental" Rights.

If the Court were to overrule its prior decisions and hold that the Privileges or Immunities Clause incorporates the Second Amendment, the States would face substantial uncertainty over what other rights are protected by that Clause. Even petitioners' *amici* diverge on this point. Compare Brief for the Goldwater Institute, et al. as *Amici Curiae* Supporting Petitioners ("Goldwater Br.") 24-25 (Privileges or Immunities Clause incorporates all personal rights protected by federal law on July 9, 1866, both fundamental and non-fundamental), with Brief of *Amici Curiae* State Legislators in Support of Petitioners 24-25 (Clause incorporates only rights enumerated in Bill of Rights). Petitioners press the expansive view. See Pet. Br. 21-22 (Clause "intended to constitutionalize" "preexistent natural rights" recognized in Civil Rights Act and "personal guarantees enumerated in the Bill of Rights").

A broader Privileges or Immunities Clause would threaten to "unleash[] a second source of constitutional protections against the states," Lawrence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 197 (1999), and "become a font for new federal common law," J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or*

Immunities Clause, 12 Harv. J. L. & Pub. Pol'y 43, 51 (1989). Some have argued that the Clause should guarantee economic rights protected under the now-discredited doctrine of *Lochner v. New York*, 198 U.S. 45 (1905). See Goldwater Br. 23 n.9 (Clause would provide "protection of economic liberties," including "free labor, freedom of enterprise, private property rights and freedom of contract").[6] Others contend that it should guarantee rights to welfare services, health services, police protection, and a certain quality of education. See Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimal Entitlements*, 44 Mercer L. Rev. 525, 538 (1993); Philip Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U. L. Q. 405, 419-420.

These are areas in which the States have long had freedom to regulate for the public good. But Second Amendment incorporation via the Privileges or Immunities Clause would open the door to a seemingly endless line of arguments, threatening the States' "'broad authority under their police powers to regulate the employment relationship to protect workers,'" *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)), and to "legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Gonzales*, 546 U.S. at 270 (internal quotations omitted). In short, myriad state and local laws would be at risk.

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[6] Given this view, the claim that such an expansive reading of the Clause "does not mean that there would be wholesale invalidation of state and local laws," Goldwater Br. 25, cannot be taken seriously.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Founded in 1991, the Institute for Justice is a public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and appropriate constitutional limits on the power of government, including restoring the Privileges or Immunities Clause to its proper role in the constitutional structure. Properly understood, the Privileges or Immunities Clause is neither a bottomless font of unenumerated rights nor an incomprehensible inkblot. Instead, it had a specific and well-documented purpose—one that remains equally relevant today and the fulfillment of which is a primary goal of the Institute for Justice.[1]

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SUMMARY OF ARGUMENT

The Thirteenth Amendment brought an end to legal slavery in America, but not the culture of tyranny that surrounded and supported it. That was the job of the Fourteenth Amendment, which represented a direct order from the people of this country to their representatives in the federal government (including the judiciary) to protect freedom and secure the rule of law throughout the nation. That order was understood but not obeyed, plunging America into a shameful period of exploitation, violence, and oppression. This case presents the Court with a fresh opportunity to engage the history and text of the Fourteenth Amendment in order to apply its provisions—*all* of its provisions—according to their original purpose.

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[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of the Court. Counsel for all parties received 10 days notice. Pursuant to Rule 37.6, Amicus affirms that no counsel or party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amicus, its members, or counsel made a monetary contribution to its preparation or submission.

And that purpose is perfectly clear. After the Civil War, the states of the former Confederacy meant to keep newly free blacks in a state of constructive servitude. This entailed wholesale violation of individual rights, not only of black citizens but of their white supporters and Union loyalists as well. The solution to that problem, as embodied in the text of the Fourteenth Amendment, was to expand responsibility for protecting individual rights from the states to the federal government. No contrary interpretation —including the one embraced by five justices in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)— can be squared with the history and text of the Fourteenth Amendment.

The right to keep and bear arms was among the most frequently invoked by those who drafted and ratified the Fourteenth Amendment. Congress received reams of evidence that freedmen and white loyalists were being systematically disarmed in the South to make them more vulnerable to intimidation, terror, and reprisals. This outraged members of Congress and the American public alike, and they determined to put a stop to it, which they did—or understood themselves to have done—through the Privileges or Immunities Clause of the Fourteenth Amendment. The Court did not honor that purpose initially, but it has the opportunity to do so now. For the reasons below, amicus respectfully urges the Court to follow the originalist path to enforcing the right to keep and bear arms as against the states and reject the comfortable but erroneous path of incorporation through substantive due process.

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ARGUMENT

This case presents the Court with an opportunity to correct a long-standing error by restoring the Privileges or Immunities Clause of the Fourteenth Amendment to its proper role as a source of federally protected individual rights. Local officials in the Reconstruction South responded to the abolition of *de jure* slavery by establishing a state of *de facto* slavery. The Privileges or Immunities Clause was designed to end it. The Court's initial refusal to honor that purpose was a disaster for the people whose freedom the Clause was intended to redeem, and it continues to haunt the Court's jurisprudence more than a century later.

Like *District of Columbia v. Heller*, this case presents a legal challenge to a firearms ban that requires no parsing of facts or debate over proper standards of review. The court of appeals held that the Fourteenth Amendment imposes no limits on state and local gun regulations, and the only question is whether that decision was correct. As explained below, the decision was not correct because it cannot be squared with the purpose, text, history, or original public understanding of the Fourteenth Amendment —particularly the Privileges or Immunities Clause.

I. Blacks And Whites Desperately Needed Judicial Protection Of Their Right To Keep And Bear Arms During Reconstruction, But They Never Got It.

Amicus takes as a given the historical evidence presented by other parties concerning the disarmament of freedmen and Union loyalists during Reconstruction. There is no dispute about the culture of tyranny and oppression that pervaded the South, nor the Reconstruction Republicans' commitment to ending it. The only question here is whether, in light of that history, the Fourteenth Amendment should be understood to protect a right of armed self-defense. Those who wrote and ratified the Amendment certainly thought so.

To the extent evidence of original understanding sheds useful light on the meaning of words in the Constitution, it would be difficult to find a stronger link than the one between the Fourteenth Amendment and the right to arms. Stephen Halbrook has documented that link extensively,[2] and his conclusions are shared by Akhil Amar, who notes that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to . . . affirm the full and equal right of every citizen to self-defense."[3] Between 1775 and 1866, Professor Amar explains, "the poster boy of arms morphed from the Concord minuteman to the Carolina freedman."[4]

The link between the Fourteenth Amendment and the right to arms is so powerful precisely because the evils the Fourteenth Amendment was intended to prevent—including the lynching of forcibly disarmed whites and blacks who presumed to resist Southern tyranny—are so stark. Words in the Constitution should be interpreted with an eye toward the particular evils they were meant to remedy, and the evils that prompted the Fourteenth Amendment are truly horrifying. In one Kentucky town, for example, it was reported that the "marshal [took] all arms from returned colored soldiers and [was] very prompt in shooting the blacks whenever an opportunity occur[red]," while outlaws made "brutal attacks and raids upon freedmen, who [were] defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders."[5]

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[2] *See, e.g.*, Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) and sources cited at viii nn. 15-17.

[3] Akhil Reed Amar, THE BILL OF RIGHTS 264 (1998).

[4] *Id.* at 266.

The outrages of the Reconstruction South are well-known today, and they were well-known at the time. Scholarship confirms that the American public was well aware of those outrages and meant to end them. A recent survey of contemporaneous print media notes that "[i]n terms of depth of coverage, the grievance that stands out the most in the popular press is the disarmament of blacks, and of white Union veterans."[6]

Unfortunately for those whom the Fourteenth Amendment was intended to protect, the courts refused to enforce its provisions consistent with original public understanding, an abdication for which many Americans paid a terrible price.

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[5] House Ex. Doc. No. 80, 39th Cong., 1st Sess. at 236-239 (1866).

[6] David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 Whittier L. Rev. 695, 705 (2009).

II. The Fourteenth Amendment Does Not "Incorporate" The Second Amendment—It Protects The *Pre-Existing* Right To Arms From State And Local Governments.

Though its opinion was tainted by the *Slaughter-House* majority's misreading of the Fourteenth Amendment three years before, the Court expressed an important truth in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), namely, that the right to arms "is not a right granted by the Constitution" and is not "dependent upon that instrument for its existence." That understanding was confirmed in *District of Columbia v. Heller*,[7] which noted that the Second Amendment did not grant but instead "codified a *pre-existing* right" to keep and bear arms.

The same is true of the *Fourteenth* Amendment right to arms: It is not in any way "dependent upon" the Second Amendment for its existence. Instead, the Fourteenth Amendment protects from state interference the same pre-existing right to arms that the Second Amendment "codified" against the federal government. Thus, in seeking to understand the Fourteenth Amendment right to arms, one looks not to the Second Amendment, but to the exact same right noted in *Cruikshank* and *Heller*—*as it was understood by the Reconstruction-era ratifying public.*

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[7] 128 S. Ct. 2783, 2797 (2008).

But instead of relying on the original public understanding of the Privileges or Immunities Clause to identify and protect individual rights under the Fourteenth Amendment, the Court, after several decades of inaction, eventually began "incorporating" against the states various provisions from the first eight amendments using the oft-maligned theory of "substantive due process."

While the doctrine of substantive due process has a more substantial pedigree than most of its critics recognize (tracing its roots to "law of the land" provisions that date back to the Magna Carta and are found in many state constitutions today[8]), it is nevertheless perfectly clear that substantive due process is doing a great deal of work today that the Privileges or Immunities Clause was meant to do. Among the results of that mistake has been to expose the Court's individual rights jurisprudence to substantial criticism, particularly from people who—unlike those who wrote and ratified the Fourteenth

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[8] *See, e.g.*, Bernard H. Siegan, ECONOMIC LIBERTIES AND THE CONSTITUTION 24-25, 42-43 (1980); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315 (1999).

Amendment—would prefer a more limited role for the federal courts in protecting individual liberty.[9]

To be sure, there is overlap among the Due Process, Privileges or Immunities, and Equal Protection Clauses, and in some cases the same conduct might well be covered by all three provisions.[10] Some have even described those provisions as "mostly but not entirely duplicative."[11] After all, as Professor Richard Aynes points out, the Reconstruction Republicans responsible for drafting the Fourteenth Amendment had, in the preceding decades, repeatedly seen their attempts to protect individual rights through the Constitution come to naught.[12] For instance, they had argued that the Privileges and Immunities Clause of Article IV provided substantive protection for individual rights, only to have that argument rejected in *Dred Scott v. Sanford.*[13] They also believed, again mistakenly, that the Thirteenth Amendment represented an end to black servitude in the South.[14] After experiencing one frustration after another, "it was clear that [Reconstruction Republicans] had good reason to build in multiple, redundant provisions" to the Fourteenth Amendment.[15]

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[9] *See* Michael Kent Curtis, NO STATE SHALL ABRIDGE 64, 146 (1986) (recounting statements of, respectively, members of Congress and state governors regarding the rights-protecting nature of the Privileges or Immunities Clause); John Hart Ely, DEMOCRACY AND DISTRUST 18-20 (1980) (criticizing "substantive due process" as a contradiction in terms).

[10] *E.g.*, Nelson Lund, *The Second Amendment and Original Meaning Jurisprudence*, 8 Preview U.S. Sup. Ct. Cas. 392 (2008) ("The outcome [of analyzing the right to keep and bear arms under the Privileges or Immunities Clause] might be the same as that derived by substantive due process analysis . . . .").

[11] *See, e.g.*, Richard Aynes, *Ink Blot or Not: the Meaning of Privileges And/Or Immunities*, 11 J. Const. L. 1295, 1305-06 (2009) (quoting Jacobus tenBroek, EQUAL UNDER LAW 239 (1965)).

[12] *Id.* at 1306.

That redundancy notwithstanding, precision and fidelity to constitutional text require a careful re-examination of the Fourteenth Amendment in order to determine which provision most plausibly protects the "pre-existing" right to keep and bear arms. A candid review of the relevant history leaves no room for doubt—it is the Privileges or Immunities Clause.

III. The Privileges Or Immunities Clause Aimed To Eliminate Constructive Servitude By Protecting The Rights Most Incompatible With It.

To enslave a class of people requires three basic things: destroy their self-sufficiency, prevent them from fighting back, and silence any opposition. Southern states did all of those things both before and after the Civil War, and the point of the Fourteenth Amendment was to make them stop. A key mechanism for doing so was to include a provision in the

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[13] 60 U.S. (19 How.) 393 (1857).

[14] Aynes, *supra* note 11, at 1306.

[15] *Id.*

Fourteenth Amendment that would force states to respect people's basic civil rights, including those rights most necessary for personal security and autonomy. The Privileges or Immunities Clause was designed to do just that.

That said, the Court need not—indeed, should not—attempt to create a complete and comprehensive new doctrine for the Privileges or Immunities Clause in this case. As demonstrated by the petitioners' and NRA respondents' briefs, there is near-universal agreement that the Clause was both intended and publicly understood to prevent states from forcibly disarming law-abiding citizens. No further analysis is needed to answer the question presented.

Amicus respectfully submits that the Court should decline the invitation of other amici to go further and hold that the Privileges or Immunities Clause does *no more than* protect those rights enumerated in the first eight amendments to the Constitution. That invitation should be resisted primarily because it would require the Court to grapple with—or simply ignore, as Justice Miller did in *Slaughter-House*—a great deal of historical evidence and legal argument far beyond what is necessary to answer the specific question at issue here. As was the case in *District of Columbia v. Heller*, the question presented here is both narrow and specific; there is simply no need for the Court to describe the full ambit of the Privileges or Immunities Clause, and indeed the unfortunate results of its first encounter with the Clause would seem to counsel particular modesty now.[16]

Moreover, such a limited conception of privileges or immunities would be wrong on the merits in any event. There is ample historical evidence that the purpose of the Fourteenth Amendment, and particularly the Privileges or Immunities Clause, was not merely to provide for the mechanistic "incorporation" of the first eight amendments (it would have been easy enough to say so), but instead to redress a whole host of laws, practices, customs, and mores whose common purpose was to destroy the ability of newly freed slaves to become self-sufficient members of society. History shows that it would have been impossible to identify, fix, and proscribe the entire host of state laws, local ordinances, and regulations that collectively made up the infamous "Black Codes" designed to keep freedmen in a state of penury and terror. Thus, for example, many states adopted laws that kept blacks from practicing trades or even leaving their employer's land without permission;[17] others adopted vagrancy laws that, in practice, made it illegal to be unemployed, and therefore illegal to look for work.[18] Notably, not just freedmen but also many whites were affected by this culture of oppression. As Akhil Amar has explained, Southern officials responded to the formal abolition of slavery by using government power to "resurrect[ ] a caste system [that] would also require repression of any whites who might question the codes or harbor sympathy for blacks."[19] The Fourteenth Amendment—particularly its Privileges or Immunities Clause—was a direct response to Southern tyranny and a very deliberate attempt to protect individual rights whose enjoyment is indispensable to personal security and autonomy.

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[16] *Cf. Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . .").

[17] *See* David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-1868*, at 8-12 (2009), 30 Whittier L. Rev. 695, 705 (2009).

Contrary interpretations of the Privileges or Immunities Clause—suggesting that the Clause be read only to require that states grant or deny rights to all citizens equally[20] or respect the first eight amendments to the Constitution[21]—cannot be squared with the historical record or original public meaning. After all, as Michael Kent Curtis has observed, "in the South, the ideal solution to the problem of speech about slavery was compelled silence"—a solution fully applicable to blacks and whites equally.[22] And the animating purpose of the Privileges or Immunities Clause, the elimination of constructive servitude, could not be achieved by enforcing only the narrow set of rights already enumerated in the existing Constitution.

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[18] These are only a handful of examples. For an extensive discussion of Southern efforts to limit freed slaves' economic opportunities and mobility, see David E. Bernstein, ONLY ONE PLACE OF REDRESS 8-27 (2001).

[19] Akhil Reed Amar, THE BILL OF RIGHTS 162 (1998).

[20] *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385 (1992).

[21] *E.g.*, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art* (Legal Studies Paper No. 2009-29) (August 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457360.

This last point is best illustrated by the sheer variety of laws invented by Southern governments to prevent freed slaves from enjoying the personal autonomy that was to have been theirs upon ratification of the Thirteenth Amendment. To take just one example, starting with Virginia in 1870, Southern states began to pass increasingly restrictive regulations of "emigrant agents"—people who attempted to recruit freedmen to leave their plantations by promising higher wages and better working conditions on understaffed Western plantations, eventually making it illegal or practically illegal for people to even *offer* these economic opportunities to poor workers.[23] Those and other laws had the express (though not always expressed) purpose of binding former slaves to the very same plantations they had worked during slavery, and upon essentially the same terms. That was anathema to the people who wrote and ratified the Fourteenth Amendment, and it is abundantly clear that they intended to confer upon the federal courts not only the power but the duty to ensure the freedom, security, and autonomy of all American citizens by protecting them from the tyranny of local governments.

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[22] Curtis, *supra* note 9, at 217.

[23] *See* Bernstein, *supra* note 18, 10-21.

But the Court need not decide those issues now because the question presented by this case is simple and straightforward: Does the Privileges or Immunities Clause protect a right to keep and bear arms? History shows that it does. That is the only question the Court need answer in this case.

IV. Interpreting The Privileges Or Immunities Clause According To Its Original Public Meaning Would Clarify And Improve The Court's Individual Rights Jurisprudence.

The *Slaughter-House* majority's failure to interpret the Privileges or Immunities Clause consistent with original understanding caused a dislocation in the Court's rights jurisprudence that has never been satisfactorily addressed, let alone corrected. As petitioners explain on pages 26 through 33 of their brief, the Privileges or Immunities Clause was meant to rectify what its proponents considered to be a serious defect in then-current constitutional doctrine by empowering federal courts to protect citizens' basic civil rights from infringement by local officials. But the *Slaughter-House* majority refused to honor that purpose, a fact that was immediately recognized by the decision's supporters and critics alike. Indeed, legal scholar Christopher Tiedeman actually praised the majority opinion for having "dared to withstand the popular will as expressed in the letter of the amendment."[24]

Slaughter-House was, by any meaningful definition of the word, "activist," in the sense that the five justices in the majority substituted their preference for what we would call minimalism for the contrary will of the people, as lawfully expressed in their founding document through the ratification of the Fourteenth Amendment. That was an act of usurpation, not modesty.[25] Indeed, the majority's argument is overtly consequentialist: Justice Miller correctly warns that a broad reading of the Privileges or Immunities Clause would "radically change[ ] the whole theory of the relations of the State and Federal governments to each other,"[26] which he plainly considers unwise, but which was nevertheless *precisely* what those who wrote and ratified the Clause intended.

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[24] David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93, 121 (1990) (quoting Christopher G. Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 102-03 (1890)).

[25] *See* Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 Harv. J.L. & Pub. Pol'y ___ (forthcoming Dec. 2009).

[26] *Slaughter-House Cases*, 83 U.S. 36, 78 (1873).

Depriving Americans of the Privileges or Immunities Clause they understood themselves to have adopted has had pernicious consequences for the country and for this Court's jurisprudence. Left without a historically grounded means of protecting individual rights, the Court has found itself protecting certain rights in one era and then abandoning them in another, and also the opposite: rejecting other rights initially, only to protect them later. Even where the Court has protected rights, it has often seemed to do so in a somewhat ad hoc manner—determining, for example, that the scope and analysis of the rights enumerated in the first eight amendments should nearly always be identical when those rights are applied against the states.[27]

The last point bears emphasis in this context. It seems entirely reasonable to suppose that one conception of the right to arms might apply as against a sovereign that possesses a general police power, like the states, whereas a different conception might apply against a sovereign that does not (or at least is not supposed to) wield such power, like the federal government. While that question need not be answered now, it will certainly arise in future cases and cannot be answered properly in the context of traditional incorporation doctrine.

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[27] *See, e.g.*, Tinsley E. Yarbrough, MR. JUSTICE BLACK AND HIS CRITICS 98-101 (1988) (discussing internal debates among Justices Black, Rutledge, and others over "incorporation" of the Bill of Rights).

Strengthening the ties between the Court's jurisprudence and the Constitution's actual text and history is the first step in undoing the errant history initiated by *Slaughter-House*—not to *eliminate* this Court's protection for individual rights, but to *cement* it. A proper reading of the Privileges or Immunities Clause would not only increase the perceived legitimacy of the Court's individual-rights jurisprudence, it would give content to that jurisprudence. The public discussions of the Fourteenth Amendment were striking both in their specificity and their legalism. The debates in Congress and at ratifying conventions, as well as contemporary press accounts, are replete with references to specific doctrines and even court cases the Framers meant to overturn, along with the specific evils the Amendment was meant to prevent; as a result, the rights protected by the Privileges or Immunities Clause can be rooted solidly in both text and history, as can their limits.[28] Protecting rights through the Privileges or Immunities Clause would allow claims of right to rise—or fall—on the basis of the history and text of the Constitution itself, helping blunt the criticisms of those who claim, mistakenly, that all individual rights jurisprudence is necessarily subjective.

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[28] *Cf. Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy") (internal citation omitted).

The Privileges or Immunities Clause is neither a meaningless nullity nor a freewheeling source of rights pulled from thin air. Relying on the Clause would help the Court determine the proper scope of its role in protecting individual rights against violation by local governments and would make that role more stable and difficult to assail as well. The solution to cries of "judicial activism" is not to abandon judicial review altogether, nor is it to remain doggedly attached to an incorporation doctrine that is both ahistorical and functionally problematic. The solution is found in the place where this Court, in its best moments, has always looked first: the text of the Constitution.[29]

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[29] *Cf. Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting) ("[N]otwithstanding the great names which may be cited in favor of [an erroneous] doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States . . . .").

CONCLUSION

The Fourteenth Amendment was understood by those who ratified it to protect the right to arms against violation by state governments. This case presents a singular opportunity to honor that purpose consistent with the amendment's original public meaning of the Privileges or Immunities Clause. Amicus respectfully urges the Court to begin that process by overruling *Slaughter-House* and holding that the right to arms is among the privileges or immunities of United States citizenship that no state may abridge.

Respectfully submitted,

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Pursuant to Supreme Court Rule 29.6, International Association of Law Enforcement Firearms Instructors, Inc. (Massachusetts), Southern States Police Benevolent Association (Georgia), Texas Police Chiefs Association (Texas), Law Enforcement Alliance of America (Virginia), Congress of Racial Equality (New York), Claremont Institute (California), and Independence Institute (Colorado) each state that they are non-profit corporations, incorporated in the states listed after their respective names. The International Law Enforcement Educators and Trainers Association (Wisconsin) is a Subchapter S corporation.

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INTERESTS OF THE *AMICI CURIAE*

Amici are law enforcement organizations, a civil rights organization, scholars, and public policy research institutions.[1]

International Law Enforcement Educators and Trainers Association

The International Law Enforcement Educators and Trainers Association (ILEETA) is a professional association of 4,000 persons who provide training to law enforcement in the proper use of firearms, and many other subjects.

The interests of additional *amici* are detailed in Appendix C.

◆

SUMMARY OF ARGUMENT

Guns save lives. Criminological data, studies of criminals, and natural experiments show that American citizens frequently use firearms, especially handguns, for lawful self-defense. Because defensive arms are common in American homes, occupied homes in the U.S. are burglarized at a much lower rate than in other nations.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received written notice in October of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. The NRA Civil Rights Defense Fund, a legally separate entity from the NRA, has made contributions to the Independence Institute, which, although not specifically for this brief, have been used in part to fund the preparation of this brief.

Ending handgun prohibition does not lead to disaster. This is shown in the District of Columbia post-*Heller*, and in South Carolina in 1965 after the 1902 ban on handgun sales was lifted.

Chicago's 1982 handgun ban was immediately followed by a very sharp increase in crime relative to other large American cities. In Chicago, as in many other cities, 911 response is often too slow to save crime victims.

Police officers in Chicago are murdered at a rate 79% above the national average, and at a higher rate than in most other large cities. Chicago's handgun prohibition is so ineffective that it has not even reduced the percentage of murders perpetrated with handguns–a percentage that has risen notably since the ban was imposed.

Judicial protection of the right to keep and bear arms would not interfere with police anti-crime tactics such as New York City's aggressive frisks of suspected illegal gun carriers.

In eleven cases, this Court has overturned convictions because they violated the defendant's right of armed self-defense. The cases provide further evidence that the right is deeply rooted in our history and traditions, and is fundamental to our scheme of justice.

Handguns are often the superior choice for home defense, and the liberty to choose the right arm for defending the family belongs to every individual family.

◆

ARGUMENT

Judicial protection of the right to keep and bear arms and the right of self-defense is legally sound, and salutary for public safety.

I. Summary of research data

In *Heller*, most of the *amici* on the instant brief filed a brief containing extensive empirical information about the law enforcement benefits of the ownership of firearms, particularly handguns, by law-abiding citizens. Brief of the International Law Enforcement Educators and Trainers Association (ILEETA), et al. as *Amici Curiae* supporting Respondent, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), 2008 WL 405576 (ILEETA *amicus*). Below is a concise summary of the information in that brief, which contains the full citations, details, and responses to critics:

- The burglary rate of occupied homes in the U.S. is far lower than in nations that severely restrict defensive gun ownership or prohibit handguns.[2]

- Studies of burglars have found that the risk of confronting an armed victim is a major deterrent to occupied residence burglary.[3] Indeed, an American burglar's risk of being shot while invading an occupied home is greater than his risk of going to prison. Presuming that the risk of prison deters some potential burglars, the risk of armed defenders would deter even more.[4]

- The Centers for Disease Control found that in the United States guns are used defensively against burglaries (usually without a shot being fired) half a million times per year.[5]

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[2] ILEETA *Heller* brief, at 8-10 (only 13% of U.S. residential burglaries are attempted against occupied homes, compared to 59% in England and Wales, 48% in the Netherlands, and 44% in Toronto).

[3] ILEETA *Heller* brief, at 8-9, citing studies of burglars in Delaware County, Penn.; Greenwich, Conn.; Massachusetts; and St. Louis. The latter study summarized: "One of the most serious risks faced by residential burglars is the possibility of being injured or killed by occupants of a target. Many of the offenders we spoke to reported that this was far and away their greatest fear." Hence, most burglars tried to avoid entry when an occupant might be home.

[4] JAMES WRIGHT, PETER ROSSI, & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 139-40 (1983) (Nat'l Inst. of Just. study); *see also* Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1, 12, 15-16 (1988).

- Because some home-invasion burglaries turn into assaults or rapes, if the U.S. home-invasion burglary rate (around 13%) rose to a level similar to other nations' (around 45%), then the millions of additional home invasions would result in about 545,713 more assaults every year. This by itself would raise the American violent crime rate 9.4%.[6] Given that the average cost of an assault is $12,784,[7] the annual cost savings from reduced assault is nearly seven billion dollars ($6,976,394).

- Since burglars do not know *which* homes have a gun, people who do not own guns enjoy free-rider benefits because of the deterrent effect from the homes that do keep arms.[8]

---

[5] There were 1,896,842 incidents in which a householder retrieved a firearm but did not see an intruder; 503,481 incidents in which the armed householder *did* see the burglar; 497,646 incidents in which the burglar was scared away by the firearm. Robert Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997).

[6] GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 140 (1991).

[7] ILEETA *Heller* brief, at 11-12 (the cited 1996 cost of crime figures were multiplied by 1.36, to account for 1996-2008 increases in the Consumer Price Index).

- In a National Institute of Justice study, many criminals reported that they personally were deterred from committing a crime because of the risk that the victim might be armed. Large majorities of incarcerated felons agree that armed victims are a substantial crime deterrent.[9]

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[8] David Kopel, *Lawyers, Guns, and Burglars,* 43 ARIZ. L. REV. 345, 363-66 (2001).

[9] Interviews of felony prisoners in eleven prisons in ten states, found:

- 34% reported personally having been "scared off, shot at, wounded or captured by an armed victim."
- 8% said the experience had occurred "many times."
- 69% reported that the experience had happened to another criminal whom they knew personally.
- 39% had personally decided not to commit a crime because the victim might have a gun.
- 56% said a criminal would not attack a potential victim who was known to be armed.
- 74% agreed that "One reason burglars avoid houses where people are at home is that they fear being shot."

JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 146, 155 (expanded ed. 1994). Notably, "the highest concern about confronting an armed victim was registered by felons from states with the greatest relative number of privately owned firearms." *Id.* at 151. Thus, "the major effects of partial or total handgun bans would fall more on the shoulders of the ordinary gun-owning public than on the felonious gun abuser. . . . [I]t is therefore also possible that one side consequence of such measures would be some loss

(Continued on following page)

- Natural experiments confirm that armed citizens deter crime. In Orlando, Florida, rapes and burglaries fell abruptly and dramatically after the police instituted a program to train women in handgun use. In Kennesaw, Georgia, home burglaries plunged after the city enacted a highly-publicized ordinance mandating home gun ownership.[10]

- Thirteen studies show that defensive gun use (DGU) is frequent in the United States. Studies range from 760,000 to 2.5 million DGUs annually, with the most thorough, highly-controlled research supporting the higher figures. In contrast, the National Crime Victimization Survey (NCVS), which does not directly ask about DGUs, indicates about 95,000 annually. The National Opinion Research Center's analysis of all the research results in an estimate of between 256,500 and 1,210,000 annually.[11]

- Data refute the notion that armed self-defense makes the victim worse off,[12] or frequently results in a criminal taking a

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of the crime-thwarting effects of civilian firearms ownership." *Id.* at 237.

[10] ILEETA *Heller* brief, at 17-19.

[11] *Id.* at 14-17.

[12] *Id.* at 22.

victim's gun.[13] In an *amicus* brief below, the Chicago Board of Education (CBE) ignored this data, and wrote: "[E]ven among highly trained police officers, 16% of officer homicides occur with the officers' own service weapons." CBE, at 16. However, unlike home defenders, most police officers wear their handguns every working day on unconcealed belt holsters. Thus, guns are sometimes snatched from inattentive officers. For police officers and for civilians, guns are virtually never taken from a defender who is aware of a threat and is holding the gun in his or her hands.

- Armed law-abiding citizens help law enforcement by reducing the number of victimizations to which thinly-stretched police must respond. Police recruits with personal civilian experience with handguns can be trained more rapidly, and to higher standards. Civilian firearms experts who lawfully own handguns have provided the major innovations in police firearms training practices in the last half-century.[14]

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[13] KLECK, TARGETING GUNS, at 168-69 (NCVS data show that a victim's weapon is taken away, at most, in one percent of cases when the victim uses a weapon).

[14] ILEETA *Heller* brief, at 22-24.

- Persons who commit homicide usually have extensive prior criminal records.[15] For example, of Illinois murderers in 2001, 43% had Illinois felony convictions and 72% had Illinois arrests within the previous 10 years.[16] In Chicago in 2007, 89.9% of murderers (and 72.6% of victims) had an arrest record known to the Chicago police.[17] In Milwaukee, 86% of persons arrested for homicide (and 75% of victims) had previous arrests.[18]

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[15] *Id.* at 27-29.

[16] Philip Cook, et al., *Criminal Records of Homicide Offenders*, 294 JAMA 538 (2005) (study did not examine criminal records from other states).

Below, some of Respondent's *amici* discussed the case of Laurie Dann, an insane women who murdered two people and wounded five others in Winnetka, Illinois. Previously, she had committed numerous crimes, for which could have been legally disarmed, but for various reasons charges were not pressed. She also could and should have been disarmed because her neighbors recognized that she was patently insane. Besides using firearms, Dann also used gasoline to set fire to the home of a woman and two children for whom she babysat. That a sociopath misused gasoline is no reason to ban all citizens from possessing gasoline for lawful purposes. The same point applies to handguns.

[17] Chicago Police Dept., *2006-2007 Murder Analysis in Chicago*, 35, 44.

[18] Milwaukee Homicide Rev. Comm'n, *Homicides and Non-Fatal Shootings: A Report on the First 6 Months of 2009*, http://www.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/Documents/Report_on_the_first_6_months_of_2009_713091.pdf.

- The same is true for homicides perpetrated by youths,[19] and for domestic homicide.[20] Gun ownership by domestic violence *perpetrators* greatly raises the danger that a victim will be killed. Gun ownership by domestic violence *victims* does not raise the victim's risk at all.[21] Many domestic shootings involve lawful self-defense by an abuse victim.[22] Federal and Illinois laws already ban firearms possession by persons subject to a domestic violence restraining order, or convicted of a felony or a domestic violence misdemeanor. 18 U.S.C. § 922(g); 430 ILL. COMP. STAT. 65/4.
- Trying to measure the anti-crime effectiveness of gun ownership by counting the number of criminals who are killed is a poor methodology for civilians and police alike.[23]
- Fatal gun accidents, including accidents involving children, have always been

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[19] ILEETA *Heller* brief, at 33-34.

[20] *Id.* at 29-33.

[21] An *abuser*'s being armed creates a 7.59 odds ratio for increased risk of femicide. The *victim* living alone and having a gun yields an odds ratio of 0.22, far below the 2.0 level necessary for statistical significance. Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089, 1090-92 (2003).

[22] ILEETA *Heller* brief, at 31.

[23] *Id.* at 34-35.

rare, and have become much rarer over the last six decades. The per capita death rate from firearms accidents has declined by 86% since 1948, while the per capita firearms supply has risen by 158%. The gun accidental death rate for children has fallen even more sharply, by 91%.[24] The annual risk of a fatal gun accident is equal to the risk of taking two plane trips during a year.[25]

- Handguns are generally more difficult for a small child to accidentally discharge than are long guns. The trigger on a rifle or shotgun is easier to pull than the heavier trigger on a revolver or the slide on a self-loading pistol. Handguns can be hidden from inquisitive children more easily than long guns.

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[24] *Id.* at 35-37, App. 7-15.

[25] *Id.* at 36, App. 15.

Adults who cause gun accidents have high rates of "arrests, violence, alcohol abuse, highway crashes, and citations for moving traffic violations." Julian Waller & Elbert Whorton, *Unintentional Shootings, Highway Crashes, and Acts of Violence*, 5 ACCIDENT ANALYSIS & PREVENTION 351, 353 (1973). Unlike in 1973, many such people are now prevented from buying a gun by the National Instant Check System.

It is true, and trivial, that homes with guns have more gun accidents, just as homes with lawnmowers have more lawnmower accidents.

II. Ending handgun prohibition does not harm public safety

A. District of Columbia

In *Heller*, D.C. and its *amici* offered a parade of horribles about the supposed results of ending the District's handgun ban. Yet in 2009, the District's homicide rate has fallen by 27%. District of Columbia Metropolitan Police Department, *Crime Statistics at a Glance*, http://mpdc.dc.gov/mpdc/cwp/view,a,1239,q,561242,mpdcNav_GID,1523,mpdcNav,%7C.asp. According to D.C. Attorney General Peter Nickles, "In the past year, robberies with guns have decreased 12 percent; assaults with guns have decreased 14 percent; and overall violent crime has decreased by 5 percent in the District." General Nickles attributes the decline in part to greater police and prosecutorial attention focused on criminal possession of illegal guns. Peter Nickles, *Our Strategies for a Safe City*, WASH. POST, Mar. 15, 2009.

Stated another way, once D.C. law enforcement stopped wasting resources on persecuting peaceful gun owners, focused prosecution of gun criminals made everyone safer.

We are not suggesting that the data currently available prove that the relegalization of handgun ownership and armed self-defense in the home have decisively reduced D.C. crime rates. It is clear that the enforcement of constitutional rights of citizens has had no deleterious effects. Indeed, we are not aware of a single instance of firearms misuse by a licensed D.C. handgun owner post-*Heller*.

B. South Carolina

In 1902, South Carolina banned handgun sales. No. 435, Regular Sess. (S.C. 1901), 748.[26] Because interstate handgun sales were legal until the federal Gun Control Act of 1968, a South Carolinian could legally travel to another state to buy a handgun. However, it is reasonable to infer that the ban on sales within South Carolina significantly depressed handgun ownership rates, particularly among citizens who were not highly determined to acquire a handgun.

In 1965, South Carolina repealed the ban. No. 330, Regular Sess. (S.C. 1965), 578.[27] As Figures 1-5 show, post-repeal, none of the crime rates (relative to the rest of the United States) after relegalization are statistically significantly different than the years before. (Underlying data are in Appendix B.)

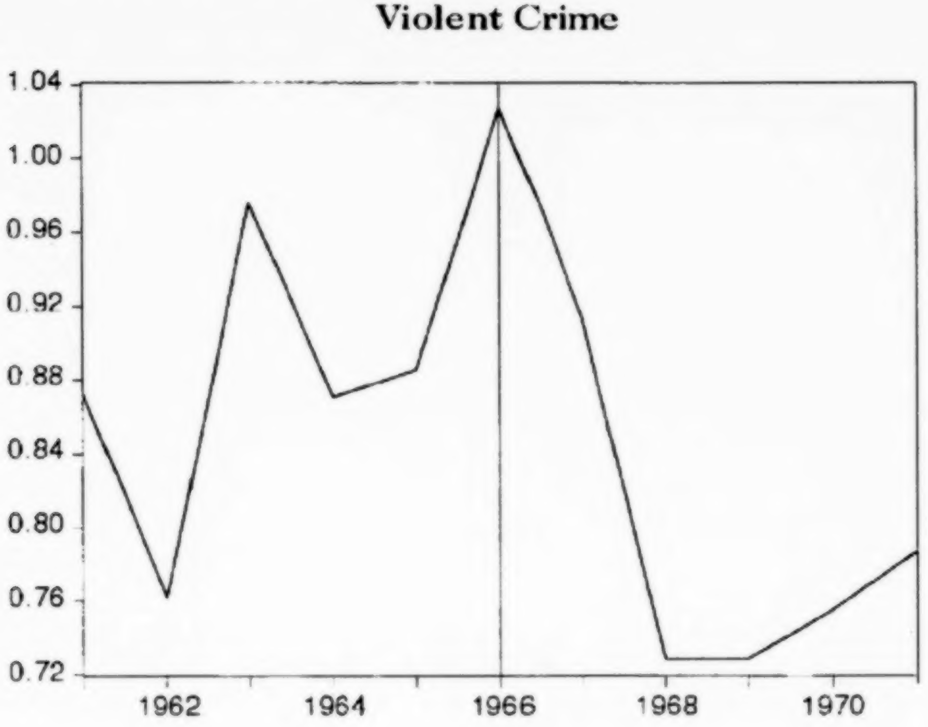
Crime was soaring nationally in the late 1960s, but it rose somewhat less in South Carolina in the post-ban years. If handgun ownership by law-abiding citizens were criminogenic, then one would have expected just the opposite result: after handgun sales were relegalized, South Carolina violent crime should have risen sharply, relative to the United States as a whole, since South Carolina was the only state in the period that enacted a law to greatly increase handgun availability.

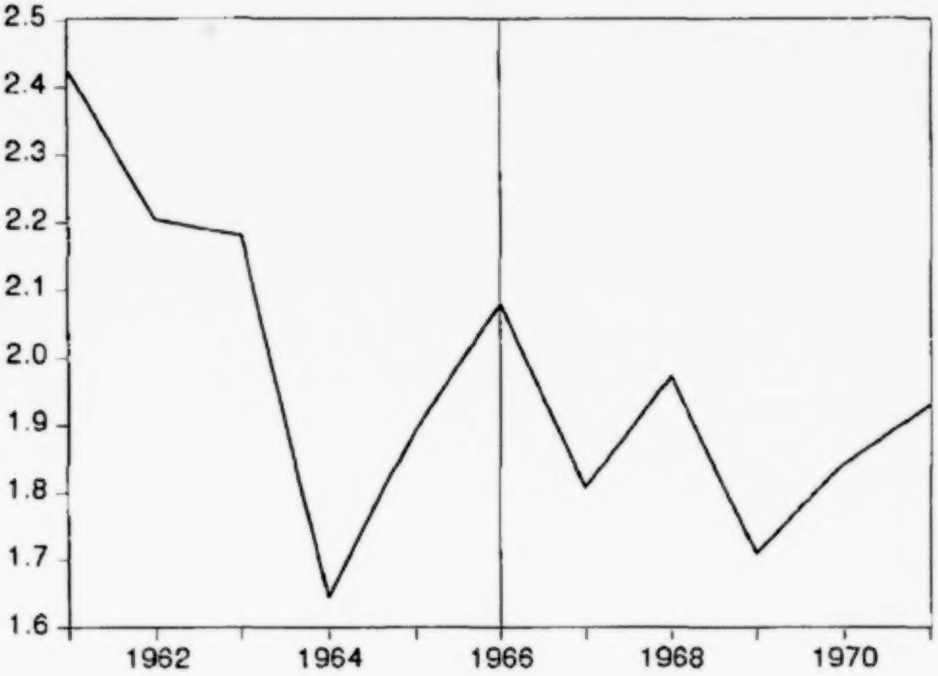
---

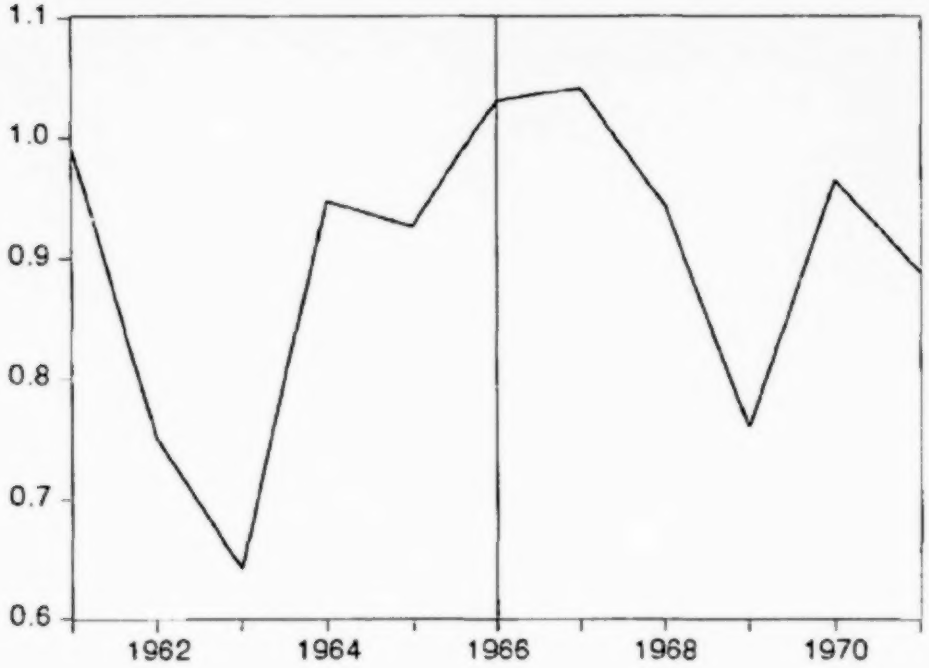
[26] The bill, which took effect in 1902, exempted handguns over 20 inches long, which are very unusual.

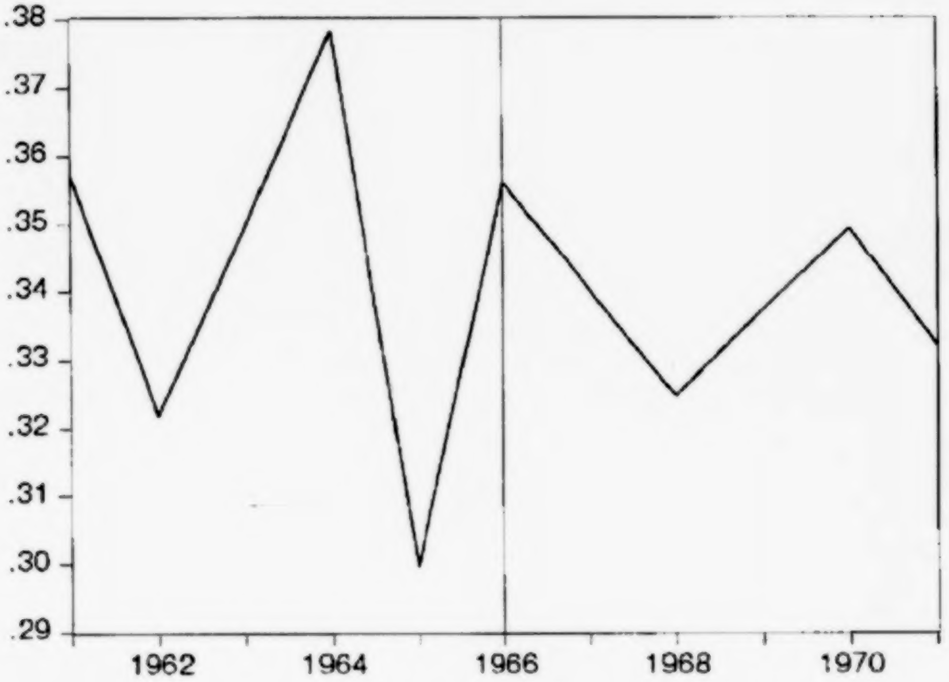
[27] The bill was passed on May 27, 1965, and took effect upon approval by the Governor.

Figures 1-5. South Carolina violent crime rates, relative to U.S. rates, before and after repeal of S.C. ban on handgun sales.

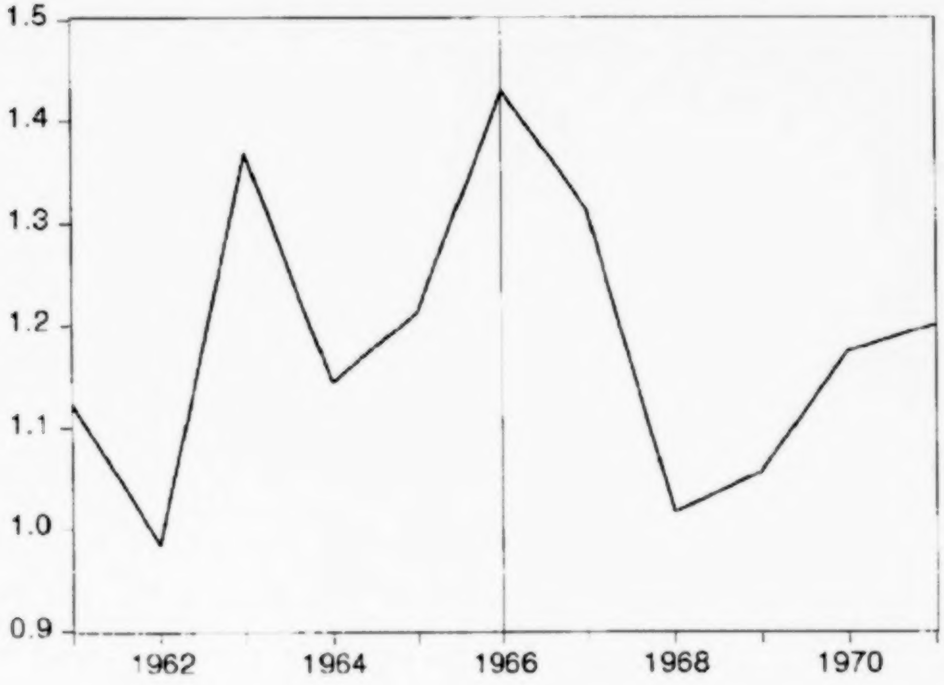



Murder
2.5
2.4
2.3
2.2
2.1
2.0
1.9
1.8
1.7
1.6
1962
1964
1966
1968
1970


Rape
1.1
1.0
0.9
0.8
0.7
0.6
1962
1964
1966
1968
1970



Robbery



Assault

There was no statistically significant increase in any of the crime series in the six years after repeal compared to the five years before. Data from South Carolina and D.C. show that relegalization of handguns does not lead to the disasters forecast by gun prohibitionists.

III. Chicago's failed handgun ban

A. After the ban, Chicago crime rates rose sharply relative to other large cities

Figure 6 shows the ratio of Chicago's violent crime rate (per 100,000 population) compared to the mean of the 24 other largest cities in the U.S. for the years 1977-2008.[28] We use FBI Uniform Crime Rate (UCR) data for all years.

There are two problems with these data. First, the data collection methodology for forcible rape used by the Illinois Uniform Crime Rate data program, including Chicago, does not comply with the FBI's national UCR guidelines. Consequently, the Illinois figures for forcible rape are not published by the FBI. Hence, our violent crime total includes murder, robbery, and assault, but not rape.

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[28] D.C. is not included, since its population is not in the top 25. In D.C., crime rates relative to other large cities (and relative to Maryland and Virginia) rose substantially after the ban. *See amicus* briefs of the Claremont Institute, 2008 WL 383535, and of the Academic Economists, 2008 WL 383520, in *Heller*.

The second problem is that before 1983, Chicago underreported crime by classifying many crimes as "unfounded." These supposedly unfounded crimes were not included in the UCR. The practice ended in 1983. According to a contemporary news article, the official crime rate rose 25% in the first four months of 1983.[29] Assuming that the 25% discrepancy was typical of the preceding years, we increased the number of robberies, assaults, and burglaries by 25% for all years prior to 1983.[30] Both the original data and our corrected data are shown in Figure 6.

The graph displays the ratio of Chicago's violent crime rate, excluding rape, to the corresponding mean crime rate of the 24 other largest cities for each year from 1977 to 2008. If Chicago's crime rate is below the average of other large cities, the ratio will be less than one. If Chicago's crime rate is above the average of the other large cities, the ratio will be greater than one. We drew a vertical line at 1983, the first year of the handgun ban. (The law banned handguns purchased after April 9, 1982, but first-time registration of a handgun, such as one previously legally owned outside the city, was allowed until Dec. 30, 1982.) As the graphs show, Chicago crime was a low point in 1982, and began a sharp, sustained rise in 1983.

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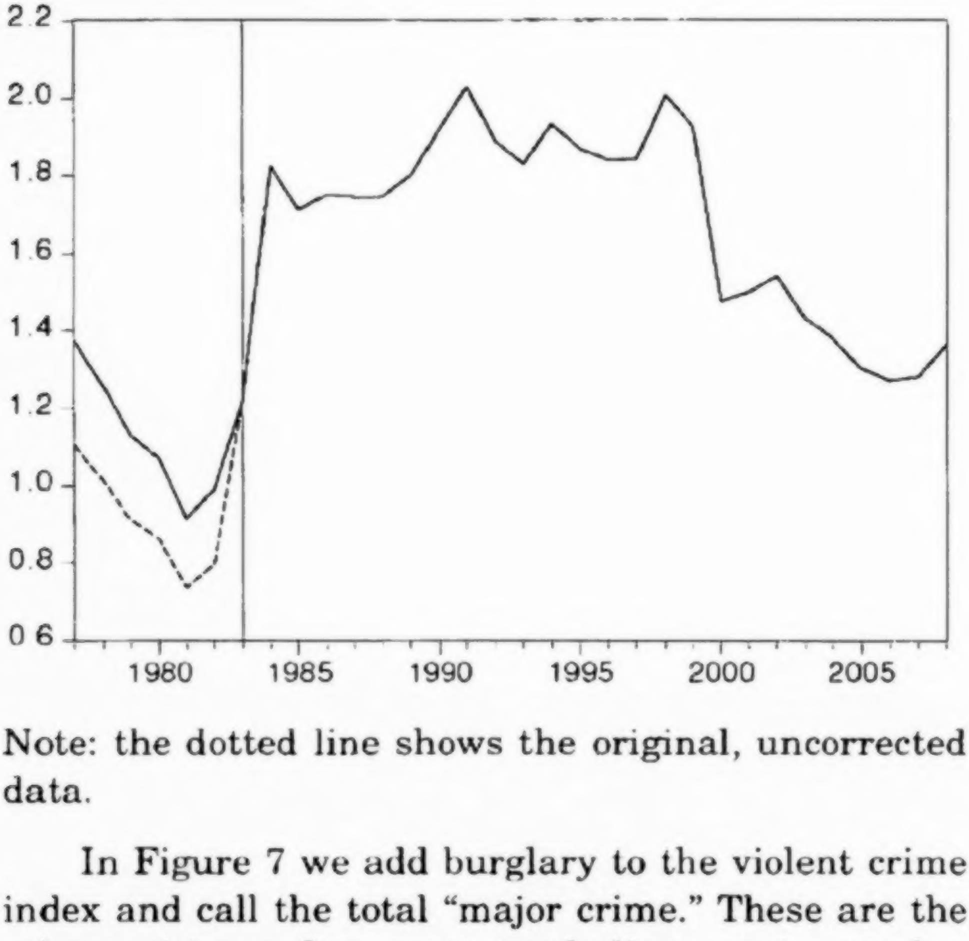
[29] *Burying Crime in Chicago*, NEWSWEEK, May 16, 1983, at 63.

[30] We assume that no murders were treated as "unfounded" and not reported to the FBI.

Figure 6

Chicago's violent crime rate relative to the other 24 largest cities

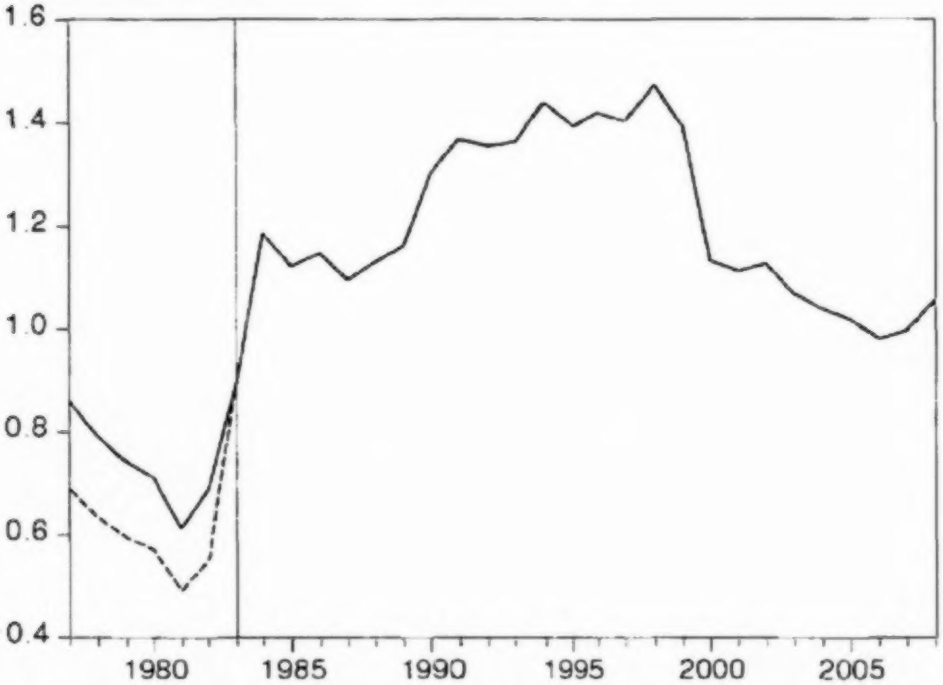


Note: the dotted line shows the original, uncorrected data.

In Figure 7 we add burglary to the violent crime index and call the total "major crime." These are the crimes citizens fear most (excluding rape): murder, robbery, assault, and burglary.

Figure 7

Ratio of Chicago's major crime rate to the other 24 largest cities



Note: the dotted line is the original, uncorrected data.

With respect to the major crime series, note that even with the 25% correction, Chicago's crime rate was well below those of other large cities before the ban, but increased immediately after the ban and never returned to its pre-ban levels.

The pre- and post-ban relative crime rates are statistically highly significantly different from each other. Using the corrected data, the pre-ban mean for Chicago's violent crime rate was 1.12, whereas the post-ban mean is 1.67, a difference of .55, which has the highly significant t-ratio for the difference between the two means of 4.95. (A t-ratio of greater than 2.0 is usually statistically significant at the 95% confidence level.)

The situation is very similar for the major crime index. For major crimes (including burglary), Chicago's mean relative pre-ban crime rate was .73, well below the mean for the other large cities; the post-ban average is 1.20, well above the mean for other large cities. This is a difference of .47, which has the even higher t-ratio of 6.53.

The t-ratios indicate that the possibility that the pre-ban and post-ban differences in the Chicago crime rate are due to random statistical fluctuation is less than 1/1000th of 1% for violent crime (1 in less than 100,000) and even less than that (1 in less than 1,000,000) for the major crime series.

There are many potential explanations for the rise and fall of Chicago's crime rates, including poverty, unemployment, and gangs. However, these are problems faced by nearly all the 25 largest cities. The only factor that might affect crime in Chicago and not in the other cities that has persisted over the years 1983-2008 is the handgun ban.

Chicago after the handgun ban is much more dangerous, relative to other large American cities, than was Chicago before the ban.

We are not claiming that the handgun ban must be the sole reason why Chicago in 1983 deteriorated so drastically compared to other large cities. But the Kennesaw, Georgia data (discussed in Part I of this brief) show that there can be an "announcement effect." When Kennesaw enacted its mandatory gun ownership ordinance, gun ownership in the already well-armed town did not change much. Yet when media coverage of the new ordinance informed burglars that Kennesaw was a very well-armed community, home-invasion burglaries dropped precipitously.

The handgun ban continues to advertise Chicago as the lone major city in America where a home-invasion burglar enjoys the security of knowing that when he confronts law-abiding victims in their homes, they will have no handgun with which to defend themselves.

B. Chicagoans cannot rely on 911

America's police work hard to rescue crime victims. But the police often cannot arrive in time to protect the victims and interrupt the crimes. The problem is acute in Chicago, where some Chicago neighborhoods have long periods when no police are available for 911 emergencies. For example, "Gussie Townsend, a 75-year-old schoolteacher . . . arrived home during a burglary in progress. Townsend said she did not see a police car for two hours, six minutes."[31]

When seconds count, Chicago rescuers are minutes away. The mean time for ambulance arrival for Chicago 911 calls for cardiac arrest is 6 minutes. The range was 1 to 22 minutes. Lance Becker et al., *Differences in the Incidence of Cardiac Arrest and Subsequent Survival*, 329 NEW ENG. J. MED. 600 (1993).

The situation is little different in many other American jurisdictions.[32]

Even if 911 responses were instant, a criminal in control of a crime scene will not permit his victim to call the police; meanwhile, neighbors may be unaware of the crime in progress. In contrast, when the victim of a home invasion has a handgun, she can prevent the criminal from gaining control, and use her free hand to dial 911.

C. Police safety

Amici police have no fears that upholding the rights of law-abiding citizens to possess handguns will endanger law enforcement officers.[33] According to

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[31] *Does where you live affect police response time?* NBC 5 WMAQ, Nov. 29, 2006, http://web.archive.org/web/20061210093454/http://www.nbc5.com/unit5investigates/10417034/detail.html.

[32] *See* ILEETA *Heller* brief, at 19-21.

[33] *Cf.* David Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J. L. & ECON. 635 (2001) (allowing licensed, trained

(Continued on following page)

FBI data from 1996 to 2008, police in the Chicago area are killed at a rate 79% higher than the national rate, a statistic that hardly suggests that disarming law-abiding citizens protects the police. *See* App. C.

Chicago's high rate of police homicides is not typical of other large cities. Of the 25 largest cities, Chicago's per capita police officer murder rate is the sixth-worst. *Id.* Chicago's sad record provides no support for the theory that handgun prohibition saves police lives. (The District of Columbia, which had a handgun ban for all but the last six months of 1996-2008, was even worse than Chicago.)

D. Chicago's ban has not affected criminals

Notably, the percentage of Chicago murders perpetrated with handguns did not decrease after the ban. From 1965-1981, the percent of Chicago murders with handguns ranged from 40% to 55.98%; the rate fell steadily from 53.88% in 1978 to 38.02% in 1982. In 1983-87, the rate remained in the 37-39% range, soared to 56.21% in 1988, and is now over 70%. Chicago Police Dept., *Murder Analysis 1992*, 14 (1965-1992); *2003 Murder Analysis*, 27-28 (73%); *2004 Murder Analysis*, 27-28 (70%); *2005 Murder Analysis*, 26 (71%); *2006-2007 Murder Analysis*, 24-25 (79% in 2006; 71% in 2007).

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citizens to carry concealed handguns in public places does not increase police officer deaths, and may reduce police deaths).

In a study of the illegal underground gun market in Chicago, scholarly gun control advocates Jens Ludwig and Philip Cook found that obtaining illegal guns was easy for gang members, but somewhat more troublesome and time-consuming for criminals who did not belong to a gang. They concluded that "the apparently high transaction costs in Chicago's gun market are due to the city's low overall rate of household gun ownership and relatively intensive anti-gun policing emphasis."

They specifically rejected the notion that the handgun ban in Chicago (or the then-existing ban in D.C.) deserved even indirect credit for reducing gun ownership: "The fact that Chicago and DC have low gun ownership rates, now and in the past, may be more the cause than the consequence of restrictive gun laws." Indeed, the Chicago ban had not even changed the fraction of suicides committed with firearms (FSS): "the available evidence does not support a conclusion that the imposition of handgun bans has reduced FSS." Philip Cook, et al., *Underground Gun Markets*, 117 ECON. J. F588 (2007).

E. Population density

Some supporters of Chicago prohibition point to the city's population density as a unique justification. The density certainly supports the legitimacy of strict rules about firearms *discharge*; for example, target shooting in one's backyard might justifiably be banned in Chicago, even though such a ban would make no sense in a rural county in Wyoming. However, the issue at bar is a ban on possession in the home. As of 2000, Chicago's population density was 12,750 persons per square mile. This is not radically different from the District of Columbia, where the density was 9,378. The Chicago figure is far less than New York City's 26,403.[34] New York City regulates handguns, but does not ban them.

IV. New York City, and stop and frisk

In the Seventh Circuit, *amicus* Chicago Board of Education (CBE) pointed to two cases involving New York's pistol licensing law. CBE, at 10. CBE forgot that the majority in *Darling v. Warden of City Prison*, 154 A.D. 413 (N.Y. App. Div. 1913), while upholding a licensing law, stated that New York's Civil Rights Law § 4 (a verbatim copy of the Second Amendment) meant that "If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power." *Id.*, at 421-22. *Darling* supports the validity of Illinois's licensing law for guns, and is contrary to Chicago's handgun prohibition.

CBE also cited the trial court opinion in *Guida v. Dier*, 375 N.Y.S.2d 826 (N.Y. Sup. Ct. 1975), *modified*, 54 A.D.2d 86, 387 N.Y.S.2d 720 (N.Y. App. Div. 1976). That opinion misunderstood the Second Amendment and its New York twin as applying only to the militia. Regardless, the case enforced the procedural due process rights of the pistol applicant.[35] Both New York cases uphold fair administration of licensing laws, not prohibition.

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[34] Census Bureau, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=&-ds_name=DEC_2000_SF1_U&-_lang=en&-mt_name=DEC_2000_SF1_U_GCTPH1R_US13S&-format=US-13.

In the Seventh Circuit, the United States Conference of Mayors (USCM) brief argued that the New York City Police Department's aggressive stop and frisk tactics caused a decline in violent crime. USCM, at 5-17. We take no position on this issue, which is subject to intense dispute among criminologists. We do dispute USCM's assertion that a decision for Petitioners in the instant case would interfere with effective police tactics against gangsters carrying guns in public.

First, this case involves possession of a handgun in the home by persons who have passed a background check and who are already authorized by Illinois law to own guns in the home. The only issue is whether these law-abiding citizens can possess handguns. Police stop and frisk is irrelevant to home possession by licensed citizens.

Second, New York City *currently* issues licenses to carry concealed handguns for lawful protection.

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[35] *Cf. Shapiro v. Cawley*, 46 A.D.2d 633, 360 N.Y.S.2d 7 (N.Y. App. Div. 1974) (upholding applicant's statutory right to a pistol permit without a showing of "need").

There are over 18,000 licenses extant in the city.[36] The existence of a system for licensed carry has not prevented New York police from stopping and frisking persons suspected of illegally carrying guns. In most states, a person who is carrying a licensed concealed handgun must carry the license with him, and produce it to a police officer upon request. If a person has no such permit, then a frisk would be legitimate if the officer had observed evidence that the person might be carrying a gun.

New York City's success (according to USCM) shows beyond any doubt that Chicago's ban is not the least restrictive alternative.

USCM misconstrued *Heller*'s citation of nineteenth century state court cases which "had understood the Second Amendment to secure a right to carry firearms openly in public . . . this right would grant effective immunity for gangs from stop-and-frisk tactics, at least as long as they carry firearms openly . . . " USCM, at 21-22, discussing *Heller*, at 2809.

The argument is incorrect. The cited cases from Georgia, Louisiana, and Tennessee, affirm, properly, that carrying a firearm for lawful protection is part of the right to keep and bear arms. These do not forbid a fairly-administered licensing system for carry permits, which can include a fingerprint-based background check and mandatory safety training. The three cited states currently have such a system, as do 37 other states.[37] Of course a carry permit may be denied to persons who may be constitutionally forbidden to own guns–such as drug-dealing gangsters.

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[36] Chan, *Annie Hall, Get Your Gun*, N.Y. TIMES, CITY ROOM BLOG, Dec. 2, 2008, http://cityroom.blogs.nytimes.com/2008/12/02/a-guide-to-city-gun-licenses/ (18,387, including retired police but not including security guards).

V. The Supreme Court's many affirmations of the right of self-defense

Heller affirmed that self-defense is an "inherent," "natural," and "fundamental" "right." *Heller*, at 2793, 2797-99, 2801, 2809, 2817, 2820. There are eleven cases in which this Court has overturned a conviction because of a violation of the defendant's right of armed self-defense. These cases provide further evidence that the right is "deeply rooted in our history and traditions," is "fundamental to the American scheme of justice," and is "necessary to an Anglo-American regime of ordered liberty." *See Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.); *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).[38]

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[37] For state laws, see STEPHEN HALBROOK, FIREARMS LAW DESKBOOK, 2008-2009 EDITION, App. A (2008).

[38] The cases are discussed in detail in David Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and*

(Continued on following page)

In *Brown v. United States*, at a federal naval yard in Texas a man named Hermes had twice assaulted Brown with a knife, and warned that the next time, either Hermes or Brown "would go off in a black box." 256 U.S. 335, 342 (1921). One day Hermes again attacked Brown with a knife; Brown ran to get his coat, which contained a pistol. Hermes pursued, and Brown shot him four times, killing him. The trial judge instructed the jury that Brown had a duty to retreat if he could do so safely, and Brown was convicted.

Overturning the conviction, Justice Holmes traced the duty to retreat rule to a much earlier period in English history, when the law did not even recognize the right of self-defense. "The law has grown," Holmes wrote, "in the direction of rules consistent with human nature." As a practical matter, "Detached reflection cannot be demanded in the presence of an uplifted knife." *Id.*, at 343. So, declared Holmes, there is no duty to retreat from anywhere that the victim has a right to be.

Richard Maxwell Brown, a leading historian of American violence, explains that "to Holmes–as to so many other Americans–the right to stand one's

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Taught Some Lessons for Jurisprudence in the Twenty-first, 27 AM. J. CRIM. L. 293 (2000).

ground and kill in self-defense was as great a civil liberty as, for example, freedom of speech."[39]

Justice Holmes' opinion in *Brown* provides a link between two great civil libertarians. Joining the Holmes opinion in *Brown* was new Justice Louis Brandeis, who later wrote "We shall have lost something vital and beyond price on the day when the state denies us the right to resort to force . . . "[40]

Holmes' opinion quoted Justice Harlan's opinion from *Beard v. United States*, 158 U.S. 550 (1895); in private correspondence, Holmes wrote approvingly of the anti-retreat view of "old Harlan."[41]

In *Beard v. United States*, three brothers–Will, John, and Edward Jones–went to the farm of their uncle, Mr. Beard, to take a cow that he owned. One of the Jones brothers carried a shotgun. Beard drove them away from his farm, and told the Jones brothers that they could have the cow (which used to belong to the Jones' long-dead mother) if a court said that the cow belonged to them.

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[39] RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 36-37 (1991).

[40] ALFRED LIEF, THE BRANDEIS GUIDE TO THE MODERN WORLD 212 (1941).

[41] 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 335 (Mark DeWolfe Howe ed., 1953) ("[L]aw must consider human nature and make some allowances for the fighting instinct at critical moments," for "a man is not born to run away.").

Will Jones made public statements that he would get the cow or he would kill Beard. Beard was informed of the threat. The Jones brothers returned to the Beard farm, armed with pistols. About the same time, Beard returned from town to his farm, bearing the shotgun he always carried when away from his farm. The three brothers attacked Beard, but in a struggle, he disarmed them all without firing a shot. In the tussle, he hit Will Jones on the head with the shotgun, inflicting a wound from which Jones later died.

When Beard was tried for murder, trial judge Isaac Parker correctly instructed the jury that Beard could not lawfully kill someone just to prevent the theft of a cow. But the judge offered several instructions that Justice Harlan, writing for a unanimous Court, found incorrect. Parker told the jury that a person cannot claim self-defense if he goes out looking for trouble. The Supreme Court agreed with the general statement, but found the instruction improper in the case at hand. Beard had merely confronted thieves who had illegally entered his property, to tell them to leave. The Court found that Beard's conduct could not possibly be considered provocative.

But the trial court made an even worse error. Judge Parker told the jury that even if Beard had the right to use self-defense against attack by the Jones brothers, Beard could not defend himself if Beard had the ability to retreat safely. The law was clear that people did not have to retreat from their own homes when attacked. Beard, though, was on his farmland, not in his home. The Supreme Court rejected the trial court's distinction between the home and the rest of a person's land.

The Court reviewed various decisions from state courts and from British and American legal commentators, all of which said that victims have no duty to retreat. Thus, Beard "was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury." Quoting from leading state supreme court cases, Justice Harlan explained that the "true man" is "not obliged to fly" from an assailant.[42] Indeed, "The tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed."[43] *Beard*, at 559-64.

Beard was cited in Justice White's dissent from denial of certiorari in *Christy v. Lujan*, 490 U.S. 1114, 1115 (1989):

> The right to defend one's property has long been recognized at common law, see W. Blackstone, Commentaries *138-140, and is

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[42] *Erwin v. State*, 29 Ohio St. 186 (1876).

[43] *Runyan v. State*, 57 Ind. 80 (1877).

> deeply rooted in the legal traditions of this country, *see, e.g., Beard v. United States* [citation omitted]. Having the freedom to take actions necessary to protect one's property may well be a liberty 'deeply rooted in this Nation's history and tradition,' *Moore v. East Cleveland* [citation omitted], and, therefore, entitled to the substantive protection of the Due Process Clause.

Beard was one of several self-defense cases arising from the Western District of Arkansas, wherein the infamous hanging judge Isaac Parker gave jury instructions that denigrated or negated the right of self-defense.

In *Gourko v. United States*, Justice Harlan's opinion for the unanimous Court held that carrying a handgun for lawful self-defense could not be considered evidence of premeditated intent to murder: "the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes simply of self-defence. . . ." 153 U.S. 183, 191 (1894).

A unanimous opinion by Chief Justice Fuller in *Starr v. United States* held that a person is "entitled to protect his life" and use his "right of self-defence" to resist an assault by a temporary peace officer who has not announced that he is a peace officer. 153 U.S. 614, 623 (1894).

Thompson v. United States involved a 17-year-old who was carrying a rifle for protection while riding a horse to his farm on the only road available, which passed by the property of a man who had previously threatened him. The unanimous opinion by Justice Shiras corrected the trial court's error "in the assumption that the act of the defendant in arming himself showed a purpose to kill formed before the actual affray. This was the same error that we found in the instructions regarding the right of self-defense, and brings the case within the case of Gourko v. U.S. . . ." 155 U.S. 271, 283 (1894).

In *Allison v. United States*, William Allison, a divorced and viciously abusive father, had repeatedly threatened to kill his ex-wife and her children. 160 U.S. 203 (1895). He had just been released from prison after serving a one-year sentence for attempting to shoot one of his sons.[44] Allison was known to carry a pistol and threaten others with it.

A few days after William Allison had come by his former family's home, brandishing a pistol and threatening to murder them all, he encountered his 20-year-old son, John Allison, at a barn. Returning from a hunting expedition, John Allison was carrying a rifle. John Allison stepped aside to let his father pass by, but the father walked straight at his son; only a few steps away, William Allison reached into his pocket as if to draw a pistol. The son promptly drew his Winchester, and killed William Allison with three shots.

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[44] SAMUEL HARMAN, HELL ON THE BORDER; HE HANGED EIGHTY-EIGHT MEN 360-63 (1898).

Like many domestic violence homicides, this was a case of lawful self-defense. A unanimous opinion by Chief Justice Fuller reversed the trial judge's preclusion of jury consideration of self-defense, and personally criticized Judge Parker for his overbearing jury instructions.

Wallace v. United States did not originate in the Western District of Arkansas. 162 U.S. 466 (1896). The trial court erred in refusing to allow evidence about the previous threats that Zane (an aggressive trespasser on Wallace's farm) had been made against Wallace, so that the jury could assess whether Wallace really felt threatened by Zane when he shot Zane. "[N]or was the mere fact that Wallace procured the gun," wrote Chief Justice Fuller for a unanimous Court, any reason for a trial judge to conclude that Wallace was not acting within his "right" of self-defense. *Id.* at 473-74.

Alberty v. United States again affirmed that a crime victim is "not bound to retreat but may use such force as necessary to repeal the assault," in a unanimous opinion by Justice Brown. 162 U.S. 499, 508 (1896).

Allen v. United States first came before the Court in 1893. An opinion by Chief Justice Fuller reversed the conviction because of Judge Parker's assertion that someone defending his life against immediate peril "must be regarded as exercising the deliberation of a judge in passing upon the law and of a jury in passing upon the facts in arriving at a determination as to the existence of the danger." The Supreme Court ruled that a person who has to make an instant decision should not be held to the same standard as a judge or jury, who have limitless time to consider the facts. 150 U.S. 551, 560-61 (1893).

At the second trial, Judge Parker told the jurors that even if they believed Allen's version of the facts (that three white boys had attacked him with willow sticks, intending to kill him), Allen, a black youth, could not claim self-defense, because sticks were not "deadly weapons."

The Supreme Court, in an opinion by Justice Shiras, reversed, because "when a fight is actually going on, sticks and clubs may become weapons of a very deadly character." The jury should have been allowed to consider whether, in the particular case, the attack with sticks was a deadly attack, which would mean that Allen had a "right" to use deadly force to defend himself. 157 U.S. 675, 676-77 (1895).

In addition, wrote the Court, Judge Parker had made the same error for which he had been reversed in *Gourko* and *Thompson*: telling the jury that Allen's decision to carry a gun for protection was evidence of premeditated intent to murder. *Id.* at 680-81.

Rowe v. United States, 164 U.S. 546 (1896), also reversed Judge Parker for erroneous jury instructions, which, as Justice Harlan wrote for the Court, violated Rowe's "right of self-defense." Having been attacked by a man with a knife, Rowe was entitled

> so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life, or to protect himself from great bodily harm. And, under the circumstances, it was error to make the case depend, in whole or in part, upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant, without more seriously wounding him.

Id., at 557-58.

McDonald v. Chicago does not test the precise parameters of the right of self-defense. This case does test the Seventh Circuit's nihilistic assertion–which is contrary to this Court's precedent–that self-defense is not a right, but a mere "gloss" which may be abolished by a government. *McDonald v. Chicago*, 567 F.3d 856, 859-60 (7th Cir. 2009).

To the contrary, self-defense is an explicit *right* in 37 state constitutions. David Kopel, Paul Gallant & Joanne Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 128-29 (2008) (quoting provisions). The natural right of self-defense was the foundation of international law. *Id.* at 58-98 (discussing "classical period" founders of international law, including Francisco de Victoria, Francisco Suárez, Hugo Grotius, Samuel von Pufendorf, Emmerich de Vattel, and others). The right was recognized by the ancient legal and religious systems of Israel, Rome, and China, and by every civilized system that followed, especially by the ones that provided the intellectual foundation for Anglo-American liberty. *Id.* at 104-29; David Kopel, *Self-defense in Asian Religions*, 2 LIBERTY L. REV. 79 (2007); David Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 519 (2006).

VI. Handguns and right of choice in self-defense

Below, Respondents' *amici* the Chicago Board of Education (CBE) and various anti-gun organizations argued that *Heller* was wrong in recognizing that handguns are appropriate arms for self-defense in the home. The argument consists of scattered citations to firearms writers who recommend a shotgun for home defense.[45] A ubiquitous topic of gun magazines, books, and websites is the author's opinion on the utility of particular guns or gun types for self-defense–and for all the other many legitimate purposes for which the Second Amendment protects the right to arms. For example, the "revolvers versus semi-automatics" debate has been going on for over a century; likewise, readers enjoy disputes about the merits of handguns versus shotguns versus rifles, and of the various types of these guns. The truth is that every type of gun has advantages and disadvantages, and there is no perfect gun for everyone in all situations.

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[45] CBE, at 15-16.

Homes and families vary, and families have the right to make highly personal decisions about safety based on their particular circumstances, not on what some lawyer dredged from the archives of a gun website.

Amici on the instant brief include the two major professional organizations of police trainers: the International Law Enforcement Educators and Trainers Association (ILEETA), and the International Association of Law Enforcement Firearms Instructors (IALEFI). We respectfully suggest that these two *amici* have considerable expertise in firearms self-defense.

Based on our expertise, we utterly reject the notion that long guns are always as good as handguns for home defense. For some people they are, and for many people they are not. That is one reason why so many police officers use handguns for defense of their homes and families when off-duty. That is one reason why 80% of defensive uses of firearms are with handguns. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 175 (1995).

Heller noted that a handgun "can be pointed at a burglar with one hand while the other hand dials the police." *Heller*, at 2818. But CBE asserts, "Much more effective is directing the intruder to dial the police, which can be accomplished persuasively with either a shotgun or a handgun." CBE, at 16. Citing one example in which this occurred, as CBE does, is not the same as proving that it is always "much more effective."

Relying on the criminal to dial the phone properly is dangerous and ill-advised. Criminals do not always cooperate with what an armed victim tells them. Some criminals do not speak English well enough to speak with a 911 operator, or may have difficulty communicating due to mental illness or substance abuse. The victim wants to provide accurate information so the police will come to the right place as soon as possible; the criminal's interest is just the opposite. Accurate information is more likely to be conveyed if the victim is personally talking with the operator, and can truthfully answer any question the operator asks. The Constitution guarantees a right of self-defense, and it is not up to aldermen to micromanage the crime victim's tactical choice about how to contact the police.

Besides, having a free hand makes it much easier for the victim to hold a flashlight, open or lock doors, manipulate light switches, and so on.

The ILEETA brief in *Heller* pointed out that, especially in a home, a long gun is harder to maneuver (e.g., around corners or doorways). The vast majority of defensive shootings take place at extremely close range–about 6.5 to 7 feet on average. At such short distances, a shoulder weapon can be difficult for some people to manage, and may be easier for a criminal to grab. Thus, handguns are often chosen as defensive arms in small urban spaces such as apartments.[46]

There is certainly a trade-off, in that handguns are generally less powerful than long guns, so the defender is less sure that the first shot with a handgun will deliver a fight-stopping hit. Individual American citizens know their own personal circumstances and have the right to decide which gun is best for their own lawful self-defense.

Heller recognized that a handgun "is easier to use for those without the upper-body strength to lift and aim a long gun." *Heller*, at 2818.

CBE argues: "no data shows that women and the elderly are any less able to use, for example, a lightweight 20-gauge shotgun with low recoil ammunition than a handgun." CBE, at 16. *Amici* in the instant brief teach the police how to use guns. Based on our collective experience, we know that there are many, many people who would find, and have found, a handgun to be far easier to handle than a long gun, including a 20-gauge shotgun.

As a practical matter, all indoor shooting ranges in urban areas allow handguns, but many cannot accommodate shotguns or centerfire rifles (i.e., anything above the tiny .22 caliber). So finding a place to practice safe firearm use is easier for the urban handgun owner.

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[46] ILEETA *Heller* brief, at 38.

Heller acknowledged that a handgun "is easier to store in a location that is readily accessible in an emergency." *Heller*, at 2818. CBE contends that an accessible gun might be misused by a juvenile. CBE, at 13. However, this is more true for long guns (which Chicago allows) than for handguns. Even the smallest apartment can accommodate a quick-access box to securely lock a handgun. Finding a suitable location for a long gun safe is more difficult; and fewer long gun safes are built for relatively quick opening.

Moreover, a constitutionally-protected item cannot be banned "simply because it may fall into the hands of children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002). The right approach is to store all guns properly when not in use.

According to CBE, *Heller*

> assumes that intruders will be accommodating by breaking in only at times when occupants have sufficient proximity to their guns. For the "accessibility" argument to work, even as a matter of logic, it would appear that a gun would have to be stored in every room. Otherwise, an unprepared homeowner might find himself in the bathroom at the time of the intrusion.

CBE, at 15.

Nonsense. As noted in Part I, *supra*, the Centers for Disease Control reports half a million defensive gun uses annually against home-invasion burglars. We doubt that most home defenders kept a gun in the bathroom. In a much more typical home invasion, a burglar might enter an unoccupied room, and the noise of the entry (or an alarm, or a barking dog) would alert the victim in her bedroom to pick up the gun there.

In a few situations, a victim might realistically fear imminent attack at any moment, in any room; for example, a woman might be the object of frequent violent threats from a stalker. CBE's apparent solution is for the woman in an eight-room house to buy semi-automatic shotguns for every room. More practical would be for the woman to own one handgun, and wear it in a holster, or in one of the gun purses or fanny packs specifically made to carry a handgun safely. The handgun is easy to carry from room to room; the shotgun is not.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs" to express or support. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994).[47] At the heart of the Second Amendment lies the principle that each person should decide for herself how to protect her own life and body.

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[47] *Cf. Hill v. Colorado*, 530 U.S. 703, 781 (2000) (Kennedy, J., dissenting) ("It is for the speaker, not the government, to choose the best means of expressing a message.").

Meyer v. Nebraska, 262 U.S. 390 (1923), would still have been rightly decided even if some Nebraska *amici*–hostile to education in general and foreign languages in particular–had scoured teaching magazines to find articles contending that people learn foreign languages better if they wait until high school to begin. Even if foreign language experts had many different opinions about the best time to start a new language, *Meyer*'s principle is that parents have the inherent, fundamental, natural right to guide their children's education. A fortiori, the decision of parents, and other law-abiding individuals, to choose the best tool to defend their lives and their families is an inherent, fundamental, and natural liberty.

◆

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A. Chicago crime data

All the calculations in Appendices A and B were performed by Professor Carl Moody of William & Mary. He is available to answer any questions about the data.

Table 1

Chicago's violent and major crime rates relative to the 24 other largest cities, 1977-2008

Year	Violent Original	Major Original	Violent Corrected	Major Corrected
1977	1.11	0.69	1.37	0.86
1978	1.01	0.64	1.26	0.79
1979	0.91	0.59	1.13	0.74
1980	0.86	0.57	1.07	0.71
1981	0.74	0.49	0.91	0.61
1982	0.80	0.55	0.99	0.69
1983	1.22	0.90	1.22	0.90
1984	1.83	1.19	1.83	1.19
1985	1.71	1.12	1.71	1.12
1986	1.75	1.15	1.75	1.15
1987	1.75	1.10	1.75	1.10
1988	1.75	1.13	1.75	1.13
1989	1.80	1.16	1.80	1.16
1990	1.92	1.30	1.92	1.30
1991	2.03	1.37	2.03	1.37
1992	1.89	1.35	1.89	1.35

Year	Violent Original	Major Original	Violent Corrected	Major Corrected
1993	1.83	1.36	1.83	1.36
1994	1.93	1.44	1.93	1.44
1995	1.87	1.39	1.87	1.39
1996	1.84	1.42	1.84	1.42
1997	1.84	1.40	1.84	1.40
1998	2.01	1.47	2.01	1.47
1999	1.93	1.39	1.93	1.39
2000	1.48	1.13	1.48	1.13
2001	1.50	1.11	1.50	1.11
2002	1.54	1.13	1.54	1.13
2003	1.43	1.07	1.43	1.07
2004	1.38	1.04	1.38	1.04
2005	1.30	1.02	1.30	1.02
2006	1.27	0.98	1.27	0.98
2007	1.28	1.00	1.28	1.00
2008	1.36	1.05	1.36	1.05

The 25 largest cities (Chicago and the other 24) used in this Table are the same cities as those listed in Appendix C. These are the 25 largest cities, not the 25 largest metropolitan areas.

The "Original" columns are based on data as it was actually reported by the Chicago Police Department. In the "Corrected" columns, Chicago crime rates for 1977-82 are increased by 25%, to correct for the crime under-reporting of the Chicago Police Department in those years. *See Burying Crime in Chicago*, NEWSWEEK, May 16, 1983, at 63 (Until 1983, the Chicago Police had undercounted reported crimes by labeling many reports of crime "unfounded." In 1983, Chicago stopped undercounting, and so the nominal crime rate "rose" by 25%.).

Table 1 does not include data for forcible rape. After 1985, the FBI Uniform Crime Reports (UCR) stopped including forcible rape data from Chicago because Chicago's data did not meet UCR standards. The raw data from which these figures are derived are available from 1985 onward at http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/Local/LocalCrimeLarge.cfm. Before that, they are available in the annual printed editions of the FBI's Uniform Crime Reports.

"Violent crime" is murder, robbery, and assault. "Major crime" is murder, robbery, assault, and burglary. Table 2 presents the data from which Table 1 was derived.

Table 2

Detailed data on Chicago crime vs. other 24 largest cities

Year	Assault	Burglary	Murder	Robbery	Robberyx	Assaultx	Burglaryx
1977	0.990564	0.537228	1.5323	1.175818	1.469773	1.238204	0.671534
1978	0.946466	0.492852	1.458075	1.049373	1.311717	1.183083	0.616064
1979	0.894158	0.467769	1.395564	0.902738	1.128422	1.117697	0.584711
1980	0.797841	0.448819	1.326709	0.888519	1.110648	0.997301	0.561024
1981	0.567425	0.387352	1.403149	0.825775	1.032218	0.709281	0.48419
1982	0.646317	0.444583	1.155634	0.891739	1.114673	0.807896	0.555729
1983	1.026644	0.744883	1.329713	1.357406	1.357406	1.026644	0.744883
1984	1.979269	0.868375	1.400974	1.70625	1.70625	1.979269	0.868375
1985	1.896224	0.819123	1.233203	1.562819	1.562819	1.896224	0.819123
1986	1.866495	0.820423	1.212882	1.655009	1.655009	1.866495	0.820423
1987	1.804343	0.743783	1.234254	1.698507	1.698507	1.804343	0.743783
1988	1.819444	0.781934	1.170595	1.679079	1.679079	1.819443	0.781934
1989	1.843993	0.784794	1.252467	1.771185	1.771185	1.843993	0.784794
1990	1.926122	0.86283	1.321877	1.928858	1.928857	1.926123	0.86283
1991	1.954477	0.886486	1.350756	2.129811	2.12981	1.954477	0.886486
1992	1.866161	0.92551	1.493656	1.923406	1.923407	1.866161	0.92551
1993	1.855418	0.957056	1.362509	1.817302	1.817302	1.855418	0.957056
1994	1.953067	0.999847	1.609577	1.92035	1.920349	1.953068	0.999847
1995	1.920107	0.96573	1.53401	1.814881	1.81488	1.920108	0.965729
1996	1.962015	1.039652	1.647434	1.700135	1.700135	1.962015	1.039651
1997	1.854124	1.02727	1.673236	1.833473	1.833473	1.854124	1.02727
1998	2.083735	1.020968	1.762801	1.907512	1.907511	2.083734	1.020968
1999	1.97256	0.935353	1.784748	1.860586	1.860586	1.972561	0.935353
2000	1.454134	0.819553	1.485019	1.50945	1.50945	1.454134	0.819553
2001	1.449334	0.773139	1.485114	1.572801	1.572801	1.449334	0.773139
2002	1.475027	0.770872	1.660372	1.632798	1.632798	1.475027	0.770872
2003	1.312436	0.774788	1.548526	1.591541	1.591541	1.312436	0.774788
2004	1.272783	0.766691	1.173715	1.544335	1.544335	1.272783	0.766691
2005	1.188311	0.787082	1.152765	1.464358	1.464358	1.188311	0.787082
2006	1.185117	0.743799	1.1422	1.386268	1.386268	1.185117	0.743799
2007	1.214076	0.767145	1.132373	1.370816	1.370816	1.214076	0.767145
2008	1.224825	0.812853	1.440279	1.541933	1.541933	1.224825	0.812853

Notes: All series are the ratio of Chicago's per capita crime rate to the mean of the corresponding per capita crime rate of the other 24 largest cities. Series with "x" have been adjusted to reflect the underreporting of crime up to 1983. Murder is assumed not to have been underreported.

In Table 1, these rates for particular crimes are consolidated into "violent crime," which is murder, robbery, and assault. The rates are also consolidated into "major crime," which is murder, robbery, assault, and burglary.

Tables 3-6

Estimated equations for statistical significance of data on Chicago crime rates vs. 24 largest cities

Table 3

Violent crime, adjusted

Dependent Variable: XRVNORAPPC
Method: Least Squares
Sample: 1977-2008
Included observations: 32

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	1.123022	0.099635	11.27137	0.0000
DUM83	0.547261	0.110535	4.951027	0.0000

R-squared	0.449669	Mean dependent var	1.567672
Adjusted R-squared	0.431325	S.D. dependent var	0.323634
S.E. of regression	0.244055	Akaike info criterion	0.077611
Sum squared resid	1.786879	Schwarz criterion	0.169220
Log likelihood	0.758217	Hannan-Quinn criter.	0.107977

F-statistic	24.51266	Durbin-Watson stat	0.495504
Prob(F-statistic)	0.000027		

Table 4

Violent crime, before and after the gun ban

Dependent Variable: XRVNORAPPC
Method: Least Squares
Sample: 1977-2008
Included observations: 32

Variable	Coefficient	Std. Error	t-Statistic	Prob.
DUM7782	1.123022	0.099635	11.27137	0.0000
DUM83	1.670283	0.047863	34.89714	0.0000

R-squared	0.449669	Mean dependent var	1.567672
Adjusted R-squared	0.431325	S.D. dependent var	0.323634
S.E. of regression	0.244055	Akaike info criterion	0.077611
Sum squared resid	1.786879	Schwarz criterion	0.169220
Log likelihood	0.758217	Hannan-Quinn criter.	0.107977
Durbin-Watson stat	0.495504		

Table 5

Major crime, adjusted

Dependent Variable: XRMAJPC
Method: Least Squares
Sample: 1977-2008
Included observations: 32

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	0.733359	0.064289	11.40721	0.0000
DUM83	0.466040	0.071322	6.534279	0.0000

R-squared	0.587327	Mean dependent var	1.112016
Adjusted R-squared	0.573571	S.D. dependent var	0.241151
S.E. of regression	0.157475	Akaike info criterion	-0.798634
Sum squared resid	0.743955	Schwarz criterion	-0.707025
Log likelihood	14.77814	Hannan-Quinn criter.	-0.768268
F-statistic	42.69680	Durbin-Watson stat	0.411584
Prob(F-statistic)	0.000000		

Table 6

Major crime, before and after gun ban

Dependent Variable: XRMAJPC
Method: Least Squares
Sample: 1977-2008
Included observations: 32

Variable	Coefficient	Std. Error	t-Statistic	Prob.
DUM7782	0.733359	0.064289	11.40721	0.0000
DUM83	1.199399	0.030883	38.83628	0.0000

R-squared	0.587327	Mean dependent var	1.112016
Adjusted R-squared	0.573571	S.D. dependent var	0.241151
S.E. of regression	0.157475	Akaike info criterion	-0.798634
Sum squared resid	0.743955	Schwarz criterion	-0.707025
Log likclihood	14.77814	Hannan-Quinn criter.	-0.768268
Durbin-Watson stat	0.411584		

APPENDIX B. South Carolina crime data

Table 7

Reported crime in South Carolina, raw numbers

Year	Population	Violent crime total	Murder & non-negligent manslaughter	Forcible rape	Robbery	Aggravated assault
1961	2,407,000	3,318	280	224	501	2,313
1962	2,436,000	3,012	247	172	468	2,125
1963	2,483,000	4,075	249	150	536	3,140
1964	2,555,000	4,240	206	271	659	3,104
1965	2,542,000	4,504	245	285	546	3,428
1966	2,586,000	5,844	301	352	744	4,447
1967	2,599,000	6,015	291	379	909	4,436
1968	2,692,000	5,853	366	404	1,152	3,931
1969	2,692,000	6,449	336	378	1,347	4,388
1970	2,590,516	7,412	377	467	1,557	5,011
1971	2,627,000	8,188	436	478	1,640	5,634

Sources for data in Appendix B: FBI, Uniform Crime Reports as prepared by the National Archive of Criminal Justice Data. South Carolina state offense totals are based on data from all reporting agencies and official estimates for unreported areas.

Table 8

Reported crime rates in South Carolina, per 100,000 population

Year	Violent Crime Total	Murder & Nonneg. Mnslghtr	Forcible Rape	Robbery	Aggravated Assault
1961	137.85	11.63	9.31	20.81	96.09
1962	123.65	10.14	7.06	19.21	87.23
1963	164.12	10.03	6.04	21.59	126.46
1964	165.95	8.06	10.61	25.79	121.49
1965	177.18	9.64	11.21	21.48	134.85
1966	225.99	11.64	13.61	28.77	171.96
1967	231.44	11.20	14.58	34.97	170.68
1968	217.42	13.60	15.01	42.79	146.03
1969	239.56	12.48	14.04	50.04	163.00
1970	274.54	14.55	18.03	60.10	193.44
1971	311.69	16.60	18.20	62.43	214.47

Table 9

Reported crime in United States, per 100,000 population

Year	Violent Crime	Murder & nonneg. mnslghtr	Forcible rape	Robbery	Aggravated assault
1961	158.1	4.8	9.4	58.3	85.7
1962	162.3	4.6	9.4	59.7	88.6
1963	168.2	4.6	9.4	61.8	92.4
1964	190.6	4.9	11.2	68.2	106.2
1965	200.2	5.1	12.1	71.7	111.3
1966	220.0	5.6	13.2	80.8	120.3
1967	253.2	6.2	14.0	102.8	130.2
1968	298.4	6.9	15.9	131.8	143.8
1969	328.7	7.3	18.5	148.4	154.5
1970	363.5	7.9	18.7	172.1	164.8
1971	396.0	8.6	20.5	188	178.8

Table 10

South Carolina crime rates vs. U.S. rates

Year	Assault	Murder	Rape	Robbery	Violent
1961	1.121237	2.422917	0.990426	0.356947	0.871917
1962	0.984537	2.204348	0.751064	0.321776	0.761861
1963	1.368615	2.180435	0.642553	0.349353	0.975743
1964	1.143974	1.644898	0.947321	0.378152	0.870672
1965	1.21159	1.890196	0.926446	0.299582	0.885015
1966	1.429426	2.078571	1.031061	0.356064	1.027227
1967	1.310906	1.806452	1.041429	0.340175	0.91406
1968	1.015508	1.971014	0.944025	0.324659	0.728619
1969	1.055016	1.709589	0.758919	0.337197	0.72881
1970	1.173786	1.841772	0.964171	0.349216	0.755268
1971	1.199497	1.930233	0.887805	0.332074	0.787096

Note: All series are the ratio of South Carolina's per capita crime rate to the corresponding US average. "Violent crime" is the sum of murder, rape, robbery and assault.

Tables 11-14

South Carolina regressions

The following regressions test the hypothesis that South Carolina's mean per capita crime rate after relegalization was the same as before. DUM is a dummy variable that takes the value zero for all years before relegalization and the value one for all years after, beginning with the first full year after relegalization (1966). Its coefficient is the difference in the before and after means. The t-statistic tests the null hypothesis. In order to reject the null hypothesis of no difference, the prob value should be less than .05. Since none of the prob values are less than .05, we cannot reject the null hypothesis of no change in the crime rates. In other words, there was no statistically significant change in South Carolina's violent crime rates, relative to the U.S. as a whole, following the relegalization of handgun sales.

Table 11

Violent Crime

Dependent Variable: RVIOPC
Method: Least Squares
Sample: 1961-1971
Included observations: 11

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	0.873041	0.046360	18.83198	0.0000
DUM	-0.049528	0.062771	-0.789023	0.4504

R-squared	0.064698	Mean dependent var	0.846026
Adjusted R-squared	-0.039225	S.D. dependent var	0.101688
S.E. of regression	0.103663	Akaike info criterion	-1.532376
Sum squared resid	0.096714	Schwarz criterion	-1.460032
Log likelihood	10.42807	Hannan-Quinn criter.	-1.577980
F-statistic	0.622558	Durbin-Watson stat	1.600345
Prob(F-statistic)	0.450383		

Table 12

Murder

Dependent Variable: RMURPC
Method: Least Squares
Sample: 1961-1971
Included observations: 11

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	2.068559	0.100379	20.60741	0.0000
DUM	-0.178953	0.135914	-1.316664	0.2205

R-squared	0.161512	Mean dependent var	1.970948
Adjusted R-squared	0.068346	S.D. dependent var	0.232542
S.E. of regression	0.224455	Akaike info criterion	0.012683
Sum squared resid	0.453421	Schwarz criterion	0.085028
Log likelihood	1.930241	Hannan-Quinn criter.	-0.032920
F-statistic	1.733604	Durbin-Watson stat	1.598993
Prob(F-statistic)	0.220491		

Table 13

Rape

Dependent Variable: RRAPPC
Method: Least Squares
Sample: 1961-1971
Included observations: 11

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	0.851562	0.056276	15.13193	0.0000
DUM	0.086339	0.076198	1.133096	0.2865

R-squared	0.124846	Mean dependent var	0.898656
Adjusted R-squared	0.027607	S.D. dependent var	0.127610
S.E. of regression	0.125837	Akaike info criterion	-1.144699
Sum squared resid	0.142514	Schwarz criterion	-1.072355
Log likelihood	8.295846	Hannan-Quinn criter.	-1.190302
F-statistic	1.283907	Durbin-Watson stat	1.786085
Prob(F-statistic)	0.286456		

Table 14

Robbery

Dependent Variable: RROBPC
Method: Least Squares
Sample: 1961-1971
Included observations: 11

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	0.341162	0.009931	34.35250	0.0000
DUM	-0.001264	0.013447	-0.094027	0.9271

R-squared	0.000981	Mean dependent var	0.340472
Adjusted R-squared	-0.110021	S.D. dependent var	0.021078
S.E. of regression	0.022207	Akaike info criterion	-4.613866
Sum squared resid	0.004438	Schwarz criterion	-4.541521
Log likelihood	27.37626	Hannan-Quinn criter.	-4.659469
F-statistic	0.008841	Durbin-Watson stat	3.024530
Prob(F-statistic)	0.927148		

APPENDIX C. Law enforcement officers feloniously killed

1. City	2. Popul.	3. # of LEO feloniously killed 1996-2008	4. City popul. as % of total US popul.	5. City % of total US LEO feloniously killed	Col. 5 divided by Col. 4
New York	8,345,075	14	2.745%	1.939%	0.7065
L.A.	3,850,920	9	1.267%	1.247%	0.9842
Chicago	2,829,304	12	0.931%	1.662%	1.7862
Houston	2,238,895	11	0.736%	1.524%	2.0691
Phoenix	1,585,838	6	0.522%	0.831%	1.5943
Phil.	1,441,117	9	0.474%	1.247%	2.6031
Las Vegas	1,353,175	1	0.445%	0.139%	0.3112
San Ant.	1,351,244	5	0.444%	0.693%	1.5583
Dallas	1,276,214	3	0.420%	0.416%	0.9900
San Diego	1,271,655	1	0.418%	0.139%	0.3312
San Jose	945,197	1	0.311%	0.139%	0.4456
Honolulu	906,349	2	0.298%	0.277%	0.9293
Detroit	905,783	9	0.298%	1.247%	4.1845
Indnpls.	808,329	3	0.266%	0.416%	1.5630
Jacksnvll.	806,080	0	0.265%	0.000%	0.0000
San Fran.	798,144	2	0.262%	0.277%	1.0553
Charlotte	758,769	2	0.250%	0.277%	1.1100
Austin	753,535	2	0.248%	0.277%	1.1178
Columbus	751,887	2	0.247%	0.277%	1.1202
Ft. Worth	701,345	1	0.231%	0.139%	0.6005
Memphis	672,046	5	0.221%	0.693%	3.1332
Baltimore	634,549	6	0.209%	0.831%	3.9821
Louisville	629,679	2	0.207%	0.277%	1.3376
El Paso	612,374	1	0.201%	0.139%	0.6877
Boston	604,465	0	0.199%	0.000%	0.0000
D.C.	581,530	8	0.195%	1.108%	5.6926

US Population 2008 = 304,059,724
LEOs Killed 1996-2008 = 722

The District of Columbia is not among the 25 largest U.S. cities, but since D.C. was the only other large city with a handgun ban in the relevant period, we have provided data about D.C.

Sources: City population data from FBI, OFFENSES KNOWN TO LAW ENFORCEMENT BY STATE BY CITY, 2008, http://www.fbi.gov/ucr/cius2008/data/table_08.html. Total U.S. population data from FBI, CRIME IN THE UNITED STATES BY VOLUME AND RATE PER 100,000 INHABITANTS, 1989-2008, http://www.fbi.gov/ucr/cius2008/data/table _01.html. Police officers killed data from FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006, table 1, http://www.fbi.gov/ucr/killed/2006/table1.html (cumulative data for 1997-2006)(murders of police officers, including the city where each murder took place, are described in the "Summary" narratives for individual years 1997-2006, available via links from the LEOKA website); FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 1996; FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2007; FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2008, *available at* http://www.fbi.gov/ucr/ucr.htm#leoka

APPENDIX D. Statement of interest of additional amici

International Association of Law Enforcement Firearms Instructors

The International Association of Law Enforcement Firearms Instructors (IALEFI) is the world's largest association of police firearms instructors. Founded in 1981, IALEFI conducts national and regional training conferences for instructors. IALEFI comprises over 10,000 members, approximately ninety percent of whom are active, non-retired instructors.

IALEFI instructors include members of every federal law enforcement agency, and every branch of the U.S. military. Most IALEFI members are Americans, with Canadians comprising the largest group from the 15 other nations also having members. IALEFI publishes a quarterly magazine, *The Firearms Instructor*, and also publishes various manuals, including *Firearms Training Standards for Law Enforcement Personnel* and the *Standards & Practices Reference Guide for Law Enforcement Firearms Instructors.*

Southern States Police Benevolent Association

The Southern States Police Benevolent Association (SSPBA) consists of more than 21,000 law enforcement employees in 12 southeastern states. Members include local, state, and federal employees.

Texas Police Chiefs Association

The Texas Police Chiefs Association was founded in 1958 to promote, encourage and advance the professional development of Chiefs of Police and senior police management personnel throughout the State of Texas. TCPA represents over 600 law enforcement executives in Texas.

Law Enforcement Alliance of America

Founded in 1991, the Law Enforcement Alliance of America's 75,000 members and supporters are comprised of law enforcements officers, crime victims, and concerned citizens.

Congress of Racial Equality

The Congress of Racial Equality, Inc. (CORE) is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations. CORE's primary interests are the welfare of the black community and the protection of the civil rights of all citizens.

CORE brings a unique perspective to the subject matter of this most important constitutional litigation. Gun control laws were first enacted in this country for the express purpose of subjugating, dominating and oppressing blacks and other minorities. Even after the Civil War, Southern states used oppressive gun control laws to keep the newly-freed slaves in a servile condition, to render them defenseless and to deprive them of other rights. The intent of the drafters of the Fourteenth Amendment was to ensure the protection of the freedmen and unionists in the South by making the Bill of Rights, particularly the Second Amendment, effective against state and local government action.

Claremont Institute

The Claremont Institute is a nonpartisan organization, recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code. The mission of the Claremont Institute is to restore the principles of the American founding to their rightful preeminent authority in our national life.

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Doctor Burnett is a Senior Fellow at the National Center for Policy Analysis, in Dallas, Texas. He has written several monographs on firearms policy.

Independence Institute

Founded in 1985, the Independence Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing information to concerned citizens, government officials, and public opinion leaders.

Independence Institute staff have written or coauthored scores of law review and other scholarly articles on the gun issue, and several books, including the only law school textbook on the subject: ANDREW MCCLURG, DAVID B. KOPEL & BRANNON P. DENNING, GUN CONTROL AND GUN RIGHTS (NYU Press, 2002).

AMICUS
CURIAE
BRIEF

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Supreme Court of the United States

OTIS MCDONALD, ADAM ORLOV, COLLEEN LAWSON,
DAVID LAWSON, SECOND AMENDMENT FOUNDATION,
INC. AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

-v-

CITY OF CHICAGO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Jews for the Preservation of Firearms Ownership ("JPFO") is a non-profit tax-exempt Wisconsin corporation with more than 5,000 members and many more Internet-based supporters. Not a lobbying group, JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th Century's eight major genocides were direct victims of "gun control" laws and policies that disarmed them.

To JPFO, the Second Amendment to the United States Constitution stands as the Founding Fathers' clear and unmistakable legal statement that an armed citizenry is the bulwark of liberty and provides the fundamental basis for law-abiding Americans to defend themselves, their families, their communities and their nation against all aggressors, including, ultimately, a tyrannical government.

As a civil rights organization, JPFO's paramount interest is the preservation of liberty under the Bill of Rights. A uniform, proper interpretation of the Second Amendment, equally applicable at all levels of government, advances that interest. The instant case represents the first time since the it's landmark decision in *District of Columbia v. Heller* that this Court will have the opportunity to decide whether the Second Amendment applies comprehensively at all levels of government or whether

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

State and local governments may, notwithstanding the Framers' clear recognition of an individual right to keep and bear arms, disarm the people and render hollow the protections of the Second Amendment -- a provision of the Bill of Rights that is arguably the very last line in the defense of American liberty.

SUMMARY OF THE ARGUMENT

In his dissent in *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003), Judge Kozinski articulated the fundamental concept that "tyranny thrives best where government need not fear the wrath of an armed people." This simple observation captures the essential nature of the Second Amendment.

Throughout history, the disarmament of populations has all too frequently resulted in genocide and mass oppression. History is replete with this familiar pattern. To hold that the right to keep and bear arms does nothing to prevent disarmament efforts by State and local governments is to disregard what the Framers understood – that individual possession of arms is essential to preventing usurpation by the state.

During the 20th Century, more than 70 million people, after first being disarmed, were slaughtered by their own governments. This pattern appeared in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79) and Rwanda (1994) just to name a few.

In many cases, firearm confiscation proceeded only after the groundwork was laid by purportedly "reasonable" regulation and registration of firearms. History illustrates just how readily the standardless "reasonable" regulation of firearms invites large-scale abuse by the state and ultimately paves the way for wholesale confiscation of arms and the mass slaughter of the disarmed (much like the massive censorship that likely would arise under a rule permitting "reasonable" regulation of speech and press).

The critical role an armed populace plays in resisting tyranny and genocide was amply demonstrated not only by the manner in which a handful of Jews in the Warsaw Ghetto held off the Nazi military machine for nearly a month, but also by the less well-known armed resistance against the Nazis by certain Jews in Poland, Lithuania, and Byelorussia – resistance that resulted in a dramatically greater survival rate for the Jews in those communities who were able to arm themselves.[2]

Restricting the right to keep and bear arms to apply only against the federal government fundamentally undermines the ability of a population to resist such mass oppression. The Framers of the Fourteenth Amendment understood that State and local governments could disarm the people as easily as the national government. The Second Amendment was created as the final barricade against the unthinkable – the day when the rest of our Constitutional safeguards have failed us and we stand exposed to the brutal reality that so many in history have understood only too late.

Because disarmament so naturally and inextricably goes hand in hand with mass oppression and genocide, and because permitting State and local governments to ignore the right to keep and bear arms fundamentally undermines the Framers' intention that the American people never be stripped of their ability to defend themselves from such tyranny, it is of critical importance that this Court reverse the judgment below.

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[2] Even in our own history we saw African Americans in the South systematically denied arms by State and local governments in an effort to facilitate oppression.

ARGUMENT

THE COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE A RIGHT TO KEEP AND BEAR ARMS EQUALLY ENFORCEABLE AGAINST THE STATE AND FEDERAL GOVERNMENTS IS ESSENTIAL TO PREVENT THE RISE OF TYRANNY AND GENOCIDE

A. The Right to Keep and Bear Arms is Essential to Prevent the Rise of Tyranny and Genocide

> . . . the simple truth – born of experience – is that tyranny thrives best where government need not fear the wrath of an armed people.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting).

This simple recognition by Judge Kozinski encapsulates the essential nature of the Second Amendment.

The position urged by Respondents, that the guarantee afforded by the Second Amendment is effective only against the federal government, would eviscerate one of the essential purposes of the Second Amendment – to ensure that an armed populace is available to discourage the ambitions of a potential tyrant.

As this Court observed in *District of Columbia v Heller*, 128 S. Ct. 2783, 2801 (2008):

> . . . history showed us that the way tyrants had eliminated a militia consisting of all the able bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents.

The propensity for governments to disarm their populations to pave the way for tyranny is well known today and was well known to the Framers. During the course of the 20th century, the human race saw disarmament translate into not simply tyrannical governments but outright genocide, time and time again.

> All too many of the great tragedies of history -- Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name a few -- were perpetrated by armed troops against unarmed populations.

Silveira, 328 F.3d at 569-70 (Kozinski, J., dissenting).

Denying the right to keep and bear arms has been a *modus operandi* of official repression since the advent of the modern state. A right to keep and bear arms effective only against federal but not State or local encroachment utterly fails to protect against the very disarmament that the Framers sought to prevent.

Because of the tragic history of citizen disarmament, this Court should declare that the Respondents' approach to the right to keep and bear arms is inconsistent with our Constitution. It would be nonsensical if State and local governments were permitted to accomplish through the back door the outright disarmament of the people when the federal government is so plainly barred from doing so.

It is sobering to realize that every instance of genocide of the Twentieth Century was preceded by the disarming of a civilian population. More than 70 million people in the aggregate were killed in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79), and Rwanda (1994). AARON ZELMAN & RICHARD W. STEVENS, DEATH BY "GUN CONTROL:" THE HUMAN COST OF VICTIM DISARMAMENT 3 (2001); *see also* R.J. RUMMEL, DEATH BY GOVERNMENT 3-10 (1997) (comprehensive analysis of genocide resulting from imbalance of power between civilians and governments).

In the past, some oppressive governments have simply engaged in the direct and outright confiscation of privately held weapons prior to committing mass murder. In other cases, however, confiscation only followed after the groundwork had been laid by "reasonable" regulation and registration of firearms. History illustrates just how readily "reasonable" regulation of firearms invites large-scale abuse by the state and ultimately paves the way for wholesale confiscation of arms and the mass slaughter of the disarmed.[3]

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[3] Invariably the proponents of "reasonable" firearms regulations intend by this terminology a largely standardless approach which invites the type of abuse which has been rampant worldwide within the last century. One need not

A prime example is the Ottoman Empire's attempted extermination of the Armenians. After deposing Sultan Abdul Hamid II in 1908, the reforming "Young Turks" enacted Article 166 of the Ottoman Penal Code (1911) prohibiting the possession, carrying, and importation of "prohibited weapons" without government permission. ZELMAN & STEVENS, *supra*, at 145. Subsequently the Turkish government ordered that all Armenians turn over all firearms, bombs, and daggers. The government further ordered that the Armenians be deported to concentration camps, and that any Armenians "who dare to use arms" to resist deportation were to be "arrested dead." *Id.* at 136-38 (*citing* Official Proclamation to Deport Armenians, June 26, 1915, Preamble, Item 5, Item 6).

Ultimately, between 1 and 1.5 million Armenians were murdered by their government. The victims had been rendered ill-equipped to raise a hand in their own defense.

In April of 1918, shortly after coming to power, the Bolshevik government that would soon become the Soviet Union enacted its first gun control law, requiring the licensing of all firearms owners through the issuance of "certificates." ZELMAN & STEVENS, *supra*, at 160. As of August 17 of that year, by resolution of the Central Executive Committee, the certificates evolved into registration documents, requiring that gun owners identify with specificity the firearms in their possession. *Id.* at 161.

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strain too hard to imagine the type of broad censorship that could be implemented under the guise of "reasonable" regulation of speech or of the press.

In October and December 1918, the government issued a series of decrees providing for the wholesale surrender of firearms by the population. Significantly, however, an exception was carved out for members of the Communist Party. *Id.* at 161-63. In the spring of 1920 war erupted with Poland, and on July 12, 1920 an even more stringent law was enacted further restricting the class of individuals who could possess firearms, imposing criminal liability on officials who failed to strictly enforce the requirements of these laws and empowering the secret police to enforce the firearm confiscation laws. *Id.* at 163-65.

Accordingly, after Stalin rose to power in 1924, the wholesale slaughter of those under Soviet rule was underway, with the population having been rendered utterly unable to resist. Between the forced collectivization of agriculture from 1929 through 1933, the show trials of 1934 to 1938, and the continued slaughter of Soviet citizens both during and after World War II by their own government, the *tens of millions* of Soviet citizens murdered by their own government simply had no recourse. They had been thoroughly disarmed years earlier because they were not Party members, high-ranking officials or otherwise within the class of persons permitted to possess arms. *Id.* at 166-73.

Certainly the most infamous genocide of the Twentieth Century was the Nazi slaughter of the European Jews. Less well-known, however, is the role that legal gun control played. Seemingly innocuous, a 1928 law enacted by the liberal pre-Nazi Weimar government prohibited firearms ownership without a license. After they attained power, however, the Nazis were able to selectively enforce this law against the Jews. A 1936 memorandum of the Bavarian Political Police documents the procedure:

> In principle, there will be very few occasions where concerns will not be raised regarding the issuance of weapons permits to Jews. As a rule, we have to assume that firearms in the hands of the Jews represent a considerable danger to the German people.

Id. at 89-90 (*citing* Bayerishe Politische Polizei, Waffenscheinen an Juden, February 5, 1936). Eventually the Nazis ended the "registration" charade. In a series of decrees issued in November 1938, all German Jews were prohibited from possessing firearms. *Id.* at 95-98 (*citing, inter alia, Nazis Smash, Loot and Burn Jewish Shops and Temples Until Goebbels Calls Halt*, N.Y. Times, Nov. 11, 1938, at 1).

In 1938, the Nazis also updated the 1928 law and severely limited and regulated the rights of non-Jews to own firearms. Exempt from this law were "authorities of the Reich," "various government entities," and "departments and their subdivisions of the National Socialist Workers' Party designated by the deputy of the Führer." *Id.* at 90-91 (*citing* Reichgesetzblatt 1938, I, 265, §11). The Nazi laws thus considerably simplified the job of rounding up Jews and other declared "enemies of the State."

In his dissent in *Silveira*, Judge Kozinski illustrated the impact of having an armed populace ready to resist a genocidal regime:

> If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

Silveira, 328 F.3d at 570 (Kozinski, J., dissenting). *See also* Steven P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483 (2000) (Nazi augmentation of Weimar gun control laws rendered Jews defenseless to officially sanctioned arms roundups and eventual victimization).

In fact, while the armed resistance at the Warsaw Ghetto is well known, less well known are the multiple instances of armed resistance against the Nazis by certain Jews in Poland, Lithuania and Byelorussia, resulting in a dramatically greater survival rate for the Jews in those communities who were able to arm themselves. *See* David B. Kopel, *Armed Resistance to the Holocaust*, 19 J. FIREARMS & PUB. POL'Y 144, 150-58 (2007), http://ssrn.com/abstract=1022081.

More recently, the world saw nearly 800,000 defenseless members of the Rwandan Tutsi tribe slaughtered by their Hutu rulers during the Spring and Summer of 1994, due to a 1979 law that left the Tutsi minority largely disarmed. ZELMAN & STEVENS, *supra*, at 123-31 (citing original sources).

The same tragic formula has recently been playing out in Zimbabwe as the government has supported large-scale violence against white land owners and has undertaken a comprehensive round up of firearms owned by those landowners. *Id.* at 183-97 (citing original reports).

Recognizing the critical function of the Second Amendment in preventing tyranny, this Court, in *Heller*, acknowledged that the Second Amendment precludes the federal government from disarming the American people. The Court did not address the question of whether State and local governments may, nevertheless, do that which the federal government may not.

B. The Right to Keep and Bear Arms Must Bind State and Local Governments Through the Fourteenth Amendment Because Disarmament and Subsequent Oppression of the People Could Otherwise be Achieved Indirectly through State and Local Law

Local governments and authorities have a history not only of oppression in their own right but also of assisting in the oppressive activities of national governments. Ignoring this reality would fundamentally undermine the protective value of this Court's ruling in *Heller*.

The Nazis, for example, accomplished their mass killing with substantial assistance from local police units. In his seminal work ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND (1998), Christopher R. Browning recounts how the German

Order Police, consisting of local police units transformed into genocide squads, were instrumental in carrying out much of the mass killing that was the hallmark of the Nazis' "Final Solution." Browning explained:

> In 1938 and 1939, the Order Police expanded rapidly as the increasing threat of war gave prospective recruits a further inducement. If they enlisted in the Order Police, the new young policemen were exempted from conscription into the army. Moreover, because the police battalions – like U.S. National Guard units – were organized regionally, they seemed to offer the guarantee of completing one's alternative to regular military service not only more safely but closer to home. . . .
>
> In late October [1941] the two companies of Order Police and their Lithuanian auxiliaries were ordered by the army to liquidate all the Jews in Slutsk, south of Minsk, a town of some 12,000 inhabitants, one-third Jewish. . . .
>
> The presence of the Order Police was felt in three ways. First, each of the major towns in the Lublin district had a Schutzpolizei agency. Included in its responsibilities was the supervision of the Polish municipal police. Second, scattered throughout the towns in the countryside were small detachments of Gendarmerie. Finally, three

> battalions of Order Police were stationed in the Lublin District.
>
> By the end of September 1942 Reserve Police Battalion 101 had participated in the shooting of approximately 4,600 Jews and 78 Poles and had helped deport approximately 15,000 Jews to the extermination camp at Treblinka.

Id. at 5, 19, 51, 104. Thus, national governments do not enjoy a monopoly on oppression. Fundamental rights are at risk from every level of government.

Civilian disarmament by State and local authorities also played an unfortunate part in our own nation's history of state-approved repression of African Americans. There was a wide variety of "gun control for blacks" legislation, both before and after the Civil War, including both naked prohibition and licensing. ZELMAN & STEVENS, *supra*, at 204 (citing numerous sources).

When slavery was legal, the slave states had comprehensive legal and customary prohibitions on black ownership of firearms. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-American Reconsideration*, 80 GEO. L.J. 309, 335-38 (1991). The authors note that, for example, in Florida "patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process." *Id.* In the North, in contrast, blacks successfully defended themselves against mob violence by bearing arms in their own defense. *Id.* at 341-42 (cited in *Silveira*, 328 F.3d at 569, Kozinski, J., dissenting).

In a telling passage from *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857), Chief Justice Taney noted that black citizenship was unthinkable because blacks would have "the right to keep and carry arms wherever they went."

Disarmament *routinely* appeared as a component of the post-Civil War Black Codes, laws that were designed to limit blacks' freedom as much as possible. *Silveira* 328 F.3d at 577. (Kleinfeld, J., dissenting); Cottrol & Diamond, *supra*, at 344. For instance, Mississippi enacted a statute specifically prohibiting freed blacks from owning and possessing any weapon without a license. Louisiana and Alabama followed suit. Cottrol & Diamond, *supra*, at 344-45 nn.176-78 (citing and quoting original sources).

The passage of the Fourteenth Amendment invalidated the expressly racial "gun control" laws, but restrictions on firearms possession continued. Examples included laws that permitted the carrying of military firearms but not inexpensive weapons that freed blacks could afford.[4] Such laws rendered blacks defenseless in public places where racial attacks often occurred. *See* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population:" Firearms Regulation and Racial Disparity – the Redeemed South's Legacy to a National Jurisprudence*, 70 CHI.-KENT L. REV. 1307-35 (1995) "The model of gun control that emerged from the redeemed

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[4] Compare such laws to modern day laws banning so-called "Saturday Night Specials," the most significant feature of which is not that they are any more deadly than other firearms (which they are not) but that they are inexpensive and thus affordable to the poor for self defense.

South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent." *Id.* at 1333.

The racial design of civilian disarmament laws was no secret. Thus, in ***Watson v. Stone***, 4 So.2d 700, 703 (Fla. 1941), in his special concurrence, Justice Buford noted that the Florida gun control provision at issue was specifically passed to "for the purpose of disarming Negro laborers . . . [and] was never intended to be applied to the white population."

The black freedmen understood that their disarmament would only be the beginning of white oppression.

> "As one of the disfranchised race," said a Louisiana black, "I would say to every colored soldier, 'Bring your gun home'."

ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 120 (1988).

Legal restrictions on blacks' firearm ownership meant that blacks frequently were unable to protect themselves from white terrorists and lynchings. "Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

Further, "[p]rivate terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such groups could only be realistically resisted with private firearms." *Silveira,* 328 F.3d at 577 (Kleinfeld, J., dissenting).

As this Court noted in *Heller*:

> A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms . . . . Their arms are taken from them by the civil authorities . . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed.* [Emphasis in original.]

128 S. Ct. at 2810.

Thus, the Framers of the Fourteenth Amendment knew all too well the ability of the States to engage in wholesale disarmament of the people. This Court recognized as much in *Heller*:

> With respect to the proposed [Fourteenth] Amendment Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead."

Id. at 2811.

Perhaps the most egregious historical example of the grave consequences which can result when the States may freely ignore the right to keep and bear arms arose in the context of the Colfax Massacre of 1873 -- the horrific event which produced *United States v. Cruickshank*, 92 U.S. 542 (1875).

The Colfax Massacre, in which *between 60 and 80* black freedmen were slaughtered defending the Grant Parish, Louisiana Courthouse, occurred in the aftermath of the contested 1872 Louisiana gubernatorial election. Marching to Colfax to take control of Grant Parish by force, partisans favoring defeated candidate John McEnery arrived on April 13, 1873, killed dozens of black men in the initial fighting and then slaughtered several dozen black prisoners later that evening. CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 90-109, 265-66 (2008).

The perpetrators of the massacre were charged under Section 6 of the federal Enforcement Act of May 31, 1870 which prohibited, in part:

> . . . two or more persons [banding or conspiring] together . . . with intent to prevent or hinder [any citizen's] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States . . . .

Cruickshank, 92 U.S. at 548. The Enforcement Act was in part an attempt by Congress to enforce the provisions of the newly ratified Fourteenth Amendment. LANE, *supra*, at 4. The defendants were charged with, among other things, conspiring to prevent the black freedmen from "bearing arms for lawful purposes." *Id.* at 553.

In vacating the convictions, this Court refused to acknowledge that the Fourteenth Amendment was created in part as a mechanism for the enforcement of fundamental rights such as the right to keep and bear arms. The Court held that the Second Amendment "means no more than that it shall not be infringed by Congress," thus rendering the Enforcement Act impotent to punish the disarmament and subsequent massacre of the black freedmen. *Id.*

These Nineteenth and Twentieth Century examples illustrate how well the Framers of the Constitution and the Framers of the Fourteenth Amendment understood the essential role an armed citizenry plays in the defense of a free people. They had before them a rich history of European despotism from which to draw the keen understanding that armed people are free people and thus were unmistakably aware of the essential nexus between firearms ownership and liberty.

Contemporary writings demonstrate that the Framers of the Constitution knew this truth. In the debates over ratification of the Constitution, one New York anti-federalist writing as "Brutus" (thought to be New York judge and convention delegate Robert Yates) noted that the great imbalance of power between government and the people posed a great risk:

> The liberties of the people are in danger from a large standing army, not only because the rulers may employ them for the

> purposes of supporting themselves in any usurpations of power . . . but there is a great hazard that any army will subvert the forms of government, under whose authority they are raised, and establish one according to the pleasure of their leader.

BRUTUS NO. X, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 287 (Ralph Ketcham ed., 1986)

Alexander Hamilton's answer, in FEDERALIST 29, emphasized how armed citizens would oppose and deter the excesses of a standing army:

> . . . if circumstances at any time should oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

James Madison, similarly, argued that the American people, unlike most of their counterparts in Europe, have the advantage of being armed, and thus a standing army in the hands of a tyrant could not overcome the collective armed defensive efforts of the citizenry. THE FEDERALIST NO. 46 (James Madison).

On January 7, 1788, "The Republican" affirmed the benefits of maintaining an armed citizenry:

> In countries under arbitrary government, the people oppressed and dispirited neither possess arms or know how to use them. Tyrants never feel secure until they have disarmed the people.

THE ORIGIN OF THE SECOND AMENDMENT 190 (David E. Young ed., 1991) (quoting article in The Connecticut Courant).

In his dissent in *Silveira*, Judge Kleinfeld noted that the "historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms." *Silveira*, 328 F.3d at 582 n.76.

The struggle culminated in the drafting of the English Declaration of Rights. In the aftermath of Charles II's and James II's attempts to disarm the people, the Declaration of Rights became an explicit condition to the accession of William and Mary to the throne in 1689. It is the Declaration of Rights that forms the basis of Blackstone's understanding of the basic rights of Englishmen. *Id.* at 582-83.

Aptly describing the Second Amendment as a "doomsday provision," Judge Kozinski saw the Second Amendment as:

> one designed for those exceptionally rare circumstances where all other rights have failed --- where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira, 328 F.3d at 570.

Thus the basic function of the Second Amendment is rendered a nullity if the right to keep and bear arms can be ignored by State and local governments. Such a limitation turns the very concept of self defense on its head. As the bloody history of disarmament has shown, a people can only protect itself when the right to possess basic personal arms is widespread. Protecting the right against federal encroachment yet allowing wholesale violation of the right by State and local officials is no protection at all. Ultimately, such a limited approach still deprives the populace of its ability to defend itself from tyrannical and genocidal rulers, since State and local officials can render the people defenseless as easily as the national government. This much was obvious to the Framers of the Constitution and the Fourteenth Amendment – and also, unfortunately, well known to the tyrants of the Twentieth Century and today.

The great fortune of the American people is that our Constitution was crafted in such a manner as to minimize the likelihood of needing our arms to oppose a tyranny arising from within. Yet, the Second Amendment was created as the final barricade against the unthinkable – the day when the rest of our Constitutional safeguards have failed us and we stand exposed to the brutal reality that so many in history have understood only too late.

Historical documents disclose the Framers' deep concern about the potential rise of tyranny and the people's means to deter it. *See United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 55-87 (2d ed. 1994) (quoting and citing numerous original sources).

The tragic history of civilian disarmament cries a warning against any systematic attempts to render innocent citizens ill-equipped to defend themselves from tyrants, terrorists, despots or oppressive majorities. Given the grave consequences of civilian disarmament and the Framers' express and unmistakable efforts to preclude such disarmament, it is essential that this Court confirm that the Second Amendment right to keep and bear arms is fully applicable against State and local governments through the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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NOVEMBER 23, 2009

AMICUS
CURIAE
BRIEF

(51)

No. 08-1521

IN THE

Supreme Court of the United States

OTIS McDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF LAW PROFESSOR AND STUDENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND BRIEF *AMICI CURIAE*

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Represented by Professor Douglas Berman amici curiae hereby formally move for leave to file a brief in support of Respondents in the above-captioned case.

I, Douglas A. Berman, state as follows:

1. I am an attorney admitted to practice law in the State of New York and a member of the Supreme Court Bar and am a law professor at The Ohio State University Moritz College of Law.

4. As of this writing, I have been unable to secure the *pro bono* services of a law firm without a significant conflict of interest in order to obtain needed assistance in completing the various administrative formalities involved in preparing and filing the brief. I was hopeful that the parties had filed blanket consents for the filing of such briefs, but have recently learned that they have not. Consequently, and in an effort to file this brief in a timely manner, counsel is now submitting this motion seeking leave to file with the current version of the proposed brief that amici wish to file.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE*

Amicus curiae are a law professor and law students who have been teaching, studying and writing about the scope and reach of the Second Amendment in the wake of the Court's ruling in *District of Columbia v. Heller.* The drafters of this brief are a law professor and students who recently participated in a law school seminar in which they studied this Court's *Heller* decision, its implications and its litigation aftermath.

Amici offer this brief to highlight jurisprudential principles that they fear have not received sufficient attention in the recent debate over whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Due Process or its Privileges or Immunities Clauses. Specifically, amici seek to enhance this Court's consideration of *how* the Second Amendment should apply to state laws and local regulations if it is to be incorporated. Amici are eager for this Court to recognize that the bulk and the brunt of firearm regulation is local and to consider the importance of developing Second Amendment jurisprudence that is especially attentive to local needs and modern litigation realities.

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* Under Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

District of Columbia v. Heller clarified that the Second Amendment protects an individual right "to keep and bear arms," and this case presents this Court's first opportunity to consider not just *whether*, but also *how*, this right is to be incorporated against states and localities. Though "jot for jot" incorporation became the modern norm for how most constitutional rights will be applied to states and localities, the Court has sometimes taken an alternative approach to the incorporation of certain Bill of Rights provisions. For example, though the Sixth Amendment jury trial right has been incorporated against the states, the unanimity requirement applied in federal court does not apply to state criminal justice systems. Similarly, First Amendment doctrines are in various ways expressly attentive to distinctive state and local standards and to distinctive state and local concerns. The modern development of Second Amendment jurisprudence in the wake of *Heller* should likewise include a formal and express recognition of distinct state concerns and it should be especially attentive to the unique public-safety interests and distinctive structural dynamics surrounding the regulation of firearms by localities.[1]

Tradition dating back before and through the Framing era, long-standing constitutional doctrines, undisputable public safety interests, and litigation practicalities all provide significant support for developing Second Amendment jurisprudence with attentiveness to the unique interests and concerns of localities. This Court can and should demonstrate its respect for historical traditions, for established constitutional doctrines, for public safety and for sound government administration by expressly holding that local firearm regulations, assuming they are subject to Second Amendment scrutiny, are subject to a less rigorous form of constitutional scrutiny than is to be applied to federal or even state firearm regulations.

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[1] For the purposes of this brief, "localities" refer generally to any governmental unit smaller than a state (city, township, county, etc.) that has a governing body with rulemaking authority.

Historically, localities have been the locus of firearm regulations. Before, during, and after the framing of the Constitution, localities imposed and enforced, with great deference from the states, numerous forms of firearm regulation. Localities raised and maintained militias, conducted firearm censuses, and closely regulated the use and storage of firearms. Traditionally, varying local circumstances meant that localities needed to, and were free to, tailor regulatory solutions on a case-by-case basis. Though this Court has held that localities are instrumentalities of the states, *see Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), states have continued to defer to localities in many regulatory areas, including regulations on the possession and use of firearms, through various home rule doctrines.

This Court, as a matter of established constitutional doctrine, has long distinguished localities from the states. More than a century ago, the Court refused to extend the sovereign immunity found in the Eleventh Amendment to localities. In *Lincoln County v. City of Luning*, 133 U.S. 529 (1890), and it has more recently has found localities to be a "person" under 42 U.S.C. § 1983. As a result, localities are amenable to lawsuits and can be liable in damages for violations of constitutional rights. Moreover, in a variety of other constitutional contexts, this Court has acknowledged, and has often stressed, the need and value of deferring to local decision-making concerning truly local matters.

Local firearm regulations are uniquely important for public safety and in the overall development of sound public policy. Firearm ownership and use varies widely amongst localities; there must be and is considerable variation in local firearm regulations, variations that wholesale federal—and even state—firearm doctrines cannot effectively capture. Localities are especially attentive to local public safety concerns and local gun cultures and customs. Moreover, local amenability to suit, and exposure to damages, justifies an approach to Second Amendment incorporation that acknowledges that citizens may and likely will seek redress for perceived wrongs from localities, but not the states, through tort suits. Localities, which have a direct and immediate responsibility for the safety and security of their constituencies, will always have a strong incentive to balancing liberty and community interests with ever-evolving public safety needs in how they regulate gun possession and use.

Though all government actions now engender a risk of litigation, in the wake of *Heller*, local firearm ordinances are a potential wellspring of civil suits targeted at democratically enacted ordinances. Local citizens always have been, and always will be, able to check overreaching government regulation through the ballot box. But if disgruntled citizens can readily make all sorts of creative constitutional claims against local firearm regulations, this check will be operationalized through litigation in federal courthouses, rather than through the city halls and town meetings of the local legislative process.

For these reasons, amici urge the Court to hold that local firearm regulations, assuming they are subject to Second Amendment scrutiny, are subject to a less rigorous form of constitutional scrutiny than is to be applied to federal or even state firearm regulations. Were this Court to so hold, amici respectfully suggest that this Court could and should remand this case to the Seventh Circuit to determine whether Chicago's unique local interests in firearm regulation can justify the local regulation at issue in this case under a less rigorous form of constitutional scrutiny than was applied by this Court in *Heller* to strike down a federal firearm regulation.

ARGUMENT

I. Historic Traditions Justify a Less Rigorous form of Constitutional Scrutiny of Firearm Regulations by Localities.

Whether and how the Constitution might reserve some inherent powers to localities is a complicated and widely debated topic beyond the scope of the present case and controversy.[2] But, whether with or without a mandate from the Constitution, both traditional and contemporary practices showcase that localities have long possessed and exercised inherent regulatory powers, and that these powers have often involved the regulation of firearms.

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[2] For an interesting and recent perspective on the inherent powers of localities, see Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 (2009) (discussing the federal constitutional limits on the ability of the state to regulate localities).

A. During the Framing Era, localities broadly regulated firearm possession and use.

The Second Amendment was written at a time when localities used numerous ordinances to control firearm sales, to arm militias, and to provide for their own defense. At the time of the framing, it was not believed that any clause of the Constitution stripped a locality of its inherent power to regulate firearms within its boundaries. Thus, localities traditionally had an inherent power to regulate firearms and their use, especially for the purpose of advancing public safety and the common defense.

As this Court has recognized, the regulation of firearm use and storage by local governments predates the Constitution, *see Heller*, 128 S. Ct. at 2819–20, and localized public safety concerns often were paramount justifications for gun regulations that sought to balance individual rights and the public welfare. For example, as early as 1648, in what was then New Amsterdam, firearms were confiscated because of fears that colonists would sell them to Native Americans. *See* JAMES B. WHISKER, THE RISE AND DECLINE OF THE AMERICAN MILITIA SYSTEM 129 (1999). The confiscated firearms were then redistributed to the colonists on the condition that they maintain them in their homes for self-defense. *Id.* Acceptance of a firearm opened the door to inspection by the local government in order to ensure that the gun was accounted for and operational. *Id.*

A common colonial version of firearm registration involved localities conducting censuses of all the firearms in possession of citizens. *See* Michael A. Bellesîles, The Origins of Gun Culture in the United States, 1760–1865, in WHOSE RIGHT TO BEAR ARMS DID THE 2ND AMENDMENT PROTECT? 150 (Edward Countryman ed., 2000). Other colonial-era local laws frequently placed restrictions on loaded weapons, gunpowder storage, and the discharging of weapons in streets, taverns, and, curiously, at home. *See Heller*, 128 S. Ct. 2819–20; *see also id.* at 2848–49 (Breyer, J., dissenting).

Generally, colonial localities "claimed authority over anything that happened within its borders." ROBERT A. GROSS, MINUTEMEN AND THEIR WORLD 10 (1976). The militia, and the weaponry it wielded, was no exception. In Concord, town officials organized militia enlistments, training schedules, and even set enlisted pay scales through a town vote. *Id.* at 60, 132. In the early colonial militias, most firearms were made locally, and virtually all firearms were maintained and repaired by local gunsmiths. *See* WHISKER, *supra*, at 97.

Along with the responsibility of raising and maintaining a militia, localities across the colonies often provided for their own defense. *See id.* at 106. At the outset of colonial America, "colonists were expected to fend for themselves" and did so by constructing various fortifications to defend their fledgling towns against raids from Native Americans. *Id.* at 192. During the Revolution, localities guarded and defended military stores as well as kept watch over British prisoners of war. *See* GROSS, *supra*, at 132–33.

Colonial localities exercised an enormous amount of control over individual firearms. This control was bound up with the preeminent role that individual firearms played in the raising and maintenance of a militia and the necessity of city defense—both firmly in the purview of the colonial-era locality. The vital role that the upkeep and accountability of firearms played in the very survival of the colonial locality made regulation indispensable. Local circumstances—such as varied community defense needs, diverse weather and wildlife concerns, and different population densities—meant that each locality had different societal demands and thus different bases to tailor regulatory solutions to their unique firearm needs and problems.

The ratification of the Constitution did not change the validity and necessity of local firearm regulations. The same local concerns over public safety and the maintenance of militias continued after ratification, and localities through the Nineteenth Century often banned or otherwise regulated the possession a use of various weapons. *See* Brief of Respondents at 28-30 (noting that weapon bans "when necessary for the public welfare . . . has ample historical pedigree" and that "bans on common weapons addressed unique local conditions"). Against this backdrop, it is especially difficult it imagine that the Framers and ratifiers of the Constitutional would have ever wanted, expected, or intended for truly local firearm regulations to be subject to repeated and robust scrutiny by federal judges.

In upholding a Nineteenth century firearm regulation, this Court recognized that the Constitution had reserved to localities "powers which relate to merely municipal legislation." *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (internal quotations omitted). In Presser, the Court supported its decision by citing to numerous cases from the 1800's that showed deference to locality regulations. *Id.* Even if *Presser* is subject to modern reconsideration, it remains a sound and important reminder of this Court's long-standing recognition of the power of local governments to prescribe firearm regulations and of the importance of federal courts showing respectful deference to such local regulatory measures.

B. Modern localities still regularly exercise regulatory powers to ensure the safe possession and use of firearms by law-abiding citizens.

The contemporary norms of locality power include control over local services and utilities, as well as matters of municipal public safety. As evidenced by the very nature of the Respondents in this case, the regulation of firearms, as a traditional power of localities, still falls within our modern broad conception of local governance. The scope of local power is inherited from two sources: state law and this Court's jurisprudence.[3] Together, these two sources underpin locality firearm regulation.

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[3] A wide-ranging debate regarding the scope of local power is the subject of an entire field of law. *See* GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY, 188 (1985).

As a matter of state law, forty-eight states have enacted city home rule doctrines and twenty-eight of these states have broad functional home rule. *See* UNITED STATES ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION, 20–21 (1993) *available at* http://www.nlc.org/about_cities/cities_101/153.aspx. (last visited Dec. 4, 2009). Broad functional home rule allows the greatest amount of discretion and autonomy in local rule making. *Id.* at 17. The vast number of home rule states indicates a preference for allowing localities to use their inherent power to self-govern. Even if this structure descends from a theory of state delegation, localities in most states still exercise a great amount of power.

In addition to state law, this Court's jurisprudence has recognized the power of localities to exercise vast control over multiple arenas. *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 54 (1978) (finding "local taxation for local expenditures" constitutional); *Village of Bella Terre v. Boraas*, 416 U.S. 1, 7–8 (1974) (upholding zoning ordinance restricting the number of unrelated people per single-family home valid). Localities have purview over many services whose funding derives from local taxes. *See, e.g., Rodriguez*, 411 U.S. at 54 (discussing local provision of services including police, fire-fighters, and hospitals). As stated by one commentator, this Court's rulings in a line of cases regarding locality power are an "illustration of a strong trend toward deference to local government self-determination." M. David Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors* *in the Political Dramas of the 1980's*, 21 B.C. L. Rev. 763, 770 (1980).[4]

Because localities traditionally regulated firearms, and because the contemporary norm of inherent local power has increased rather than decreased, localities still possess the inherent power to regulate firearms. In light of these traditions and in light of modern needs, this Court should expressly declare that local firearm regulations, assuming they are subject to Second Amendment scrutiny, are subject to a less rigorous form of constitutional scrutiny than is to be applied to federal or state firearm regulations.

II. Long-standing Constitutional Doctrines Justify a Less Rigorous Form of Constitutional Scrutiny for Gun Regulations Enacted and Enforced by Localities.

This Court's precedents generally hold that localities are mere instrumentalities of the states and as such do not have distinct legal status. *See, e.g.*, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 133 (2004).

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[4] Furthermore, where local interests have been at odds with state law, this Court has recognized the power of a locality to countermand state law when acting under a federal mandate. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 322 (1958). Even without an express federal grant, some cases have been read to allow local rulemaking to trump state authority. *Cf.* Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 Urb. Law. 257, 265–66 (1999) (reading *Romer v. Evans*, 517 U.S. 620 (1996), as an example of local law trumping state law).

But this Court has distinguished localities from the states in one critical area—amenability to suit for constitutional violations—which in turn may further justify a different standard of constitutional scrutiny for certain types of local regulations.

The main source of risk imposed upon localities emerges from the preeminent federal civil rights statute, 42 U.S.C. § 1983. Section 1983 imposes liability on "persons" acting under the color of state law when they violate federal rights. 42 U.S.C. § 1983 (2006). This Court, in *Monell v. Department of Social Services of City of New York*, held that the term "person" applied to cities, but not to the states. 436 U.S. 658 (1978). That holding was consistent with the well-settled precedent that foreclosed the sovereign immunity found in the Eleventh Amendment from localities. *See Lincoln County v. Luning*, 133 U.S. 529 (1890).

This Court has read § 1983 to apply both to local government officials as well as the locality generally. Importantly, the broad liability imposed by § 1983 is tempered when applied to individuals by various immunity doctrines. Individual officials and officers "performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Unlike individual officials sued in their personal capacities, however, localities do not have access to either absolute or qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980). Some scholars have suggested that this legal regime essentially imposes strict liability on localities for constitutional torts. See John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 69 (1998).

The current legal regime poses a difficult problem for localities. On one hand, localities are instrumentalities of the states and therefore are responsible for implementing and enforcing state statutes. At the same time, localities are open to the risk of liability if such actions are at some point found to be unconstitutional. "If the city is responsible for the constitutional wrong, however, then it is liable in damages, no matter how unforeseeable the judgment of unconstitutionality might have been at the time of enforcement." David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2236 (2006).

Given the real threats of constitutional litigation and liability facing localities, constitutional doctrines should (and often do) include a formal and express attentiveness to local conditions and needs. This Court's First Amendment jurisprudence recognizes these principles, as it has obscenity standards linked formally to local norms, *see Miller v. California*, 413 U.S. 15, 24-31 (1973) (making "contemporary community standards" central to what qualifies as protected expression), and it takes account of local needs when assessing time, place and manner regulations on forms of expression. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stressing that the "nature of a place [and] the pattern of its normal activities" are central assessing what regulations on protected First Amendment expression are permissible). More broadly, as the late Chief Justice William Rehnquist stressed when fearing local billboard regulation would be subject to exacting First Amendment scrutiny, "little can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess such legislative or administrative determinations." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting) (noting the value in deferring to local decision-makers in the determination of aesthetic regulation). *Cf. generally* Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201 (2008) (developing arguments "for implementing the Second Amendment, after *Heller*, in a way that is informed by federalism values").

III. Modern Public Safety Concerns Justify a Less Rigorous Form of Constitutional Scrutiny of Firearm Regulations by Localities.

Firearm ownership and usage varies, sometimes dramatically, across localities both among and within states. "Residents of rural areas and small towns are far more likely to own a gun than residents of large cities, partly because of the importance of hunting and sport shooting in those communities." Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1040, 1046 (2009). Additionally, the externalities of firearm ownership and crime are highly localized: "[T]he threat of gun violence in some neighborhoods is an important disamenity that depresses property values and economic development. Firearm violence, then, is a multifaceted problem that has notable effects on public health, crime, and living standards." *Id.* at 1049. *See also* Brief for Respondents at 17 (expressing concern with the prospect of "all levels of government [being] disabled from adopting (or even experimenting with) sensible firearm regulations that could fight crime and save lives under at least some local conditions").

Though this Court has expressed concerns about a "national crazy quilt" if municipalities were allowed to regulate contrary to state legislatures' will, *Nixon*, 541 U.S. at 136, cities are little different than states in this regard. *Cf. id.* at 146 (Scalia J., concurring). In the firearm context, the worry of too much local variation tends to be overblown, and local regulatory variation in fact may be beneficial. First, localities are familiar with firearm regulation. Prior to a push by states to preempt local firearm regulation, most states left regulation in the hands of localities. *See* Kristin A. Goss, *Policy, Politics and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 706 (2004). Additionally, the variation amongst localities would not create notice problems for citizens. As with many other regulations enacted by the locality, citizens entering the locality need only contact the appropriate authorities.

Deference to variation is also appropriate because the impact of local regulation is largely contained within the locality. Firearm regulation at the local level is in large part concerned with status conferral. Localities are largely charged with licensing gun dealers and issuing permits to its citizens. Additionally, this Court's decision in *Heller* may and perhaps should prompt localities to directly (and democratically) consider whether certain areas within their jurisdictions should be deemed "sensitive places" in which blanket gun prohibitions may be permissible. *See Heller*, 128 S. Ct. at 2816–17. All such local regulations generally lack external impact or problems: each regulation only applies within the jurisdiction, and when any citizen leaves the preordained jurisdictional limits the regulations no longer apply.

In addition to the obvious advantages of local government regulation in the firearm context as compared to federal authorities, localities can also have certain inherent regulatory advantages over states. First, local governments tend to be more in tune to the needs of citizens than federal or even state governments. "Local representatives also tend to be responsive to individual citizens and community organizations more directly than state or federal legislators, because local lawmakers must live and work among their constituents." Eric Gorovitz et al., *Preemption or Prevention?: Lessons from Efforts to Control Firearms, Alcohol, and Tobacco*, 19 J. PUB. HEALTH POL'Y 36, 37 (1998). Also, it is far easier for individuals to seek more preferential regulatory regimes at the local level than even at the state level: "[t]he easy ability for individuals to exit local jurisdictions makes it unlikely that local majorities can get away with oppression for long." Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same Sex Marriage*, 21 J.L. & POL. 147, 164 (2005).

Examples of unique local gun regulations abound. Perhaps most notable, the town of Kennesaw, Georgia has an ordinance that requires every "head of household . . . to maintain a firearm."[5] While Kennesaw, a town of just over 20,000 people,[6] may desire such a law (which it does not appear to attempt to enforce), comparable legislation likely never could or would emerge from state or federal government entities. Similarly, in Virginia, every county has adopted different firearm regulations. *See* LOCAL FIREARM ORDINANCES, LAWS, AND REGULATIONS (available at http://www.dgif.virginia.gov/hunting/regulations) (last visited on Jan. 4th 2009) [hereinafter LOCAL FIREARM ORDINANCES]. These ordinances are tailored to the individual requirements of the locality: e.g., the city of Richmond prohibits the transport by vehicle on public streets of any loaded shotgun or rifle, but Richmond County has no such prohibition. *Id.* The county's regulations are less concerned with transport—necessarily an issue of public safety—and are more concerned with the caliber of rifle used to hunt game—necessarily an issue of conservation. *See Id.*[7]

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[5] KENNESAW, GA, CODE OF ORDINANCES, Part II, Chapter 34, Article II, § 34-21(a) (2009). The full text of the ordinance is:

> In order to provide for the emergency management of the city, and further in order to provide for and protect the safety, security and general welfare of the city and its inhabitants, every head of household residing in the city limits is required to maintain a firearm together with ammunition therefore.

Id.

[6] According to a survey in 2000 the official population of the town was 21,675. ABOUT US, Kennesaw, Georgia City Website (available at *http://www.kennesaw-ga.gov/index.aspx?nid=36*) (last visited on Jan. 4th, 2009).

In sum, local needs and concerns regarding gun possession and use provide an additional strong reason for this Court's Second Amendment jurisprudence to incorporate a formal and express norm of deference to local decision-making and local regulations. This deference is justified by the localized nature of firearm rights, responsibilities and externalities. In particular, localities are generally better places, especially in the firearm context, for regulatory efforts and energies to meet the needs of their constituencies, especially in comparison to state and federal counterparts.

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[7] Perhaps unsurprisingly the locality with the strictest firearm ordinance in Virginia is Arlington County. Its ordinance states in part:

> It shall be unlawful for any person to discharge or shoot off a firearm in the county. It shall be unlawful for any person to discharge or shoot or throw any dangerous missiles by mechanical, explosive, air-or gas-propelled means, or similar method or device onto or across any public sidewalk, path, or roadway, at any public structure or building, or at or onto the property of another.

LOCAL FIREARM ORDINANCES.

IV. Modern Litigation Realities and Sound Government Administration Justify a Less Rigorous Form of Constitutional Scrutiny of Firearm Regulations by Localities.

Especially because the scope and application of the Second Amendment rights are jurisprudentially uncertain and politically controversial, there has already been significant constitutional litigation in lower courts concerning individual gun rights and government regulations since this Court's decision in *Heller*. Were this Court to apply *Heller*'s ruling to all localities without clarifying the need and importance of judicial deference to local needs and concerns, federal and state courts could and likely would be flooded with constitutional claims and disputes concerning many local rules and regulations that impact the possession and use of guns. *See* Brief of Respondents at 19-20 (noting how many local laws "would be subject to attack" and expressing concern that jurisdictions "would have to spend scarce resources defending" against "[c]ostly Second Amendment challenges" which could force governments to repeal or revise even those local laws that "substantially contribute, under local conditions, to reducing violence, injury, and death).

Significantly, in this case, this Court is asked to strike down a pair of local regulations—as opposed to a state or federal law—as a violation of the Second Amendment. To do so without the full development of an evidentiary record concerning the local needs and problems that prompted these regulations risks sending an unduly broad and aggressive message that localities have no distinct regulatory authority or cognizable regulatory needs in the context of firearms. Especially given that localities are already susceptible to suit in ways states are not, further erosion of local authority in the context of firearm regulation may prompt a continuous stream of plaintiffs marching to courthouse doors seeking declaratory judgments from state and federal judges precluding the application of both civil and criminal firearm regulations. While such regulations are generally reflections of local will and require democratic majorities—either through elected representatives or direct democracy ballot initiatives—there is a risk after *Heller* that a single disgruntled plaintiff can and will seek to utilize the judicial branch as a firearms super-regulator to make an end-run around the democratic lawmaking process. *See generally* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009) (expressing concerns about a Second Amendment jurisprudence that is "anti-democratic, allowing [judges] to make 'value judgments' that belong[] to the people themselves" and suggesting that "cases filed since *Heller* and the multitude of federal, state, and municipal gun control regulations threaten to suck the courts into a quagmire").

In light of these practical concerns, this Court should not make a determination on whether Respondents' regulations are a violation of the Constitution even if it concludes that the Second Amendment is applicable against states and localities. Rather, if this Court should incorporate the Second Amendment against the states, it should then remand this case to federal district court in order to determine whether, in light of the heightened deference that should be shown toward truly local regulations, Respondents' regulations are unduly burdensome on individual rights in light of local needs and conditions. Such a remand for further development of an evidentiary record concerning local needs and demands is necessary to avoid undermining the role that localities play in the administration of the democratic process and to reemphasize, as this Court has done elsewhere, that local concerns merit considerable deference in federal courts.

Remand in this case is justified in part because the question presented only asks this court to incorporate the Second Amendment against the states and does not directly address what impact this ruling could have on local regulations, and in particular Respondent's regulation. While the application of the Second Amendment to the states necessarily implies application to its subparts, the degree of deference afforded to localities may lead to different results depending on the source of the law. That is, a law passed at the local level may survive a constitutional challenge even when a federal or state counterpart would not. This derives from the origin of local law as a true reflection of the democratic process and our nation's traditional deference to locality regulations concerning purely municipal matters.

CONCLUSION

This Court's Second Amendment jurisprudence should include an express and formal concern for the needs and values reflected in local firearm regulations. Both in tradition and modern practice, states have deferred to localities on issues truly local in nature, especially in prominent arenas involving the local public welfare such as with firearm possession and use. Historical and existing variation amongst localities showcases the need and importance of local decision-making to tailor regulations in light of the demands and desires of local constituencies. If this Court should incorporate the Second Amendment against the states, this Court should then remand this case for an initial determination of whether, in light of heightened deference to locality rulemaking authority, Respondents' ordinances violate the Second Amendment.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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IN THE
Supreme Court of the United States

OTIS MCDONALD ET AL.,
Petitioners,
v.
CITY OF CHICAGO ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE MARYLAND ARMS COLLECTORS' ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTEREST OF AMICUS CURIAE[1]

The Maryland Arms Collectors' Association, Inc., is a Not For Profit Corporation voluntary membership corporation. It was established in 1949 and is incorporated in Maryland. Membership requirements include being a United States citizen, being at least 18 years of age, and having no criminal record. Its over 200 individual members are bound together by a common interest in the collecting, preserving, using, and/or studying of any type of arms and/or accessories pertaining to the arms field. The firearms that are collected include pistols, rifles, and shotguns. The collections cover a variety of historical periods, including colonial and modern times. Many members keep these arms for traditional purposes, such as defense of self and family.

Collecting firearms is a popular hobby in all fifty states. Most members of the Maryland Arms Collectors' Association (MACA) reside in Maryland, one of six states with no guarantee to bear arms in its state constitution. The other states also with no such guarantee are California, Iowa, Minnesota, New

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[1] Rule 37.6 notice.
The parties have consented to the filing of this brief, reflected in letters filed by the parties with the Clerk of the Court. Counsel of record for all parties received written advance timely notice of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund, a not for profit 501(c)(3) fund.

Jersey, and New York. The lack of a guarantee to bear arms is a detriment to millions of law-abiding adults.

MACA files this brief because its members are among the people who enjoy no protection to keep their arms unless this Court holds that the Second Amendment applies to the states through incorporation of the due process clause or through incorporation of the privileges or immunities clause of the Fourteenth Amendment The Fourteenth Amendment was adopted in 1868 to curb abuses of constitutional rights by the states, including the right to keep and bear arms. Maryland's constitution has no right to bear arms. A right to keep and bear arms guarantee was proposed at the Maryland constitutional convention, but it was defeated. Why was the proposal defeated? According to records of the debates in the Maryland constitutional convention of 1867, some delegates assumed the Second Amendment applied to the states and that such a guarantee, therefore, would not be necessary in the Maryland constitution. And there were other delegates with racist reasons; for example, the proposal that "every citizen has the right to bear arms in defence of himself and State" was subject to an attempt to amend by inserting "white" after the word "every." Stephen P. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 111 to 113 (Greenwood Press 1989). See also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Georgetown L. J. 309, 342-49 (1991).

SUMMARY OF ARGUMENT

The right to keep and bear arms is incorporated against the States by the Fourteenth Amendment, and the people of Maryland have been waiting for that recognition since 1868 when the amendment proposed by the 39th Congress was ratified by the States.

Congressman John A. Bingham, the author of Section 1 of the Fourteenth Amendment, called the Fourteenth Amendment the "amendment to enforce the Bill of Rights."[2]

In the words of University of Akron law professor Richard L. Aynes, "the Fourteenth Amendment had a very practical purpose. It was designed to offer federal protection to the most precious rights of American citizens that pre- and post-Civil War events demonstrated were so essential." The protection of Second Amendment rights was part of that design.[3]

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[2] John A. Bingham. Reprinted distribution pamphlet of speech "One country, one Constitution, and one people. Speech of Hon. John A. Bingham, of Ohio, in the House of Representatives, February 28, 1866, in support of the proposed amendment to enforce the bill of rights." Library of Congress, Rare Books, AC901.M5, Vol. 475, No. 11 Misc. Pam.

[3] Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. Contem. Legal Issues ___ (forthcoming 2009).

In the words of Wake Forest University law professor Michael Kent Curtis, the modern historian of the Fourteenth Amendment, "The rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States [included] the right ... to bear arms."[4]

Michigan State University law professor Michael Anthony Lawrence says there are two ways that the right to keep and bear arms applies to the states: First, it could be incorporated by the Privileges or Immunities Clause of the Fourteenth Amendment. Second, it could be incorporated by the Due Process Clause of the Fourteenth Amendment.[5] Direct application is foreclosed by *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247-51 (1833).

The history of the adoption of the Fourteenth Amendment shows that its Privileges or Immunities Clause was intended to protect the Second Amendment from infringement by the states. Privileges and immunities under Article IV, Section 2 of the U.S. Constitution included "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 417 (1857). Surely it is not surprising that the Second Amendment was understood to have been intended to be included in the privileges or immunities clause of the Fourteenth Amendment. However, employing this kind of original-meaning jurisprudence would require revisiting the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *United States v. Cruikshank*, 92 U.S. 542 (1876).

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[4] Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (Duke University Press 1986). See pp. 52, 53, 56, 72, 88, 140-1 and 164 for debate extolling the right to arms expressly.

[5] Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Missouri L. Rev. 1 (2007).

The Second Amendment also applies to the states through the Fourteenth Amendment's Due Process Clause. This option achieves the protection of the right to keep and bear arms from state infringement by applying well-established rules on selective incorporation. The right to keep and bear arms meets the test of being "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n. 14 (1968). *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798-99, 171 L.Ed.2d 637 (2008), emphasizes this right was "one of the fundamental rights of Englishmen." *Heller* also stresses that the "inherent right of self-defense has been central to the Second Amendment right," which explains why the right to arms is "fundamental" in the sense articulated in *Duncan*'s incorporation test. 128 S.Ct. at 2817. The right protected by the Second Amendment meets the Court's test of what is "fundamental" far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental provisions of the English Bill of Rights. Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 195 (2008).

ARGUMENT

I. Incorporation Is Possible Under the Privileges or Immunities Clause.

Incorporation of the Second Amendment could occur through the Privileges or Immunities Clause. That Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, § 1. Professor Laurence H. Tribe endorses incorporation of the Second Amendment through the Privileges or Immunities Clause. According to Professor Tribe, the Second Amendment "directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action." Laurence H. Tribe, I AMERICAN CONSTITUTIONAL LAW 901-02 n.221 (3rd Ed., Foundation Press 2000). In *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), a plurality of this Court incorporated part of the First Amendment through the privileges or immunities clause of the Fourteenth Amendment.

Incorporation through privileges or immunities is supported by the intent of the framers of the Fourteenth Amendment and by public understanding at the time the amendment was adopted.

A. Incorporation is supported by the intent of the framers of the 14th Amendment:

As Harvard law professor Mark Tushnet argues in *The Future of the Second Amendment*,[6]

> [T]he next step will be litigation challenging state and local gun control regulation, in which the first issue will be whether the Fourteenth Amendment makes the restrictions the Second Amendment imposes on the national government applicable to the states as well. On originalist grounds, such an "incorporation" seems to me unquestionably correct. The debates over the Fourteenth Amendment's adoption are replete with comments that one of the Amendment's benefits would be to ensure that the South's freedmen would be able to protect themselves from marauding whites by guaranteeing their own right to arm themselves. The only embarrassment is a doctrinal one: all these references described the right to keep and bear arms as one of the privileges of the citizenship that the Fourteenth Amendment guaranteed and contemporary incorporation doctrine rests not on the privileges and immunities clause of the Fourteenth Amendment, but rather on its due process clause.

See also Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp.

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[6] Mark Tushnet, *The Future of the Second Amendment*, 1 Albany Gov't L. Rev. 354, 355 n. 4 (2008).

Legal Issues ___ (forthcoming 2009), available at http://ssrn.com/abstract=1354404 (posted March 6, 2009, and revised September 9, 2009).

The Fourteenth Amendment must be read as a whole. People who are not citizens of the United States would continue to be protected under the equal protection and due process clause. *Plyler v. Doe*, 457 U.S. 202 (1982). Therefore, incorporation under privileges or immunities would not undermine the rights of non-citizens because their rights are protected by the Fourteenth Amendment's guarantee to equal protection and due process.

B. Incorporation is supported by public understanding of the 14th Amendment at the time of adoption:

Research by legal scholar David T. Hardy found that "[t]he legislative history of the Amendment, and of related legislation, was reported to the public in detail that seems unbelievable to a modern political enthusiast, accustomed to the electronic media's sound bites and to print journalism that focuses upon condensing, digesting and interpreting events for the reader."[7]

When Congressman Bingham gave his floor speeches in the House of Representatives on February 26 and 28, 1866, he made clear his argument that the proposed Amendment would serve to enforce the Bill of Rights against the states. The New York Herald newspaper, at the time considered the "the most largely circulated journal in the world,"[8] carried Bingham's February 26 speech on the front page. When he spoke again on February 28, the Herald again carried his speech on the front page. David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (2009).

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[7] David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695 (2009).

When Senator Jacob Howard spoke in the Senate on May 23, 1866, he also described the Fourteenth Amendment as needed to protect liberties guaranteed by the Federal Bill of Rights, needed so that the same rights enforced against the Federal government would be enforced against the States. *Id.* Hardy's research found that the day after Senator Howard's speech, the New York Times reported in transcript-like detail Sen. Howard's floor speech."

The American citizens who ratified the Fourteenth Amendment would have understood that the Amendment was being offered to enforce the entire Bill of Rights on the States. Persons who would suggest that Senator Howard's speech was not widely known by citizens of the time "must deal with the fact that his description [of the Amendment] made front pages of the New York Times and the New York Herald, was carried in the Philadelphia Inquirer, and was covered by many smaller papers." *Id.*

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[8] *New York Herald History*, http://nyherald.com/new-york-herald-history/

II. Incorporation is possible under the Due Process Clause.

Selective incorporation through the Due Process Clause of the Fourteenth Amendment is the modern method used to apply guarantees in the Bill of Rights to the states. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search and seizure); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Establishment Clause).

Applying the sort of Fourteenth Amendment inquiry required by this Court in the above cases compels a finding that the Second Amendment applies to the states.

A. The 2nd Amendment meets the *Duncan* and *Glucksburg* fundamentalities test:

The Fourteenth Amendment prevents "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Constitution Amendment XIV, § 1. Under the doctrine known as substantive due process, this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). With this doctrine, due process encompasses certain "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). Selective incorporation is a species of substantive due process, in which the rights that the Due Process Clause protects include some of the substantive rights enumerated in the first eight amendments of the Bill of Rights to the Constitution. *See Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."). *See also Glucksberg*, 521 U.S. at 720 (speaking of enumerated rights together with implied fundamental rights in the context of substantive due process). Both selective incorporation and substantive due process require a positive response to the following question: Is a right so fundamental that the Due Process Clause guarantees it? Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights.

Under the familiar early formulation of *Palko v. Connecticut*, 302 U.S. 319 (1937), only those rights "implicit in the concept of ordered liberty" were incorporated. However, *Palko* was overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

This Court ultimately abandoned the imprecise test in *Palko* in favor of a more concretely historical one. In *Duncan*, the Court recognized that it had abandoned the imprecise rule in *Palko* for an analysis grounded in the "actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country." 391 U.S. at 149 n. 14. Therefore, incorporation turns on "whether given this kind of system a particular procedure is fundamental -- whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* In determining whether the Due Process Clause incorporated the right to jury trials in criminal cases, *Duncan* noted that every American state "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* This Court also reviewed the place of the right in pre-Founding English law and in the Founding era itself. *Id.* at 151-54. This Court cited the English Declaration and Bill of Rights, Blackstone's COMMENTARIES, early state constitutions, and other evidence from the Founding era.

B. The 2nd Amendment meets the well-established selective incorporation rules:

Just as *Duncan* defined "fundamental rights" as those "necessary to an Anglo-American regime of ordered liberty," so also this Court has determined, outside the context of incorporation, that only those institutions and rights "deeply rooted in this Nation's history and tradition" can be fundamental rights protected by substantive due process. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). This Court noted the similarity between this general substantive due process inquiry and the incorporation test stated in *Duncan*. *See also Glucksberg*, 521 U.S. at 721 ("Our Nation's history, legal traditions, and practices ... provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."

Internal quote from *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Therefore, incorporation is logically a part of substantive due process. Applying this test, the right to keep and bear arms ranks as fundamental, meaning "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n. 14. Therefore, the Fourteenth Amendment incorporates it. Furthermore, the right is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721. Guided by both *Duncan* and *Glucksberg*, history shows that the attitudes and historical practices of the Founding era and the post-Civil War period compel a finding that this right is deeply rooted in this Nation's history and tradition.

The Second Amendment guarantees a right that is not limited to citizens of the United States. It reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Language throughout *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), states that the right to keep and bear arms is fundamental by characterizing it in the same way that other opinions described enumerated rights found to be incorporated. The prefatory clause of the Second Amendment describes part of the right it protects. This Court held in *Heller* that the phrase necessary to the "security of a free State," means necessary to the "security of a free polity." *Heller*, 128 S.Ct. at 2800. Hence, the text of the Second Amendment already holds that the right it protects relates to an institution, the militia, which is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n. 14. The parallel is striking, particularly because the militia historically comprised all able-bodied male citizens. *Heller*, 128 S.Ct. at 2799.

Even before the Second Amendment, this necessary "right of the people" existed as "one of the fundamental rights of Englishmen." *Id.* at 2797-98. *Heller* identified several reasons why the militia was considered "necessary to the security of a free state." First, "it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary.... Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 2800-01. In addition to these civic purposes, *Heller* characterized the right to keep and bear arms as a corollary to the individual right of self-defense. *Id.* at 2817 ("[T]he inherent right of self-defense has been central to the Second Amendment right."). Thus the right contains both a political component (a means to protect the public from tyranny) and a personal component (a means to protect the individual from threats to life or limb). The personal component protects the fundamental right to life and personal security and autonomy. "The right to defend oneself from a deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982). The right is fundamental for a practical reason: a person has to be alive to enjoy a right.

As reasoned in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *rehearing en banc granted*,

> We begin with the Founding era. *Heller* reveals evidence similar to that on which *Duncan* relied to conclude that the Due Process Clause incorporated the right to a jury in criminal cases. The analysis in both *Heller* and *Duncan* began with the 1689 English Declaration of Right (which became the English Bill of Rights). *Compare Heller*, 128 S.Ct. at 2798 (noting that the Declaration of Right included the right to bear arms), *with Duncan*, 391 U.S. at 151 (noting that the Declaration of Right included the right to a jury trial).

The English Bill of Rights was a clear statement of the "undoubted rights and liberties" of Englishmen. As such, it was a precursor to our own Bill of Rights. (English Bill of Rights, 1689, 1 Wm. & Mary, ch. 2, sec. 7.)

Continuing with the reasoning as found in *Nordyke*:

> Thus the right to keep and bear arms shares ancestry with a right already deemed fundamental. *Cf. State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion) (relying solely on the presence of a prohibition against cruel and unusual punishments in the English Bill of Rights for the conclusion that it is incorporated into the Due Process Clause of the Fourteenth Amendment).

The parallel continues. *Heller* noted the emphasis that Blackstone placed on the right, just as *Duncan* had looked to Blackstone. *Compare Heller*, 128 S.Ct. at 2798 ("Blackstone ... cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen"), *with Duncan*, 391 U.S. at 151-52 (citing Blackstone). This is significant because Blackstone "constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999). His [Blackstone's] theoretical treatment of the right to bear arms provides insight into how American colonists would have understood it.

Blackstone gave the right to bear arms pride of place in his scheme. He divided rights of persons into absolute rights and relative rights. *See* William Blackstone, 1 COMMENTARIES *123-24 (1765). It is "the principal aim of society," according to Blackstone, "to protect individuals in the enjoyment of those absolute rights," *id.* at *124-25; England alone among nations had achieved that aim. Blackstone defined these absolute rights as "personal security, personal liberty, and private property." *Id.* at *141. However, the English Constitution could secure the actual enjoyment of these rights only by means of certain "barriers" designed "to protect and maintain [them] inviolate." *Id.* The right to bear arms ranked among these "bulwarks of personal rights." *Id.* Blackstone considered the right "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at *144. *See also Heller*, 128 S.Ct. at 2798-99 ("[T]he right secured in 1689 as a result of the [abuses of the Stuart monarchy] was by the time of the founding understood to be an individual right protecting against both public and private violence."). For readers of Blackstone, therefore, the right to bear arms closely followed from the absolute rights to personal security, personal liberty, and personal property. It was a right crucial to safeguarding all other rights. Blackstone's view of the right to bear arms pervades the writings of the Revolutionary generation. *See, e.g.*, Samuel Adams, Letter to the Editors, Boston Gazette, February 27, 1769, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 90 (Philip B. Kurland & Ralph Lerner eds. 1987). It also suffused public discourse at the time of the Fourteenth Amendment's enactment. *See* Amar, *supra* at 261-64 (providing examples); *infra* pp. 4492-94.

The behavior and words of the colonists themselves also demonstrate the right's importance. As *Heller* pointed out, the American colonists of the 1760s and 1770s strongly objected to royal infringements on the right to keep and bear arms, just as they objected to the Crown's interference with jury trials, a fact that *Duncan* highlighted. *Compare Heller*, 128 S.Ct. at 2799 ("[T]he Crown began to disarm the inhabitants of the most rebellious areas[, which] provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."), *with Duncan*, 391 U.S. at 152 ("Royal interference with the jury trial was deeply resented."). A year before the Boston Massacre in 1770, one pamphleteer commented on the tensions between suspicious colonists and the British troops quartered in the city:

> Instances of the licentious and outrageous behavior of the *military conservators* of the peace still multiply upon us, some of which are of such a nature ... as must serve fully to evince that a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defense, was a measure as *prudent* as it was *legal*: such violences are always to be apprehended from military troops, when quartered in the body of a populous city.... It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

A Journal of the Times, March 17, 1769, New York Journal, Supp. 1, April 13, 1769, *quoted* in Stephen Halbrook, A RIGHT TO BEAR ARMS 7 (1989). Thus, the events of the age confirmed Blackstone's assessment of the nature of the right.

Revolutionary agitators and theoreticians further advocated this Blackstonian view of the right to keep and bear arms. Two years after the Boston Massacre, Samuel Adams wrote, in a report of one of the Committees of Correspondence, that

> [a]mong the Natural Rights of the Colonists are these[:] First, a right to Life; Secondly, to Liberty; thirdly, to Property; *together with the Right to support and defend them in the best manner they can* -- Those are evident Branches of, rather than deductions from, the Duty of Self-Preservation, commonly called the first Law of Nature.

Samuel Adams, *The Rights of the Colonists* (1772), *reprinted* in 5 *The Founder's Constitution*, *supra*, at 394, 395 (emphasis added). Writing to an American unionist in 1775, Alexander Hamilton threatened armed resistance to British invasions of American rights. *See* Alexander Hamilton, *The Farmer Refuted* (1775) *reprinted* in 1 THE WORKS OF ALEXANDER HAMILTON 55, 163 (Henry Cabot Lodge ed., 1904) ("If [Great Britain] is determined to enslave us, it must be by force of arms; and to attempt this, I again assert,

> would be nothing less than *the grossest infatuation, madness itself.*"); *see also id.* at 62-64 (referring to Blackstone's conception of "absolute rights").
>
> Thus, if the suspension of trial by jury, taxation without representation, and other offenses constituted the most offensive instances of British tyranny, the ability to call up arms-bearing citizens was considered the essential means of colonial resistance. Indeed, the attempt by British soldiers to destroy a cache of American ammunition at Concord, Massachusetts, sparked the battles at Lexington and Concord, which began the Revolutionary War.

Seizures were not confined to armories and magazines. The British also seized the arms of individual civilians. Bostonians were forced to surrender 1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses. Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL 95 (6th ed. 1903). The July 6, 1775, *Declaration of the Causes and Necessity of Taking Up Arms* by the Continental Congress included the complaint that the inhabitants of Boston were disarmed by British General Gage. DOCUMENTS OF AMERICAN HISTORY 92, 94 (5TH ED. 1949).

From *Nordyke*:

> For the colonists, the importance of the right to bear arms "was not merely speculative theory. It was the lived experience of the[ ] age." Akhil Reed Amar, *supra*, at 47 (referring

to Locke's conception of the right of revolution).

This lived experience informed the colonists when they set out to form a government. They considered, by the light of experience as well as of education, that preserving the right to bear arms was the appropriate way both to resist the evil of standing armies and to render the evil unnecessary. *See Heller*, 128 S.Ct. at 2800-01. Advocating for the new Constitution, Hamilton argued that "if circumstances should at any time oblige the government to form an army of any magnitude[,] that army can never be formidable to the liberties of the people while there is a large body of citizens... who stand ready to defend their own rights and those of their fellow-citizens." The Federalist No. 29, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As it was to many of his fellow citizens, a citizenry possessed of arms and trained in their use "appear[ed] to [Hamilton] the only substitute that c[ould] be devised for a standing army, and the best possible security against it, if it should exist." *Id.*

This brief survey of our history reveals a right "deeply rooted in this Nation's history and tradition." Moreover, whereas the Supreme Court has previously incorporated rights that the colonists fought for, we have here both a right they fought for and the right that allowed them to fight.

Evidence from the post-Revolutionary years strengthens this impression. Supreme Court Justice James Wilson, one of the framers of the Pennsylvania Constitution and of the Federal Constitution, referred, in one of his lectures on the common law (delivered serially from 1790 to 1791), to the right of self-defense as "the great natural law of self-preservation, which... cannot be repealed, or superseded, or suspended by any human institution .... [It is] expressly recognized in the constitution of Pennsylvania." James Wilson, Lecture on the Right of Individuals to Personal Safety, *in* 3 The Works of the Honorable James Wilson 77, 84 (Bird Wilson ed., Phila., Lorenzo Press 1804). St. George Tucker, editor of "the most important early American edition of Blackstone's Commentaries," *Heller*, 128 S.Ct. at 2799, extolled the right to bear arms as the "true palladium of liberty." St. George Tucker, *View of the Constitution of the United States*, *in* 1 *Blackstone's Commentaries* app. at 300 (St. George Tucker ed., Phila., William Birch Young & Abraham Small 1803). Emphasizing the right's importance, Tucker cautioned that "[w]herever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." *Id.* Justice

> Joseph Story, in his influential Commentaries on the Constitution, echoed that sentiment. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (Boston, Hilliard, Gray & Col. 1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers....").

Eighteenth century Americans consistently demanded that the right to arms be written into the Constitution. In ratifying the Constitution, several of the state conventions recommended the addition of a bill of rights and specified the rights that it should guarantee. The only provisions common to all of the bill of rights demands were freedom of religion and the right to arms. Of the state ratifying conventions that recommended a bill of rights, five suggested a right to arms.[9] Only four mentioned due process,[10] or sought a prohibition on cruel and unusual punishment,[11] or requested that the right to assemble for redress of grievances be guaranteed.[12] By way of comparison, only three mentioned free speech[13] and/or the various specific criminal procedure rights except for double jeopardy, which only New York mentioned.[14]

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[9] Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836), 1:326 (New Hampshire), 3:659 (Virginia), 1:328 (New York), 1:335 (Rhode Island), 4:244 (North Carolina).

[10] Elliot, DEBATES, 1:326 (New Hampshire), 3:658 (Virginia), 1:328 (New York), 1:334 (Rhode Island).

[11] Elliot, DEBATES, 1:328 (New York), 1:335 (Rhode Island), 3:658 (Virginia), 4:244 (North Carolina).

From *Nordyke* comes the history of the importance of the right to keep and bear arms in the state constitutions:

> [S]tate constitutions confirm the importance of the right to keep and bear arms throughout our history. "Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights[, and b]etween 1789 and 1820, nine states adopted [such] analogues." *Heller*, 128 S.Ct. at 2802-03. Thus, as of 1820, thirteen of the twenty-three states admitted to the Union had Second Amendment analogues. We must take account of this prevalence of state constitutional analogues to the Second Amendment, just as the Supreme Court noted the ubiquity of state constitutional provisions guaranteeing juries in criminal cases when it incorporated that right. *See Duncan*, 391 U.S. at 153-54. The statistics are not as overwhelming as those before the Court in *Duncan*, but they are nonetheless compelling.

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[12] Elliot, DEBATES, 1:328 (New York), 1:335 (Rhode Island), 3:658-9 (Virginia), 4:244 (North Carolina).

[13] Elliot, DEBATES, 1:335 (Rhode Island), 3:659 (Virginia), 4:244 (North Carolina).

[14] Elliot, DEBATES, 1:328 (New York).

> These materials reflect a general consensus, in case law as well as in commentary, on the importance of the right to keep and bear arms to American republicanism. *See, e.g.*, *Heller*, 128 S.Ct. at 2805-09, 2805-09 (discussing materials). They show the continued vitality of the right that the Englishmen of the Glorious Revolution declared, Blackstone lauded, and the American colonists depended upon.

And, finally, a survey of the period immediately following the Civil War supports incorporation of the Second Amendment through the Fourteenth Amendment. Again, from *Nordyke*:

> Although it has not been considered dispositive in Fourteenth Amendment cases, the understanding of the Framers of that Amendment logically influences whether a right is fundamental, in the sense of deeply rooted in our history and traditions and necessary to an Anglo-American conception of ordered liberty.
>
> As *Heller* recognized, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S.Ct. at 2809-10; *see also* Akhil Reed Amar, *supra*, at 192 (noting that "slavery led to state repudiation of virtually every one of

the ... freedoms [in the Bill of Rights]"). One major concern in these debates was the disarming of newly freed blacks in Southern states by statute as well as by vigilantism. *See Heller*, 128 S.Ct. at 2810. Many former slave states passed laws to that effect. *See*, *e.g.*, Act of Nov. 29, 1865, 1865 Miss. Laws 165 ("[N]o freedman, free Negro or mulatto ... shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife...."). General Charles H. Howard, in a letter provided to Congress, reported to the head of the Freedmen's Bureau that the "militia organizations in the opposite county of South Carolina (Edgefield) were engaged in disarming the negroes.... Now, at Augusta, ... I have authentic information that these abuses continue. In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities." Report of the Joint Committee on Reconstruction, H.R.Rep. No. 39-30, pt. 3, at 46 (1st Sess.1866).

The Framers of the Fourteenth Amendment sought to end such oppressions. During the debates surrounding the Freedmen's Bureau Act, the Civil Rights Act, and the Fourteenth Amendment, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" someone's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S.Ct. at 2811.

Representative Bingham, a principal author of the Fourteenth Amendment, argued that it was necessary to overrule *Barron* and to apply the Bill of Rights to the states. In his [Bingham's] view, *Barron* was wrongly decided because the Bill of Rights "secur[ed] to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of persons -- those rights dear to freemen and formidable only to tyrants." Cong. Globe *Id.* at 1090. Representative James Wilson, a supporter of the Fourteenth Amendment, described Blackstone's scheme of absolute rights as synonymous with civil rights, in a speech in favor of the Civil Rights Act of 1866 (a precursor to the Fourteenth Amendment). Cong. Globe *Id.* at 1115-19. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms," among other rights, as inherent in a "republican government." Cong. Globe *Id.* at 1629. The reports and testimony contain similar evidence, confirming that the Framers of the Fourteenth Amendment considered the right to keep and bear arms a crucial safeguard against white oppression of the freedmen. Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 9-38 (1998); *see also* Akhil Reed Amar, *supra*, at 261-66.

The target of the right to keep and bear arms shifted in the period leading up to the Civil

> War. While the generation of 1789 envisioned the right as a component of local resistance to centralized tyranny, whether British or federal, the generation of 1868 envisioned the right as a safeguard to protect individuals from oppressive or indifferent local governments. *See* Akhil Reed Amar, *supra*, at 257-66. But though the source of the threat may have migrated, the antidote remained the same: the individual right to keep and bear arms, a recourse for "when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *supra*, at *144.

The right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on the right to keep and bear arms to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging the right less than a century later. The crucial role that this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental and that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. Even today, forty-four states have a guarantee to bear arms. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 205 (2006).

Thus, because the right to keep and bear arms meets the criteria set by *Duncan* and by *Glucksberg*, the Second Amendment must be incorporated through the due process clause of the Fourteenth Amendment.

C. This Court may incorporate under the due process clause without calling into question any of its prior case law:

We note also that this Court may incorporate under the due process clause without calling into question any of its prior case law. *Cruikshank* and similar cases have long been treated by this Court as precedent governing only incorporation under the privileges or immunities clause.

A century ago, this Court acknowledged the independence of the two approaches to incorporation. In *Twining v. New Jersey*, 211 U.S. 78 (1908), it first ruled that "exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment..." *Id.* at 99. It then noted

> The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the

> first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law....

Id. Cruikshank rejected incorporation of three rights: freedom of association, the right to arms, and the right not to be illegally deprived of life. When this Court held freedom of association to be protected by the due process clause, *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 460-63 (1958), it did not overrule *Cruikshank*: in fact, it did not mention that decision. Likewise, when this Court upheld a due process right against unjustified deprivation of life, *Tennessee v. Garner*, 471 U.S. 1 (1985), there was no mention of *Cruikshank*. Under due process incorporation, *Cruikshank* is irrelevant.

III. "States-as-laboratories" does not trump essential liberties.

The "States-as-laboratories" dictum, cited by the court below, is not a valid argument against incorporation. Justice Sutherland made that clear in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279-80 (1932):

> It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our

> constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.

States served as laboratories for such practices as slavery and Jim Crow laws. The Constitution trumps a state's illegal "experimentation."

IV. Convicted felons and the mentally disturbed have no right to arms.

Heller's pronouncement to this effect has been criticized as unsubstantiated. Actually the court just did not bother to cite the substantiating evidence because the issue was foreign to the issues before it. As to why felons and the unbalanced have no right to arms, the short answer is that in the minds of the Founders they had no civil rights at all. Felons were without property rights. They were civilly dead, and often truly dead since capital punishment was the normal punishment for felony. The insane were not civilly dead, but they had lost the right to control their property. *See, e.g.*, Don B. Kates & Clayton Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings Law Journal 1339 (2009).

The right to arms was extended only to trustworthy people. In other words, it did not extend to felons or the unbalanced. Incorporation of the Second Amendment would have no change in this area.

CONCLUSION

The decision below should be reversed. The people of Maryland and the people of the other States have been waiting since 1868 for the recognition that the right to keep and bear arms is incorporated against the States through the Fourteenth Amendment.

Respectfully submitted,

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Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation established under the laws of the state of New York to assist African Americans in securing their civil and constitutional rights through litigation and advocacy challenging racial discrimination.[1] Since its founding in 1940 under the leadership of Thurgood Marshall, however, LDF has been committed to transforming this nation's promise of equality into reality for all Americans. In this case, Petitioners ask the Court to reconsider a key question concerning the proper interpretation of the Fourteenth Amendment, which, more than any other constitutional provision, embodies our nation's commitment to equal justice for all under the law.

The Fourteenth Amendment was enacted following the Civil War to correct *Dred Scott v. Sandford*, 60 U.S. 393, 406-07 (1857), which had relegated African Americans to the status of mere "persons" without citizenship. Unfortunately, the Court's late nineteenth-century decisions created obstacles to effective enforcement of the Fourteenth Amendment and its guarantee of equality under the law, regardless of race, national origin, or alienage. For more than six decades, LDF has been at the forefront of efforts to enforce the Fourteenth Amendment. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967).

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. Letters of consent by the parties have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Court's late nineteenth-century decisions concerning the scope of the Fourteenth Amendment had devastating consequences for African Americans and the country as a whole. But whether this case presents the appropriate vehicle for the Court to wipe their stain from the pages of the *United States Reports* is less clear. *Amicus* submits this brief on behalf of neither party with the limited goal of suggesting that the Court's well-established framework for the "incorporation" of rights under the Due Process Clause of the Fourteenth Amendment should form the starting point for the Court's analysis in this case.

The Court should turn to the largely unexplored Privileges or Immunities Clause of the Fourteenth Amendment only if it first determines that the Second Amendment right to keep and bear arms is *not* incorporated as against the states through the Due Process Clause. Many of the rights and individual freedoms that define and guard modern life in America have only been meaningfully expressed through decades of important cases decided under the Due Process Clause. Accordingly, if this Court looks anew to the Privileges or Immunities Clause, its decision should supplement, and not supplant, existing civil rights protections already safeguarded through the Due Process Clause. *Amicus* takes no position on the ultimate constitutional issues involved in this case.

SUMMARY OF ARGUMENT

Today in this country, there is general agreement that everyone is entitled to the fundamental protections of the Bill of Rights, that no one should be subject to racial, ethnic, national origin or other forms of discrimination, and that Congress has the power to enforce those rights and protections. But this has not always been the case. Decisions of the Court during and immediately after Reconstruction failed to accept these principles, and effectively limited the reach of the Fourteenth Amendment, and its Privileges or Immunities Clause, which guarantees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV.

In the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Court established that the Privileges or Immunities Clause provided no protection against state or local infringements on constitutional rights. Subsequent decisions relying on *Slaughter-House* prevented Congress from safeguarding the newly won freedoms of former slaves. For instance, in *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court held that the federal government had no power to prosecute the perpetrators of the Colfax massacre;[2] and in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court struck down the Civil Rights Act of

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[2] On Easter Sunday, April 13, 1873, white insurgents committed a mass murder of over sixty African Americans who sought to defend the duly-elected government in Grant Parish, Louisiana against a coup. *See* Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (2008).

1875, which prohibited racial discrimination in public accommodations, as beyond Congress's enforcement power.

Thanks in large part to these Reconstruction-era decisions dramatically restricting the scope of the Privileges or Immunities Clause, the Due Process Clause of the Fourteenth Amendment came to serve as the primary vehicle to prevent state infringement of constitutional guarantees contained in the Bill of Rights. But despite this complex and contested past, the Due Process Clause has proven adequate to the task of ensuring the applicability of constitutional guarantees to the states. In this case, the Court has the option to continue to use its traditional Due Process Clause framework to analyze the issue presented: whether the Second Amendment "right to possess and carry weapons in case of confrontation," as articulated in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), is "incorporated" as against the states through the Fourteenth Amendment.[3]

Petitioners urge the Court to consider incorporation of the Second Amendment primarily under the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Pet'rs' Br. at 9-65. But history, prudence, and principles of judicial restraint counsel that, before embarking on an exploration of this uncharted constitutional terrain, the Court should first look to its well-established framework under the Due Process Clause for determining whether a provision of the Bill of Rights applies to state and local governmental action. There is a danger that a shift to the Privileges or Immunities Clause as the primary source of incorporated rights could result in a rollback of constitutionally-protected freedoms—both in terms of the range of individuals covered by the Fourteenth Amendment, and the scope of rights that the Amendment protects. Thus, this Court should not begin its analysis with a reexamination of long dormant constitutional text, the meaning and scope of which is unclear.

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[3] In *Heller*, *amicus* took the position that a departure from the Court's earlier pronouncements regarding the scope of the Second Amendment was unwarranted. *See* Brief for *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioners, *District of Columbia v. Heller*, 128 S. Ct. 645 (2008) (No. 07-290), 2008 WL 157192. For purposes of this case, *amicus* recognizes this Court's constitutional interpretation in *Heller* that there is "an individual right to possess and carry weapons in case of confrontation" protected by the Second Amendment. *Id.* at 2797 (2008).

This Court has another option: it can acknowledge expressly the mistakes of the Reconstruction-era Court and correct them. Should the Court choose to do so, it must preserve the Due Process Clause precedents that robustly safeguard constitutional protections for all persons, and that have been essential to the development of our democracy. It would be ironic, to say the least, if this Court decides to reexamine the Privileges or Immunities Clause in this case—which involves firearms regulations in a city where, each year, many times more African Americans are murdered by assailants wielding guns[4] than were killed during the Colfax massacre by white insurgents who escaped federal prosecution in *Cruikshank*. *See supra* p. 3 n.3. But it would be a tragedy of the magnitude of *Slaughter-House* itself if, in the process of revitalizing the Privileges or Immunities Clause, the Court were to destabilize its existing Due Process jurisprudence and thereby undermine dozens of decisions that have played an essential role in bringing our nation's commitment to equality and democracy closer to reality.

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[4] In 2008, 74.8% of the 511 homicide victims in Chicago (or 369 individuals) were African Americans; 80.6% of all homicides were committed with firearms, and almost of all these murders were committed with handguns. *See* Chicago Police Department, *2008 Murder Analysis Report* 21, 30-32 (2009), *available at* https://portal.chicagopolice.org/portal/page

ARGUMENT

I. In Determining Whether the Second Amendment Right to Keep and Bear Arms Is Incorporated as Against the States, the Court Should Look in the First Instance to Its Existing Due Process Framework

A. For Decades, the Court's Due Process Jurisprudence Has Provided a Workable Framework for Determining When a Provision of the Bill of Rights Applies to the States

The Due Process Clause of the Fourteenth Amendment "incorporates" certain constitutional rights so as to place limits on state and local governmental action. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus, all fundamental rights comprised

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within the term liberty are protected by the Federal Constitution from invasion by the States."); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (describing the "long line of cases" recognizing that "the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.").

The familiar test to determine whether a particular right is protected under the Due Process Clause involves a two-step inquiry: (1) whether the right at issue is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968); and (2) whether the right is "deeply rooted in this Nation's history and tradition," *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

This test for incorporation under the Due Process Clause has been applied to nearly every individual rights provision of the Bill of Rights and has proven workable. In a long line of cases, this Court has determined that the fundamental protections of the

First,[5] Fourth,[6] Fifth,[7] Sixth,[8] and Eighth Amendments[9] are incorporated as against the States through the Due Process Clause.[10] Apart from the Second Amendment question presented in this case, the Court has yet to analyze only two individual rights found in the Bill of Rights for the purposes of incorporation: the Third Amendment prohibition on the quartering of soldiers in private homes[11] and the Eighth Amendment right against excessive bails and fines.[12] *See* Erwin Chemerinksy, *Constitutional Law* 545 (3d ed. 2009).

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[5] *See Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Establishment Clause); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of expressive association).

[6] *See Mapp v. Ohio*, 367 U.S. 643 (1961) (protection against unreasonable search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement).

[7] *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (protection against taking with just compensation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Benton v. Maryland*, 395 U.S. 784 (1969) (protection against double jeopardy).

[8] *See In re Oliver*, 333 U.S. 257 (1948) (right to a public trial, right to notice of accusations); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by impartial jury).

[9] *See Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment).

[10] The Court has expressly found only two such rights unincorporated: the Fifth Amendment right to grand jury, *see Hurtado v. California*, 110 U.S. 516 (1884); and the Seventh Amendment right to a jury trial in civil cases, *see Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916).

Given the frequency with which the Court has applied the test for incorporation under the Due Process Clause, it is unsurprising that there has been no indication that this test has suddenly proven unworkable, or is ill-suited for the analysis necessary here. *See* Pet'rs' Br. at 66-72 (advocating incorporation of the Second Amendment through the Due Process Clause); Br. of Resp'ts Nat'l Rifle Ass'n of Am., *et al.* in Support of Pet'rs., at 24-30 (same).

Of course, the decision to incorporate the individual right to keep and bear arms recognized in *Heller* does not flow *a fortiori* from this Court's prior cases involving incorporation. There is substantial disagreement over whether the Fourteenth Amendment places limits on the ability of state and local governments to regulate firearms. *See* Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 57-72, 85-89 (2009) (examining the mixed historical evidence and concluding that the record does not strongly support incorporation).

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[11] The Second Circuit has addressed this issue. *See Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

[12] This Court has recently suggested that the prohibition on excessive bails and fines is in fact incorporated. *See Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008).

Nevertheless, this Court should, in the first instance, attempt to resolve the question of incorporation as it has for decades: by asking whether the right asserted fits within the established framework for incorporation under the Due Process Clause—*i.e.*, whether the individual right to keep and bear arms recognized by *Heller* is implicit in the concept of ordered liberty, and whether it is deeply rooted in this nation's history and tradition.

In *Heller*, the Court expressly reserved the issue of incorporation, but the Justices began to grapple with precisely the questions central to Due Process analysis. *Compare Heller*, 128 S. Ct. at 2798 ("By the time of the founding, the right to have arms had become fundamental for English subjects."), *with id.* at 2844 (Stevens, J., dissenting) ("[F]or most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial."). The traditional Due Process framework for answering questions of incorporation is therefore applicable here, and by beginning its analysis with that framework, the Court may be able to resolve this case without deciding far more difficult constitutional questions concerning the meaning of the Privileges or Immunities Clause.

B. The Court Should Not Decide Constitutional Questions Unnecessary to the Resolution of This Case

Principles of judicial restraint counsel that the Court should generally refrain from ruling on a constitutional question unless it must do so to resolve the case at hand. *See Slack v. McDaniel*, 529

U.S. 473, 475 (2000) (The "Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 525-26 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so, for '[t]he Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.'" (quoting *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring) (internal quotation marks and citation omitted)); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring) ("Courts do not review issues, especially constitutional issues, until they have to.").

Although issues of judicial restraint frequently arise in contexts where a court must choose between resolving a statutory or a constitutional issue, *see, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009), the overarching principle is the same: under normal circumstances, a court should decide no more than is necessary to resolve the case at hand. *See PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more."). Here, where the Court is presented with two competing constitutional grounds on which to resolve the question presented, the more prudent course would be for the Court to begin its analysis with the more well-established constitutional framework, *i.e.*, the Due Process Clause, rather than reviving a long dormant provision, *i.e.*, the Privileges or Immunities Clause.

To be sure, in some instances it is both appropriate and necessary for the Court to revive debate over an important but long dormant constitutional question. *Cf. Brown*, 347 U.S. 483 (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). But where a case can be resolved and constitutional interests appropriately vindicated, without considering a difficult and previously unexplored constitutional issue, it is often unwise for the Court to weigh in absent compelling reasons to do so. In this case, therefore, the Court's existing Due Process framework provides the clearest path for addressing the question presented, and should form the starting point of the Court's analysis.

C. The Court's Nineteenth Century Cases Concerning the Scope of the Fourteenth Amendment Present No Bar to Incorporation Under the Due Process Clause

Slaughter-House, and the other late nineteenth-century cases that effectively wrote the Privileges or Immunities Clause out of the Constitution, have been thoroughly discredited, and their continuing doctrinal significance has been substantially eroded by this Court's use of the Due Process Clause to incorporate key constitutional rights as against the states.

Slaughter-House initiated a post-Reconstruction line of decisions, such as *Cruikshank* and the *Civil Rights Cases*, that are rightly regarded as among the most misdirected in the history of the Court. In these cases, the Court enunciated principles far broader than were necessary to decide the matters at hand, and it too readily struck down Congressional legislation designed to combat discrimination against African Americans after the Civil War, including both the Ku Klux Klan's reign of terror and the establishment of a reconfigured caste system in the form of the Black Codes and Jim Crow.[13]

While it is undeniable that these cases are part of a dreadful chapter in the history of this nation, they present no bar to incorporation of constitutional rights as against the states under the Due Process

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[13] *See, e.g.*, Elizabeth Pryce-Foley, *Liberty for All* 36 (2006) ("If [the] *Slaughterhouse* Court had interpreted the Privileges or Immunities Clause of the Fourteenth Amendment as making the federal Bill of Rights applicable to the states, the southern states could not have continued to enact legislation that denied the Bill's liberties to African-Americans."), *quoted in* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 39 (2007); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 93 (2009) ("In the wake of the Supreme Court ruling [in the *Civil Rights Cases*], the federal government adopted as policy that allegations of continuing slavery were matters whose prosecution should be left to local authorities only—a *de facto* acceptance that white southerners could do as they wished with the black people in their midst."); Lane, *supra*, at 249 (explaining that *Cruikshank* and its progeny granted southern states "control of their colored population—because the Supreme Court had decreed that the Negroes must look first to the states for protection against violence and fraud").

Clause. As Petitioners acknowledge, the "central rule" of these cases—namely, that the Bill of Rights has no application to the states—is "a doctrinal anachronism" in light of the development of incorporation doctrine under the Due Process Clause. Pet'rs' Br. at 64-65 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992)).

Indeed, the Court has already effectively rejected *Cruikshank*'s erroneous view that the Due Process Clause "adds nothing to the rights of one citizen as against another." 92 U.S. at 554. Last year, this Court recognized in *Heller* that *Cruikshank* held erroneously that the First Amendment was inapplicable to the States, and that the Court's reasoning in *Cruikshank* lacked "the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23.[14]

The question of whether the right to keep and bear arms as recognized in *Heller* is incorporated remains for this Court to determine, but *Cruikshank* has been discredited as an historical relic, and should not be looked to for guidance.[15] As a case that allowed racially-motivated murderers who wantonly and tragically flouted the Constitution to escape the reach of federal power, it should not be relied on as valid precedent, particularly here.

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[14] *Cf. United States v. Emerson*, 270 F.3d 203, 222 n.13 (5th Cir. 2001) (noting that *Cruikshank* "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment," and that it therefore does not "establish[] any principle governing" the question of incorporation); *Nordyke v. King*, 563 F.3d 439, 448 (9th Cir. 2009) (stating that *Cruikshank* did not address "incorporation through the Due Process Clause"), *rehearing en banc ordered*, 575 F.3d 890 (9th Cir. 2009).

[15] *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), also pre-date the development of modern incorporation doctrine, and, to the extent that they

II. Any Revival of the Privileges or Immunities Clause Should Supplement, and Not Supplant, Existing Due Process Protections

If, in this case, the Court determines that it must interpret the Privileges or Immunities Clause to correct the mistakes of the Reconstruction-era Court, it should make clear that its ruling does not open the door for a reevaluation of its existing Due Process Clause decisions and, thus, does not destabilize the textual source of other, already incorporated, rights. This case does not require a broad ruling of that kind, and principles of prudence and judicial restraint militate against it.

Restraint is particularly appropriate here, given the marked uncertainty regarding the full scope of the Privileges or Immunities Clause. *See Saenz v. Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting) ("Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873").[16] In addition, there are substantial prudential considerations associated with any attempt to give new expression

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stand for the general proposition that the Bill of Rights has no application to the states, they should be deemed similarly anachronistic.

[16] Even under the Court's existing precedents, however, the Privileges or Immunities Clause is not a nullity, but rather protects certain limited rights. *See Saenz*, 526 U.S. at 502-03.

to a clause enacted to protect the citizenship of freed slaves after more than a century of having those rights, and many others, vindicated through an alternative doctrinal approach.

In light of that uncertainty and the potential risk to well-established safeguards for key constitutional rights, any venture by this Court into the largely uncharted terrain of the Privileges or Immunities Clause should supplement, and not supplant, clear and well-settled Due Process Clause case law. *See Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (noting that the Court should exercise caution when entering "un-chartered area[s], where the guideposts for responsible decisionmaking . . . are scarce and open-ended" (alterations in original, internal quotation marks and citations omitted)).

In order to present a full picture of the possible jurisprudential and practical consequences that such a reevaluation of the textual source of incorporation might entail, we highlight below some of the many complicated constitutional questions that might arise in the event that this Court reinterprets the Privileges or Immunities Clause.

A. The Range of Individuals and Entities Covered by the Privileges or Immunities Clause Is Unclear

The first question that would arise under a revitalized Privileges or Immunities Clause is what individuals and entities are entitled to the Clause's protections. Unlike the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which speak in terms of "person[s]," the Privileges or Immunities Clause refers only to "citizens." It therefore may be unclear whether the Privileges or Immunities Clause would apply to aliens (including lawful residents, visitors, undocumented immigrants, or even enemy combatants held within the jurisdiction of the United States).

It is well-settled under existing Due Process precedents that the protections of the Bill of Rights are applicable to non-citizens. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the criminal procedure protections of the Fifth and Sixth Amendments are applicable to all individuals, regardless of formal citizenship status). Under the Due Process Clause, basic constitutional protections safeguard non-citizens against both state and federal action. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

As explained by the Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Constitution embodies ideals that are applicable universally to all persons within the jurisdiction of the United States:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.

Id. at 369. The Constitution thus commands the protection of the rights and liberties of *persons as such*, and not only as citizens.

The universality embodied in our constitutional commitment to personhood is a core value of our nation's history and tradition. *See* Alexander Bickel, *Citizenship in the American Constitution*, 15 Ariz. L. Rev. 369, 370 (1973) ("[T]he original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizens."). Because of the robust protections for individual rights under existing Due Process and Equal Protection precedents, non-citizens in the United States are entitled to essentially the same protections under the Bill of Rights as are formal citizens.

The status of these constitutional safeguards, however, would be less clear if the Privileges or Immunities Clause were the exclusive source for incorporation. *See, e.g.*, Jamal Greene, *Heller High Water? The Future of Originalism*, 3 Harv. L. & Pol'y Rev. 325, 344 (2009) ("Reliance on the Privileges or Immunities Clause as the path of incorporation could have disturbing implications . . . for resident aliens and undocumented immigrants, whom the text of the Clause excludes from its protection.").

This is not to say that the Privileges or Immunities Clause necessarily excludes non-citizens from its scope. *See, e.g.*, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 25 (1980) (arguing that the Privileges or Immunities Clause's "reference to citizens may define the class of rights [protected,] rather than limit the class of beneficiaries [covered]," and that the bundle of rights typically associated with citizenship is properly extended to all persons under the Fourteenth Amendment).

Moreover, even if non-citizens are excluded from the reach of the Privileges or Immunities Clause, the Equal Protection Clause serves as an independent check on deprivations against aliens. *See* Laurence H. Tribe, *American Constitutional Law* § 7-6, at 1325 (3d ed. 2000) ("[B]y prohibiting discrimination in legal rights among all persons—citizens and aliens alike—[the Equal Protection Clause could], in effect . . . secure the 'privileges or immunities of citizens of the United States' to all persons within the jurisdiction of a particular state."); *cf. Graham v. Richardson*, 403 U.S. 365, 371-72 (1973) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); *Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

Petitioners are quite right that a decision invoking the Privileges or Immunities Clause as a source of incorporated rights should not "deprive non-citizens of any rights." Pet'rs' Br. at 62. But there are other views,[17] and the questions that might arise concerning the rights of non-citizens flowing from the Privileges or Immunities Clause should give the Court pause before issuing any ruling that might weaken the scope of existing Due Process protections.

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[17] For instance, Professor Tribe contends that "there may be no convincing escape from the conclusion that the Privileges or Immunities Clause . . . protects only a limited group of persons—United States citizens." Tribe, *supra*, § 7-6, at 1325.

The exclusion of non-citizens from the most basic constitutional safeguards has an ignominious history in the Court's decisions. For much of this nation's history, African Americans were considered "persons" but not "citizens," and therefore were deemed to have "no rights which the white man was bound to respect." *Dred Scott*, 60 U.S. at 407; *see also* Bickel, *supra*, at 387 ("It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson, which is the point of the *Dred Scott* case"). Any paring back of existing constitutional protections based on a reevaluation of the Privileges or Immunities Clause would thus be inconsistent with the Constitution's universal guarantee of fundamental rights to all persons, regardless of citizenship status.[18]

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[18] As with the aliens, the status of corporations may become unclear in the wake of a doctrinal shift away from the Due Process Clause as the source of incorporated rights. The Court has recognized corporations as "persons," thus entitling them to a broad array of constitutional protections against state governmental action under the Due Process Clause, *see S. Ry. Co. v. Greene*, 216 U.S. 400, 412 (1910), but not as "citizens" under the Privileges or Immunities Clause. *See Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907). As the Court explained in *NAACP v. Button*, 371 U.S. 415 (1963), for-profit and non-profit corporations, including *amicus*, currently enjoy a degree of First Amendment freedom of speech protection against state governmental regulations. *See id.* at 428-29; *see also Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475

B. The Range of Rights Covered By the Privileges or Immunities Clause Is Unclear

If the Privileges or Immunities Clause were to supplant the Due Process Clause as the principal basis for the incorporation of rights against state and local governmental action, a second serious question would arise concerning the range of rights that could be considered "Privileges or Immunities." The confusion that might arise in such a scenario militates against a sweeping ruling that would cast doubt upon the proper textual source of fundamental constitutionally-protected rights.

There is substantial disagreement as to what rights are included within the Privileges or Immunities Clause. On the one hand, the Privileges or Immunities Clause might be interpreted more narrowly than the Due Process Clause. The Court has held that the Due Process Clause includes many unenumerated rights, such as the right to marry, *Loving*, 388 U.S. 1; to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to reproductive freedom, *Casey*, 505

U.S. 1, 8 (1986) (plurality opinion); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978). Re-conceptualizing the Privileges or Immunities Clause as the source for incorporation could force the Court to revisit its precedents establishing the freedoms that corporations currently enjoy.

U.S. 833; and to intimate relations, *Lawrence v. Texas*, 539 U.S. 558 (2003).

The status of these unenumerated rights might suddenly become unclear in a new incorporation doctrine that relies exclusively on the Privileges or Immunities Clause. *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 195-96 (1999) ("Who can say with confidence which of the salutary traditions surrounding substantive due process would be preserved intact once the transplantation had occurred?").

Notably, some scholars have contended that the Privileges or Immunities Clause, as understood by its framers and ratifiers, might be relatively narrow, including only those rights that were understood as "civil" rights at the time of its ratification (*i.e.*, those rights associated with living in organized society generally), such as the right to free speech or to own property, as distinct from: (1) "political" rights (*i.e.*, those rights deriving from the particular arrangements of specific societies), such as the right to vote or to hold office, *see, e.g.*, Akhil Amar, *America's Constitution: A Biography* 391 (2005) (noting that the Privileges or Immunities Clause "applied only to civil rights and not to political rights such as voting, jury service, militia service, and officeholding"); and (2) "social" rights (*i.e.*, those rights exercised amongst private citizens) that would encompass full equality in all spheres of life, *see* Earl M. Maltz, *Reconstruction Without Revolution: Republican Rights Theory in the Era of the Fourteenth Amendment*, 24 Hous. L. Rev. 221, 224-26 (1987). A shift to the Privileges or Immunities

Clause as the principal source of incorporated rights could therefore dramatically narrow the range of constitutional protections against state and local governmental action.

On the other hand, however, the Privileges or Immunities Clause could be the source of expanded constitutional protections. As an initial matter, many of the historical sources relied on by petitioners suggest that the Privileges or Immunities Clause, at a minimum, was intended to incorporate the first eight amendments in their entirety. *See* Pet'rs' Br. at 29-32 (quoting assertions by Representative Bingham shortly after ratification of the Fourteenth Amendment in, *inter alia*, Cong. Globe 42d Cong., 1st Sess. 84 app. (1871)). By contrast, the Court has already explained that the Due Process Clause only "selectively incorporates provisions of the Bill of Rights." *Wolf v. Colorado*, 338 U.S. 25, 26 (1949), *overruled as to remedy*, *Mapp*, 367 U.S. 643 (1961).

Moreover, some commentators have urged a broad reading of the Privileges or Immunities Clause, pointing to the Court's expansive list of freedoms associated with Due Process, as stated in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as a starting point for interpreting the scope of the Privileges or Immunities Clause. *See* David H. Gans & Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges and Immunities Clause of the Fourteenth Amendment* ix, 31 (2008) *available at* http://www.theusconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf. In *Meyer*, the Court held that Due Process includes

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399.

Others have suggested that the Privileges or Immunities Clause might include other specific rights, such as natural rights and economic liberties protected under the now-discredited doctrine of *Lochner v. New York*, 198 U.S. 45 (1905). *See* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 2 (1996) ("Can we resurrect the Privileges or Immunities Clause and revive *Slaughter-House* without exhuming *Lochner*, a case that too often left the worker and the small business person to be regulated by massive combinations of corporate power?").

Still others have suggested that the Privileges or Immunities Clause could guarantee positive rights to life essentials such as government assistance, *see* Erwin Chemerinksy, *Making the Case for a Constitutional Right to Minimal Entitlements*, 44 Mercer L. Rev. 525, 538 (1993), and a basic education, *see* Goodwin Liu, *National Citizenship and the Promise of Equal Educational Opportunity*, in *The Constitution in 2020* (Jack M. Balkin & Reva B. Siegel, eds. 2009); or a national right to vote, *see* John Benjamin Schrader, *Note, Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 Vand. L. Rev. 1285, 1307-09 (2009) (observing that the majority of state legislatures to ratify the Fourteenth Amendment concluded that the right to vote was among the Privileges or Immunities protected by the Amendment).

Against this backdrop, it is likely that a decision by the Court altering the textual source of incorporated rights would bring less, rather than more clarity, to Fourteenth Amendment law. This is not to suggest that the Court should never tackle the meaning of the Privileges or Immunities Clause in the appropriate case. But the current wide disagreement about the scope of the Clause suggests that the Court should not confront this issue lightly. And given this uncertainty, should this Court ultimately decide to reexamine its Privileges or Immunities decisions, it should leave in place the full extent of the protections for rights that have been previously determined to fall within the scope of the Due Process Clause.

CONCLUSION

In resolving this case, principles of judicial restraint counsel that the Court should look to its well-established Due Process precedents in the first instance. But if the Court renders a ruling interpreting the Privileges or Immunities Clause, any such decision should supplement, and not supplant, existing Due Process protections. The civil rights protections against state and local action established through Due Process incorporation are an essential bulwark in safeguarding fundamental liberties. The Court should act cautiously so that these protections, on which literally millions of Americans rely, are not disturbed by any decision concerning the scope of the Privileges or Immunities Clause.

Respectfully submitted,

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AMICUS
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Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus curiae* is the National Shooting Sports Foundation, Inc. ("the NSSF"), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of approximately 5,000 federally licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; publishers; and individuals. The NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and the shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

The NSSF's interest in this action derives principally from the fact that the NSSF's federally licensed firearms manufacturer, distributor, and retailer members provide the lawful commerce in firearms that makes possible the exercise by the People of the preexisting individual right enshrined in and protected by the Second Amendment. Members of the industry, for example, supply the United States armed forces and federal, state, and local law enforcement with the firearms they use to protect America's national security and keep our communities safe, and also supply hunters, sportsmen, and gun owners with the firearms they use for legitimate and lawful purposes, which include defense of their families, themselves and their homes. More generally, as a guardian of our nation's rich hunting and shooting heritage and traditions, the NSSF believes that any interpretation of the Second Amendment must be informed by that heritage – particularly the history of firearms in colonial America before and during ratification of the Second Amendment. Because that history demonstrates that the Second Amendment's individual right to "keep and bear arms" is "fundamental" within the meaning of Fourteenth Amendment jurisprudence, the NSSF submits this brief in support of Petitioners and urges this Court to reverse the decision of the United States Court of Appeals for the Seventh Circuit.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The Petitioners have received at least 7 days notice from the *amicus*, and the Respondents' consent is being submitted herewith.

SUMMARY OF THE ARGUMENT

The Second Amendment to the Constitution provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Whether the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment turns on whether the right to keep and bear arms is "fundamental," or "deeply rooted in this Nation's history and traditions." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

As this Court recognized in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008), the Second Amendment did not create a new right, but enshrined a right that had already existed. History makes clear that that pre-existing right was indeed fundamental and deeply rooted in our history. Firearms played an integral role in Americans' lives before and during ratification of the Constitution and the Bill of Rights. Personal ownership of firearms was, of course, often critical to survival in the 17th and 18th centuries (and long thereafter) – providing food before there were supermarkets and safety before there were police forces. More importantly, late 18th century Americans deemed firearms to be their principal protection against tyranny – first from the British crown and then from the new national government they were creating in the Constitution. Individual States also guaranteed these rights in various forms at the founding, in the aftermath of the Civil War, and thereafter, such that 44 States currently protect the right to bear arms. In light of this history, the fundamental character of the individual right to bear arms is self-evident.

ARGUMENT

In its landmark *Heller* opinion, this Court held that, "[b]y the time of the founding, the right to have arms had become fundamental for British subjects." 128 S. Ct. at 2798. That right pre-existed our Constitution, *id.* at 2797, served as the basis for the Second Amendment, *id.* at 2797-99, and encompasses what the Court recognized as "the inherent right of self-defense," *id.* at 2817.

In deciding whether the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment, the Court must now determine whether the rights guaranteed by the Second Amendment are fundamental to our society – an inquiry that turns on whether the right is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968), and "deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks and citation omitted). A review of the role of firearms in colonial society and our nation's founding, the Framers' notions of the right to keep and bear arms, and the subsequent recognition of the right by the States leads inescapably to the conclusion that the individual rights guaranteed by the Second Amendment are, indeed, "fundamental" and, therefore, apply to the States through the Due Process Clause of the Fourteenth Amendment.[2]

I. FIREARMS WERE A PRINCIPAL AND UBIQUITOUS TOOL OF SURVIVAL IN COLONIAL AMERICA

In the colonial era leading up to the drafting of the Constitution and Bill of Rights, firearms played a prominent role in America. No longer a privilege shared only by noblemen and the wealthy, as in Britain, firearms in America were an important means of assuring self-preservation for all classes.[3] Firearms were commonly viewed as essential to protecting colonists from attacks by Native Americans, insurrections by slaves, and harm from wild animals. Firearms also proved superior to other weapons in hunting, for both food and trade, the vast numbers of wild game and fowl that inhabited the New World – so much so that Native Americans, when possible, abandoned their traditional weaponry for the new firearms.[4]

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[2] The NSSF agrees with Petitioners that this would also be an appropriate case in which to consider incorporation under the Fourteenth Amendment's Privileges and Immunities Clause.

Although it is impossible to quantify with certainty the prevalence of firearms in colonial America, academicians have been able to extrapolate estimates from probate inventory reports and contemporary accounts of observers. One recent such study estimates firearms ownership in 1774 at over fifty percent, compared with roughly seventy-seven percent clothes ownership and thirty percent money and coin ownership.[5] According to a review of over 5,000 probates from 1636 through 1810, "[a]pproximately 50-79% of itemized male inventories contained guns."[6] These are likely conservative estimates, and firearms ownership was likely substantially higher.[7]

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[3] *See* LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA 41 (1975); ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA 17 (2001).

[4] KENNETT & ANDERSON, *supra* note 3, at 41-42, 51.

[5] *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1835-36 (2002).

[6] *Id.* at 1838.

Numerous observers of life in the colonies reported the commonplace use of firearms. An Anglican minister of the era, for example, noted that "the great quantities of game, the many kinds, and the great privileges of killing make the Americans the best marksman [*sic*] in the world."[8] Another commentator reported that "there is not a Man born in America that does not understand the Use of Firearms and that well. . . . It is almost the First thing they Purchase and take to all the New Settlements and in the Cities you can scarcely find a Lad of 12 years That [does not] go a Gunning."[9] Yet another noted: "[W]hen a boy was twelve 'he then became a fort soldier, and had his port-hole assigned him. Hunting squirrels, turkeys, and raccoons, soon made him expert in the use of his gun.'"[10] Even non-citizens had access to firearms. Slaves, for a time, in some areas had access to firearms for hunting, although armed slave insurrections subsequently led to the disarmament of slaves and, in some regions, freed blacks as well.[11] Native Americans, dependent on firearms for food and defense, also came to possess significant quantities of firearms.[12]

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[7] The probate reports are admittedly incomplete and imperfect sources of information; however, as the authors explain, they tend to understate items possessed. For example, one would expect clothing to be reported on every probate, which it is not. *Id.* at 1836-37. It is also possible that firearms were passed on to others before death.

[8] KENNETT & ANDERSON, *supra* note 3, at 42 (citation omitted).

[9] *Id.* (citation omitted).

[10] *Id.* (citation omitted).

Laws in effect in the colonies encouraged, even required, the carrying and use of firearms. Inhabitants in at least six colonies were required to carry firearms to church, public meetings, or while traveling, in order to repel sudden attacks by Native Americans.[13] More ubiquitous, however, were "militia laws," which appeared beginning in the mid-17th century and required colonists to bear arms in common defense against Native Americans and Britain's European enemies.[14] The militia laws generally required persons between specified ages (usually between sixteen and sixty) to bear arms, often at their own expense, and to provide arms for servants living within their households.[15] Laws encouraging hunting emerged in order to hone marksmanship skills at private expense.[16] By the time of the American Revolution, every colony had its own militia of private citizens,[17] and firearms were ingrained in the American experience.[18]

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[11] *See* CLAYTON E. CRAMER, ARMED IN AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 33-36 (2006) (citing South Carolina laws and customs).

[12] *See id.* at 46-50; KENNETT & ANDERSON, *supra* note 3, at 51.

[13] *See* CRAMER, *supra* note 11, at 9-11.

[14] *See, e.g.*, *id.* at 3-11.

[15] *See id.* at 3-9 (describing various militia laws and exemptions from militia service).

[16] *See* KENNETT & ANDERSON, *supra* note 3, at 46.

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[17] *See* CRAMER, *supra* note 11, at 3.

[18] The firearms-dependent society of late 18th century America, of course, gave birth to a vibrant firearms manufacturing industry. Today, the manufacture and sale of firearms in America remain in private hands. Indeed, as there is no government-owned arsenal, private manufacturers, most of whom are members of the NSSF, supply small arms used by the American military, law enforcement, and consumers. Because the Second Amendment protects an individual right to "keep and bear arms," the commerce engaged in by those manufacturers that makes exercise of that right possible is also necessarily cloaked in some degree of Constitutional protection. *Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866-867 (1982) (plurality opinion) (noting, in the context of First Amendment rights, that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom") (emphasis in original); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (without the "peripheral rights" to distribute, receive, read, inquire, think, and teach, the specific rights of freedom of speech and press would be less secure).

Surely, the right to keep and bear arms becomes illusory if the means of exercising it are prohibited. In the same way that banning newspapers squelches freedom of speech and freedom of the press, prohibiting manufacturers from producing guns and shipping them in interstate commerce, and criminalizing the purchase and possession of guns by ordinary citizens, strips citizens of their Second Amendment rights.

II. THE BRITISH TRIED BUT FAILED TO DISARM THE COLONISTS DURING THE AMERICAN REVOLUTION

Colonial life entered a new phase in 1767, with the British Parliament's passage of the Townshend Acts. As the dispute between the colonies and the Crown escalated, the colonists' widespread possession of firearms quickly became an issue – and one that the colonists defended immediately.

A. At the Earliest Hostilities, Colonists Asserted Their Pre-Existing Individual Right to Keep and Bear Arms

The Townshend Acts imposed customs duties on items commonly imported into the colonies. This "taxation without representation" sparked outrage among many colonists, and led to petitions to the Crown and Parliament for redress. Because Boston was seen as the hotbed of civil unrest in the colonies, British General Thomas Gage was instructed to send military forces into the city.[19] When riots then erupted in Boston in 1768, the British Ministry responded by seeking to disarm the inhabitants of Boston.[20]

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[19] 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY, 1763-1775, at 68-69 (Clarence E. Carter ed., Yale University Press 1931-33).

[20] *See* BOSTON GAZETTE, September 26, 1768, at 3, cols. 1-2 (reporting that the Ministry had instructed the Governor to disarm the people); VIRGINIA GAZETTE, October 27, 1768, at 2, col. 3 (same); MARYLAND GAZETTE (Annapolis), October 20, 1768, at 3, col. 1 (same); GEORGIA GAZETTE (Savannah), November 2, 1768, at 1, col. 1 (same).

Bostonians became alarmed, and passed a resolution advising every man to arm himself "in Case of Sudden Danger."[21] When King George III denounced this resolution as an illegal act, Samuel Adams defended the resolution by declaring that, as "subjects of England," the Bostonians were "entitled . . . to the right of having and using arms for self-preservation and defence." Adams argued that the right to bear arms constituted what British jurist William Blackstone had called "'auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property.'"[22]

As tensions continued to rise, skirmishes between the colonists and the Redcoats culminated in the Boston Massacre on March 5, 1770. During the ensuing criminal trial of the British soldiers, both the prosecution and defense agreed that Bostonians had the right to arm themselves for self-defense.[23] Indeed, successfully representing the soldiers, John Adams asserted this right as follows: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence."[24]

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[21] BOSTON CHRONICLE, September 19, 1768, at 363, col. 2; *see also* BOSTON POST POST-BOY & ADVERTISER, September 19, 1768, at 1, col. 3; NEW YORK JOURNAL, OR GENERAL ADVERTISER, Supplement, September 24, 1768, at 1, col. 3.

[22] 1 THE WRITINGS OF SAMUEL ADAMS 317-18 (Harry Alonzo Cushing ed., G.P. Putnam's Sons 1904). Adams quoted *verbatim* from WILLIAM BLACKSTONE, 1 COMMENTARIES 140-41, 143-44.

[23] *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 23-25 (2008).

B. Britain Tried to Subdue Boston by Disarming its Residents

Three years of relative calm thereafter came to an abrupt end on December 16, 1773, with the Boston Tea Party.[25] Parliament responded by, among other things, revoking the Massachusetts Province Charter; appointing General Gage as governor of Massachusetts, with authority to declare martial law and suppress rebellion by force; and establishing a Massachusetts Council appointed by the Crown.[26]

The British were aware, however, that because Massachusetts residents were well-armed, the British would have great difficulty controlling them. In the words of Lord Percy:

> What makes an insurrection here always more formidable than in other places, is that

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[24] JOHN ADAMS, 3 LEGAL PAPERS 248 (Belknap Press/ Harvard Univ. Press 1965).

[25] Recently passed legislation had been designed to give the British East India Company a monopoly on the trade by suppressing the trade in Dutch tea and waiving import taxes on English tea. *See* HALBROOK, *supra* note 23, at 29.

[26] *See id.* at 29-30; DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 99 (R. Aitken 1789) *reprinted by* (Liberty Classics 1990); BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION, 1766-1775, at 136-39 (Free Press 1975), *reprinted by* (Liberty Fund 2003).

> there is a law of this Province, wh[ich] obliges every inhabitant to be furnished with a firelock, bayonet, & pretty considerable quantity of ammunition. Besides wh[ich] every township is obliged by the same law to have a large magazine of all kinds of military stores. They are, moreover, trained four times in each year, so that they do not make a despicable appearance as soldiers, tho' they were never yet known to behave themselves even decently in the field.[27]

Accordingly, Lord Dartmouth, secretary of state for America, recommended that General Gage disarm the colonists.[28]

General Gage agreed that disarmament would be prudent, but he knew it had to be implemented gradually because there were simply too many armed citizens.[29] After seizing the gunpowder at the Massachusetts powder houses[30] and banning the export of all arms and ammunition into the colonies,[31] he decided in 1775 to confiscate arms and ammunition directly from the citizens. One such search-and-seizure mission led to the first military engagements of the war, the Battles of Lexington and Concord.[32]

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[27] Percy to the Duke of Northumberland (his father), September 12, 1774, *in* HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 37-38 (Charles Knowles Bolton ed., Charles E. Goodspeed 1902).

[28] Dartmouth to Gage, October 17, 1774, in 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 19, at 175.

[29] Gage to Dartmouth, December 15, 1774, 1 CORRESPONDENCE OF GENERAL GAGE, *supra* note 19, at 387.

[30] *See* HALBROOK, *supra* note 23, at 32, 36-38.

Fearing rebellion at his back, General Gage then sought to disarm all inhabitants of Boston. On April 23, 1775, believing that colonists were hiding arms and ammunition, Gage promised a committee of Selectmen "that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town. . . . And that the arms aforesaid at a suitable time would be return'd to the owners."[33] Acting on this promise, "the people delivered to the selectmen 1778 fire-arms [muskets], 634 pistols, 973 bayonets, and 38 blunderbusses [short-barreled shotguns]."[34] Having seized the weapons, however, General Gage then reneged on his promise to let the inhabitants leave. The Boston residents thus were held hostage in their own town.[35]

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[31] 5 Acts Privy Council 401, *reprinted in* CONNECTICUT COURANT, December 19, 1774, at 3, cols. 2-3. The decree was renewed from time to time until 1783. *See* JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776, at 412 (Atlantic Monthly Press 1923).

[32] *See* HALBROOK, *supra* note 23, at 73-74. In April of 1775, General Gage learned from informants that the Massachusetts colonists had hidden arms and ammunition at roughly thirty homes and farms in Concord. On April 18th, "[h]aving received Intelligence, that a Quantity of Ammunition, Provision, Artillery, Tents and small Arms, [had] been collected at Concord," he ordered Lieutenant Colonel Francis Smith to "March with the Corps of Grenadiers and light Infantry, put under [his] Command, with the utmost expedition and Secrecy to Concord where [he would] seize and destroy" the munitions. KNOLLENBERG, *supra* note 26, at 231-32.

[33] Attested Copy of Proceedings Between Gage and Selectmen, April 23, 1775, *in* CONNECTICUT COURANT, July 17, 1775, at 4, col. 2.

On June 17, 1775, Bostonians fought the Battle of Bunker Hill. This proved to General Gage that his previous attempt at disarmament had been unsuccessful and led him on June 19, 1775, to renew his call for the colonists to surrender their arms, declaring "that all persons in whose possession any fire arms hereafter be found, will be deemed enemies to his majesty's government."[36] Stated otherwise, General Gage had declared the mere possession of arms and ammunition in Boston to be an act of treason.

Not surprisingly, colonists elsewhere feared that the disarmament of Boston was only the first step in a general plan to disarm all Americans. In his famed "liberty or death" speech to the Convention of Delegates of Virginia, for example, Patrick Henry proclaimed: "They tell us . . . that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? . . . Will it be when we are totally disarmed, and when a British guard shall be stationed in every house?"[37] Likewise, a New Hampshire patriot wrote: "Could [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?"[38]

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[34] RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Little, Brown, & Co. 1903).

[35] *See* HALBROOK, *supra* note 23, at 85-89.

[36] NEW YORK JOURNAL, August 31, 1775, at 1, col. 4. *See also* 2 AMERICAN ARCHIVES, 4th series, at 1027 (Force ed.).

This widespread fear of disarmament precipitated renewed calls for armed self-defense throughout the colonies.[39] Josiah Warren of the Massachusetts Provincial Congress, for example, recommended that New Yorkers secure their weapons for themselves or "within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them."[40] The South Carolina General Committee, meanwhile, "recommended, to all persons, to provide themselves immediately, with at least twelve and a half pounds of powder, with a proportionate quantity of bullets."[41] Typical of the entreaties was the message of the North Carolina contingent of the Continental Congress:

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[37] JOURNAL OF PROCEEDING OF CONVENTION HELD AT RICHMOND 34 (J. Dixon 1775); *see also* VIRGINIA GAZETTE, April 1, 1775, at 2, cols. 1-2.

[38] NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, January 13, 1775, at 1, col. 1, *reprinted in* 1 AMERICAN ARCHIVES (Washington, D.C. 1837-53), 4th series, at 1065 (Force ed.).

[39] *E.g.*, NEW YORK JOURNAL, May 4, 1775, at 2, col. 3 (New York); NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3 (New Jersey); NORTH CAROLINA GAZETTE, July 14, 1775, at 1, col. 1 (South Carolina).

[40] 2 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775-1776-1777, at 10 (Thurlow Weed 1842).

> It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form yourselves into a Militia. . . . Carefully preserve the small quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies. . . .[42]

Lest there be any doubt about how significantly the colonists viewed Britain's attempts to disarm them, the Continental Congress included disarmament in its July 6, 1775 Declaration of Causes of Taking Up Arms. Drafted by Thomas Jefferson and John Dickinson, the Declaration stated, in relevant part:

> The inhabitants of Boston being confined within that town by the General their Governor, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in

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[41] JOHN DRAYTON, 1 MEMOIRS OF THE AMERICAN REVOLUTION . . . AS RELATING TO SOUTH CAROLINA 166 (Charleston 1821).

[42] NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 2, col. 3.

> open violation of honor, in defiance of the obligation of treaties, which even savage nations esteem sacred, the Governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.[43]

This Declaration was made known throughout the colonies,[44] making clear that Britain's policy of disarmament was one of the leading causes of the American Revolution.

III. BECAUSE THE SECOND AMENDMENT DERIVES FROM THE AMERICANS' REFUSAL TO BE DISARMED, IT PROTECTS A FUNDAMENTAL RIGHT OF THE INDIVIDUAL TO KEEP AND BEAR ARMS

Having successfully resisted disarmament, the Americans were able to defeat Great Britain in 1783. Suspicious of government, however, Americans of that era retained their fear of disarmament. Indeed, as Americans considered the ratification of a new Constitution, their refusal to permit disarmament led directly to the inclusion of an individual right to bear arms in the Second Amendment of the Bill of Rights. As the discussions surrounding the Second Amendment demonstrate, while the expression of the right provoked substantial debate, the fundamental nature of an individual's right to keep and bear arms was an unspoken assumption. The Second Amendment did not create the fundamental individual right; it protected and enshrined it. *See Heller*, 128 S. Ct. at 2798.

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[43] 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, at 151 (Worthington Chauncey Ford ed., Government Printing Office 1905).

[44] *E.g.*, CONNECTICUT COURANT, July 17, 1775, at 2, col. 1. *See also* HALBROOK, *supra* note 23, at 100-02.

Debate over the right to keep and bear arms was ignited when the Framers suggested standardizing militia training and weaponry, much as they had proposed standardizing currency and domestic and international trade. To promote uniformity and the interchangeability of firearms and ammunition across the various States, George Mason proposed a "militia clause," which would permit Congress to "make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed."[45]

Despite the benign purpose of standardization, the militia clause generated numerous objections following the same theme: the Antifederalists opposed federalizing the militia because they feared it would give the central government power to disarm the people. Even George

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[45] DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA . . . VOL. V. SUPPLEMENTARY TO ELLIOT'S DEBATES 464 (Jonathan Elliott ed., J.B. Lippincott 1845).

Mason himself, the Virginian Antifederalist who had proposed the militia clause, argued as follows:

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. . . . Why should we not provide against the danger of having our militia, our real and natural strength destroyed?[46]

The Federalists dismissed these arguments as unfounded, because the militia comprised "the people" themselves, whom Congress had no power to disarm. In his pamphlet, *An Examination of the Leading Principles of the Federal Constitution*, for example, Noah Webster explained that, because the armed populace would remain sovereign, there was no need to fear a standing army:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce

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[46] 3 Debates in the Several States Conventions on the Adoption of the Federal Constitution 380 (Jonathan Elliot ed., J.B. Lippincott 1836).

> unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.[47]

And Tench Coxe, writing under the name "A Pennsylvanian," made the same argument:

> Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against our own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.[48]

Finally, and perhaps most authoritatively, during the ratification process, James Madison wrote that "the advantage of being armed, which the Americans possess over the people of almost every other nation" formed "a barrier against the enterprises of ambition."[49]

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[47] NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

[48] PENNSYLVANIA GAZETTE, February 20, 1788, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1778-1780 (Merrill Jensen ed., State Historical Society of Wisconsin 1976) (microfilm supplement).

Despite these basic differences over which governmental body should be permitted to "arm" the militia, however, both sides to the debate agreed that the government did not have the power to deprive the people of their fundamental right to keep and bear arms. Indeed, in 18th century America, it is difficult to conceive how anyone could have seriously advocated such a position.

Accordingly, the Antifederalists ensured that what became the Second Amendment – guaranteeing the pre-existing right of an individual to keep and bear arms – be included within the Bill of Rights.

IV. THE HISTORY OF THE RIGHT TO BEAR ARMS AMONG THE STATES CONFIRMS THE FUNDAMENTAL NATURE OF THAT RIGHT

As if to underscore the fundamental nature of the individual right to bear arms, the right has been protected at virtually every other stage of the development of our federal system.

For example, each of the original 13 States had deemed the right to bear arms fundamental, with several of them including the right in their State constitutions.[50] Then, following the Civil War, the discourse surrounding ratification of the Fourteenth Amendment again reflected the fundamental nature of the right to bear arms and the need to protect it from State encroachment.[51] Indeed, a primary purpose of the Fourteenth Amendment was to reverse the "Black Codes" of the South, which, among other things, deprived African Americans of their individual right to bear arms and, concomitantly, the right to defend themselves, their families and their homes. *See Heller*, 128 S. Ct. at 2809-10. As Jacob Howard explained in the Senate, referring to "the personal rights guaranteed and secured by the first eight amendments of the constitution" (among which he included the right to bear arms), "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[52] So important is the individual right to keep and bear arms in our nation's heritage that, today, 44 states guarantee the right to arms in their constitutions.[53]

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[49] 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492-93 (John P. Kaminski *et al.* eds., State Historical Society of Wisconsin 1984).

Throughout our nation's history, the individual right to keep and bear arms has been integral to the protection of the inalienable rights to life, liberty and property. If the States were now free to eliminate that right, however, it would become meaningless. As the United States Court of Appeals for the Ninth Circuit properly held in *Nordyke v. King*, 563 F. 3d 439, 457 (9th Cir. 2009),

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[50] *See* HALBROOK, *supra* note 23, at 126-68.

[51] *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS 1866-1876 (1998) chapters 1-4.

[52] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

[53] Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-205 (2006).

> the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

This history proves strongly not only that the Second Amendment guarantees an individual right to "keep and bear arms," but that that right was fundamental to the creation and protection of our country. Accordingly, this Court should reverse the decision below.

CONCLUSION

In accordance with the intent of the Framers that the Second Amendment protect a fundamental, individual right to "keep and bear arms," this Court should reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

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OTIS MCDONALD, *et al.*,
Petitioners,
v.
CITY OF CHICAGO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE* OAK PARK CITIZENS COMMITTEE FOR HANDGUN CONTROL IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*

The Oak Park Citizens Committee for Handgun Control ("Committee")[1] is an unincorporated, voluntary association of Oak Park residents who lobbied the Oak Park Village Board to enact an ordinance banning handguns in Oak Park over 25 years ago, and who later organized the campaign in support of the ban in a public referendum called by the Village Board.

The Committee was formed after an Oak Park attorney, James Piszczor, was shot with a handgun in a Chicago courtroom on October 21, 1983, while representing a client in court. His murderer, Hutchie Moore, was the respondent in the proceeding. Moore appeared in court in a wheelchair and hid the handgun under a blanket which he carried on his lap. Moore first shot the presiding judge, Henry Gentile, in the forehead and then fired on Piszczor. Judge Gentile died on the scene. Piszczor died shortly thereafter while undergoing emergency surgery.

The morning after his murder, Piszczor's widow issued a press release urging enactment of stricter laws on the possession and carrying of handguns. It received significant coverage in the Chicago media, and the Committee was formed shortly thereafter.

The Oak Park ordinance prohibits the possession of handguns in the community. Oak Park, Ill., Mun. Code § 27-1-1. Police officers, members of the Armed

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Forces and National Guard, private security guards and federally licensed firearms collectors are exempt from the ban. *Id.* So also are gun clubs and theatre organizations. *Id.* Rifles and shotguns may be kept and carried on one's own land or place of business. *Id.* Violations are punishable by a fine of not more than $1,000 for a first offense and $2,000 for any subsequent offense, but not imprisonment. *Id.* at § 27-4-1(A). Oak Park does not require registration or licensure of any weapon and does not prohibit possession and use of tasers.

Amicus has a substantial interest in ensuring the continued legality of Oak Park's handgun ban to help protect the public health and safety of the community from criminal violence, accidental deaths and injuries, and suicides committed with handguns. In the ten years before enactment of the ban, the community was plagued by instances of handgun crime and other handgun-related violence, including the accidental death of a four-year-old child. *See* Section II *infra*. Since enactment of the ban in 1984, crime has gone down in the community, *see* Addendum, and there have been no accidental deaths related to handguns.

SUMMARY OF ARGUMENT

This Court has incorporated against the states only those enumerated constitutional rights that are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 324-25 (1937), *overruled on other grounds by Benton* v. *Maryland*, 395 U.S. 784 (1969). This phrase reflects not only a theoretical standard, but also a practical reality. Incorporated rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964). Thus, as this Court observed when incorporating the right against self-incrimination against the states, incorporation makes sense when it would be "incongruous to have different standards" concerning the exercise of the right, regardless of whether it is the state or the federal government which is threatening the personal interest the right protects. *Id.* at 11.

According to this Court, the Second Amendment protects the right to handgun ownership because handguns are the "quintessential self-defense weapon." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2818 (2008). And, as relevant here, the self-defense significance of the Second Amendment renders it particularly inappropriate for incorporation against the states. The right of self-defense has unquestionably been the subject of varying state standards throughout our nation's history. There is nothing incongruous about states and local communities adopting different standards concerning the role handguns play, if any, in ensuring the right of self-defense, especially in light of the vastly different circumstances that communities face regarding the public safety implications of handguns. Incorporating the Second Amendment right to *own* arms for self-defense would entail developing uniform federal standards for the *use* of those protected firearms in self-defense. To incorporate the Second Amendment right to possess handguns in one's home would portend a massive federal intrusion into the administration of the right to self-defense that is as unwarranted as it is unnecessary.

The People of Oak Park, through their elected representatives—and themselves, collectively, in an advisory referendum called by their representatives—have determined that handguns in the home pose a menace to their public health and safety. After long debate and careful consideration of thoroughly presented arguments advanced by both handgun proponents and opponents, they chose to ban handguns from their community. There is no reason in law or sound public policy why any supposed contrary nationwide judgment regarding the quintessence of handgun ownership in American society should trump the more specifically tailored considerations of the people of Oak Park and the role handguns play in their community. Other guns remain available to Oak Parkers for self-defense in the home and other lawful purposes. Oak Park asks only for the right to decide for itself what weapons best protect the public health and safety of its own citizens and their homes. The Constitution of the United States does not require otherwise.

ARGUMENT

This Court's decision in *Heller* carefully examined the text and historical roots of the Second Amendment—both its prefatory clause (referring to "a well regulated militia") and its operative clause (referring to the "right of the people")—to explain its present-day content. Looking to the English roots of the right, the Court observed that the right to arms was "by the time of the founding understood to be an individual right protecting against both public and private violence." 128 S. Ct. at 2798-99. That is, the right served to protect an individual's ability both to resist government oppression and to act in self-defense "when 'the intervention of society in his behalf may be too late to prevent an injury.'" *Id.* at 2799 (quoting Blackstone, 1 *Commentaries* 145-46 n.42 (1803)).

This Court recognized that the interest in protecting against government oppression was directed particularly toward the new *federal* government. As this Court recounted, "the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." *Id.* at 2801. To be sure, this Court noted that various state constitutions and statutes from the founding era and the early post-ratification period connected the right to arms with self-defense. But notably, those provisions all connected the right to arms with defense *of* the individual states, not defense *from* attack by the individual states. *Id.* at 2802-03 (quoting Pennsylvania Decl. of Rights of 1776 § XIII ("'That the people have a right to bear arms for the defense of themselves, and the state . . . .'"(emphasis omitted)), North Carolina Decl. of Rights § XVII ("'That the people have the right to bear arms, for the defence of the State . . . .'"), 19 Colonial Records of the State of Georgia 137-39 (A. Cander ed. 1911 (pt. 2)) (right to bear arms "'for the security and defence of this province'" (emphasis omitted)), 1780 Massachusetts Constitution Pt. First, Art. XVII ("'That the people have a right to keep and bear arms for the common defence . . . .'")).

The ratification-era history recounted in *Heller* brings the incorporation question into sharp relief. Unlike the other individual rights enumerated in the first eight amendments to the Constitution, the Second Amendment was uniquely rooted in the importance of *preserving* the states.[2] This Court should reject the view that today this same amendment is a limitation on the states' ability to exercise their most fundamental of sovereign powers: to adopt regulations that reflect localized consideration for how best to protect the health and safety of their citizens.

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[2] As *Heller* says, "the purpose" of the Second Amendment was to preserve the "citizens' militia" as a means of protecting the states against the "oppressive military force" of the national government's standing army "if the constitutional order broke

I. THE VALUE OF SELF-DEFENSE THAT THE RIGHT TO ARMS SERVES HAS TRADITIONALLY AND PROPERLY BEEN THE SUBJECT OF VARYING STATE REGULATION.

As *Heller* noted, "modern developments have limited the degree of fit between the prefatory clause and the protected right." *Id.* at 2817. Today, the right to arms conferred by the Second Amendment is significant not because it empowers the people to resist governmental oppression with force, but rather because it effectuates the right of self-defense. As this Court noted, "it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." *Id.* Put simply, self-defense may have had "little to do with the right's *codification*," but it is "the *central component* of the right itself." *Id.* at 2801 (emphasis in original).

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down." 128 S. Ct. at 2801. The text of the Second Amendment is distinctive in that it is the only one of the Bill of Rights having its own preamble, a linguistic structure "unique in our Constitution", *id.* at 2789, and also the only one of the Bill of Rights which expresses a purpose to protect the common good, and not merely the interests of the individuals on whom the constitutional right is conferred.

While the "limited degree of fit between" the clauses may not change the right itself, the centrality of self-defense as the basis of the modern right to arms has considerable significance for whether that right ought to be incorporated against the states. Incorporation of a right inevitably involves the development of uniform standards for the exercise of the right. As relevant here, an individual right to handguns for self-defense purposes applicable nationwide would require nationwide standards concerning the circumstances under which a handgun may be used in self-defense. Such questions have always been considered a matter for state lawmakers in the exercise of their police power to protect the health and safety of their citizens. To hold that the right to own handguns in the home for self-defense applies nationwide would portend a massive and unwarranted invasion of the states' sovereign powers to develop and apply their own standards for the use of weapons in self-defense.

A. Incorporating The Second Amendment Would Involve The Development Of Uniform National Standards For Self-Defense.

To declare a right incorporated against the states is likewise to declare that a uniform federal standard governs the lawful exercise of the right and the proper authority of the states to limit the individual interest the right protects. Incorporation of the right to free speech means that state power to enforce appropriate time, place and manner restrictions is subject to uniform federal standards. *Cox* v. *Louisiana*, 379 U.S. 536 (1965). Incorporation of the right to be free from unreasonable searches and seizures means that state power to admit evidence obtained in violation of the right is limited by the uniformly applicable exclusionary rule, *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961), with uniform federal standards concerning exceptions to the exclusionary rule likewise applying in state courts, *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984) (good faith exception); *Nix* v. *Williams*, 467 U.S. 431 (1984) ("inevitable discovery" exception). Incorporating the Fifth Amendment right against self-incrimination means that state power to use a defendant's statement against him in court is limited by the uniform federal requirements of *Miranda* v. *Arizona*, 384 U.S. 436, 478-79 (1966). The Sixth Amendment right to jury trial means that the state's power to convict is subject to uniform federal standards regarding the standard of proof to convict, *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993) (reasonable doubt standard), the minimum number of jurors needed for a fair jury trial, *Ballew* v. *Georgia*, 435 U.S. 223, 239 (1978) (plurality) (no fewer than six jurors), qualifications of jurors, *Morgan* v. *Illinois*, 504 U.S. 719 (1992) (establishing voir dire requirements in capital cases), and the proportion of jurors required to vote in favor of a conviction, *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (conviction by nonunanimous six-person jury violates accused's right to trial by jury). And the Eighth Amendment right against cruel and unusual punishment means that the state's power to impose the death penalty is subject to numerous uniform federal restrictions. *Kennedy* v. *Louisiana*, 128 S. Ct. 2641 (states cannot impose the death penalty for child rape that did not end in death of the victim), *modified on denial of reh'g*, 129 S. Ct. 1 (2008); *Roper* v. *Simmons*, 543 U.S. 551 (2005) (executing juveniles violates the Eighth Amendment); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (holding unconstitutional the execution of mentally retarded criminals); *Lockett* v. *Ohio*, 438 U.S. 586, 604-05 (1978) (plurality) (jurors must not be precluded from considering mitigating evidence in capital sentencing).

To incorporate the right to keep in one's home a handgun—the "quintessential self-defense weapon," *Heller*, 128 S. Ct. at 2818—would require the development of uniform standards regarding the exercise of the right to self-defense with such a weapon. Such a step would intrude on what has traditionally been the subject of state regulation. And such a step would be particularly inappropriate because the circumstances that warrant allowing an individual to use a handgun in self-defense, if any, will differ depending on demographic and cultural characteristics that vary widely across the United States.

B. State Self-Defense Law Varies Widely.

State legislatures have long been responsible for ensuring public safety both by regulating when an individual is justified in using deadly force against another in self-defense, and by setting limits on what weapons are fit for private ownership and where they may be kept. State legislatures, and sometimes even local authorities, are better positioned than federal courts to determine both the appropriate contours of the right of self-defense and the types of gun regulations needed to balance the competing interests in individual self-defense and public safety.

Self-defense is a long-recognized affirmative defense to what would otherwise be a criminal act of harming another, potentially fatally. 2 W.R. LaFave, *Substantive Criminal Law* § 10.4(a) (2d ed. 2009). The "authority of States over the administration of their criminal justice system lies at the core of their sovereign status." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). And in exercising their sovereign right to define the circumstances under which self-defense is permitted, as well as the degree of force permitted to be employed in various circumstances, different states facing different geographic circumstances and bearing different cultural heritages have reached different conclusions.

The circumstances under which an individual may use deadly force in self defense varies from state to state. Most states require individuals to have a "reasonable belief" that they are faced with an imminent threat of death or serious bodily harm before permitting the use of deadly force in self-defense. Most states also require that the level of force used in self defense be proportional to the threat posed. But even these general guidelines mask material differences. Whether an individual has the right to use a gun to defend himself has always varied from state to state.

For example, with respect to what constitutes a "reasonable belief" that the defendant faced an imminent threat of deadly force, some states have adopted objective, "reasonable person" standards.[3] Others give significant weight to whether the individual had an honest, good faith, personal belief that he was in danger of being killed or seriously harmed.[4] Still other states require both an objective and subjective belief of imminent harm.[5] To individuals claiming self-defense, the standard that is used can mean the difference between a criminal sentence and a justified act.

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[3] *See, e.g.*, Georgia: *Nelson* v. *State*, 331 S.E.2d 554 (Ga. 1985) ("reasonable man" standard governs resolution of whether defendant's belief is reasonable); Idaho: *State* v. *Rodriguez*, 460 P.2d 711, 716 (Idaho 1969) ("The appellant's fear alone is not a legally sufficient reason upon which to base an inference that appellant acted in self-defense . . . . there must be in addition circumstances sufficient to excite the fears of a reasonable man."); New Hampshire: N.H. Rev. Stat. Ann. § 627:3 Competing Harms (judging the urgency of self-defense by "ordinary standards of reasonableness").

For example, in North Dakota, the factfinder looks to the defendant's subjective belief to determine if force was used in self-defense: "once the factfinder determines under a claim of self-defense that the actor honestly and sincerely held the belief that the use of defensive force was required to protect himself against imminent unlawful injury, the actor may not be convicted of more than a crime of recklessness or negligence," even if his belief was objectively unreasonable. *State* v. *Leidholm*, 334 N.W.2d 811, 816 (N.D. 1983). Yet if the same defendant had been across the border in Minnesota, the affirmative defense would not be available to him. In *State* v. *Bland*, the prosecution conceded that the defendant had an honest belief that his life was in danger, yet the court upheld a conviction of assault with a deadly weapon when the defendant's testimony proved that, objectively, a reasonable man would have found defendant's "response was unnecessary, unreasonable, and excessive." 337 N.W.2d 378, 381 (Minn. 1983).

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[4] *See, e.g.*, North Dakota: *State* v. *Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (explaining that "an accused's actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows."); Kentucky: *Hilbert* v. *Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005) ("'the focus of the penal code is on the defendant's actual subjective belief in the need for self protection and not on the objective reasonableness of that belief'" (quoting *Elliott* v. *Commonwealth*, 976 S.W.2d 416, 419 (Ky. 1998))).

[5] *See, e.g.*, Colorado: *People* v. *Darbe*, 62 P.3d 1006, 1009 (Colo. Ct. App. 2002) (Colo. Rev. Stat. § 18-1-704 requires both that an individual "'had reasonable grounds to believe, and did believe, that she or another person was in imminent danger of being killed or of receiving great bodily injury'").

An individual who provokes an attack by another will, in most states, be deemed the "aggressor" in the confrontation and lose the right to employ force in self-defense. 2 W.R. LaFave, *supra* § 10.4(e). What constitutes provocation varies widely, to the point where different states have articulated contradictory standards. In some jurisdictions, a defendant's aggressive words may be sufficient provocation to deprive the defendant of a claim of self-defense.[6] In other states, words alone do not constitute provocation for purposes of self-defense: if a defendant initiates a confrontation using only aggressive words and is then physically attacked by his opponent, the defendant can still avail himself of the affirmative defense of self-defense even though he initiated the confrontation. *See McDonald* v. *State*, 764 P.2d 202, 205 (Okla. Crim. App. 1988) (citing Commission comments to Oklahoma Uniform Jury Instructions defining "aggressor").[7] States also differ on the type of acts that can constitute provocation. Some state courts have gone so far as to say that even overt acts which are criminal in and of themselves are not provocation which can deprive a defendant of a self-defense claim.[8] Others have taken a far more lenient approach. For instance, in some states individuals can leave an altercation, arm themselves with a weapon, and seek out the opponent from the earlier altercation without losing their claim to self-defense.[9]

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[6] *See People* v. *Barnard*, 567 N.E.2d 60, 66 (Ill. App. Ct. 1991); *Scott* v. *Commonwealth*, 129 S.E. 360 (Va. 1925); *State* v. *Council*, 123 S.E. 788 (S.C. 1924).

[7] Other states, like New Hampshire, look to the intent of the defendant: aggressive words may be sufficient to deprive the defendant of the self-defense justification if the defendant intended to kill or seriously injure his opponent when the words were uttered. *State* v. *Bashaw*, 785 A.2d 897, 899 (N.H. 2001).

Traditionally, the use of force in self-defense is justified only when the force used was proportional to the threat faced. 2 W.R. LaFave, *supra* § 10.4(b). However, some states allow greater leeway when an individual uses force, even deadly force, in defense of a home or dwelling. States that take this approach have enacted "castle laws," which allow an individual to use deadly force in response to any intrusion into the home. Florida, for example, passed an amendment to its self-defense laws in 2005 which created a presumption that "[a] person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence." Fla. Stat. § 776.013(4). Homeowners can thus use deadly force against an individual who unlawfully and forcefully enters a residence, without any requirement to first order the trespasser to leave, as long as the homeowner knows that the trespasser had entered unlawfully and forcefully. *Id.* § 776.013(1).[10] Castle laws such as these disregard the proportionality requirement and justify the use of deadly force against an intruder in the home even if the intruder poses no physical threat.[11] In contrast, Virginia, a state which has not adopted the castle doctrine, requires the defendant to have a reasonable fear of imminent bodily harm or death and to have faced an "overt threat" of violence before he is justified in using deadly force in self-defense in his own home.[12] And though Virginia law allows an inhabitant to order a trespasser to leave and, once refused, to use force to compel the trespasser's departure, it does not allow for the use of deadly force against the trespasser, except in "extreme circumstances." *Pike* v. *Commonwealth*, 482 S.E.2d 839, 840 (Va. Ct. App. 1997); *Montgomery* v. *Commonwealth*, 36 S.E. 371, 372 (Va. 1900). Further, individuals cannot even brandish a weapon in defense of property in Virginia, much less fire it. *Commonwealth* v. *Alexander*, 531 S.E.2d 567, 569 (Va. 2000) (a "deadly weapon may not be brandished solely in defense of personal property.").

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[8] *See King* v. *State*, 13 Tex. App. 277 (1882), *available at* 1882 WL 9355, at *3 (trespassing on the victim's property with a gun following a dispute may not be an act of provocation that prevents a claim of self-defense), *State* v. *Borwick*, 187 N.W. 460 (Iowa 1922) (shooting at a tire of a vehicle in motion not provocation under the standard for self-defense).

[9] *See State* v. *Bristol*, 84 P.2d 757, 766 (Wyo. 1938) (where a defendant armed himself with a pistol following an argument with a neighbor, went to a restaurant where the neighbor was dining, and "glared" at his direction, defendant was not an aggressor. The neighbor attacked the defendant without a weapon and the defendant shot and killed the neighbor in response, yet the court held the prosecution had presented "no evidence in the case which in any way limited defendant's right of self-defense."). *Compare State* v. *Neeley*, 20 Iowa 108 (1866), *available at* 1866 WL 125, in which a defendant took a shotgun to a field near the property of a neighbor, with whom he had a long-standing dispute. When his neighbor approached with a pistol, defendant shot and killed him. Defendant claimed that the neighbor had fired the first shot, but the court found this was no defense, writing,

> if the prisoner, with a loaded weapon, sought the deceased with a view of provoking a difficulty or with the intent of having an affray, and a difficulty did ensue, he cannot, without some proof of change of conduct or action, excuse the homicide upon the ground that the deceased fired the first shot.

Id. at *4.

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[10] The California penal code contains a similar presumption, but California courts have held that "the intentional use of deadly force merely to protect property is never reasonable." *People* v. *Curtis*, 37 Cal. Rptr. 2d 304, 318 (Cal. Ct. App. 1994); *see also People* v. *Ceballos*, 526 P.2d 241 (Cal. 1974) (use of deadly force to protect property that is not a dwelling is not justified).

[11] *See also* Colo. Rev. Stat. § 18-1-704.5 (providing that "citizens of Colorado have a right to expect absolute safety within their own homes" and justifying the use of deadly force where: (1) The intruder made an unlawful entry into the occupant's dwelling; (2) The occupant had a reasonable belief that the intruder had committed a crime in the dwelling (in addition to the uninvited entry), or was committing or intended to commit a crime against person or property (in addition to the uninvited entry); and (3) The occupant reasonably believed that the intruder might use physical force, no matter how slight, against any occupant of the dwelling).

States also differ over whether the use of force is justified only as a last resort. Some states have adopted a "duty to retreat law" which requires an individual to retreat from any situation where he faces deadly force if it is possible to do so safely.[13] Others have expressly adopted "no duty to retreat" statutes, in which a person has *no* requirement to retreat if he is in a place he has a legal right to be, even if he is able to escape the situation safely and avoid using deadly force.[14] Some states have adopted a "no duty to retreat" rule for self-defense in the home, but require retreat if one is outside the home, while others have extended the "no duty to retreat" privileges to places of employment,[15] vehicles,[16] and airplanes.[17] Still other states, far from requiring retreat, even permit individuals to seek out an attacker even after the two have been separated. *State* v. *Starks*, 627 P.2d 88, 91 (Utah 1981) (defendant may use deadly force in self-defense even after defendant armed himself and went to a location where he knew he would find the deceased); *Thomas* v. *State*, 51 S.W. 1109, 1109-10 (Tex. Crim. App. 1899) (deadly force may be used in self-defense even if defendant seeks out deceased to provoke difficulty, so long as there was no actual provocation).

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[12] *Yarborough* v. *Commonwealth*, 234 S.E.2d 286, 292 (Va. 1977) (man who reached down to his boot which held a knife did not make an overt act that would justify the use of self-defense in response).

[13] *See, e.g.*, Conn. Gen. Stat. § 53a-19(b).

[14] *See, e.g.*, Alaska Stat. § 11.81.350(f); Fla. Stat. § 776.013(3); Ga. Code. Ann. § 16-3-23.

C. Differing State Laws Regarding The Permissible Use Of Weapons Reflect The Different Value Judgments Of Different Communities That Have Never Been Thought Subject To A Uniform National Standard.

The distinctions in state self-defense law, including many going directly to the questions when and whether an individual may brandish or use a deadly weapon like a handgun, are evidence that different communities face different circumstances and possess different values concerning an individual's use or threatened use of force in general, and use or threatened use of guns in particular. Variations in state self-defense law reflect value judgments that no court has ever questioned properly belong to the various states. Whether, for example, a man's home is his castle, and the owner ought to be permitted to protect his home by whatever means he deems necessary is hardly a question amenable to a uniform national answer. Some states might conclude that "[l]ife is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress." *Carpenter* v. *State*, 36 S.W. 900, 907 (Ark. 1896). That certain western states (Texas and Utah) have chosen to permit victims of crime to seek out their attackers so that they may employ deadly force in their own defense may well reflect the extent to which fewer of their citizens live in the tight confines characteristic of cities, where the presence of armed individuals seeking out others in self-defense poses greater risks to the public. States with a larger proportion of densely populated urban areas like Chicago, where gang rivalries are an everyday concern, might reasonably and appropriately place greater restrictions on the permissible use of force, and especially deadly force.

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[15] *See, e.g.*, Alaska Stat. §§ 11.81.335(b), .350(f); Del. Code Ann. tit. 11, § 464(e)(2)(b); Haw. Rev. Stat. § 703-304(5)(b)(i).

[16] *See, e.g.*, Okla. Stat. tit. 21, § 1289.25(B)(1).

[17] *See, e.g.*, Ind. Code § 35-41-3-2(d) (providing that a person is justified in using deadly force to stop a hijacking while on an airplane).

State courts have been explicit about how their laws concerning weapons take local circumstances into consideration. For example, in *City of Seattle* v. *Montana*, 919 P.2d 1218 (Wash. 1995), the Washington Supreme Court upheld the validity of a Seattle Municipal Code provision which prohibited the carrying of "dangerous knives." *Id.* at 1225. The court explained that:

> Given the realities of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more

> likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed.

Id.

Likewise, in *California Rifle & Pistol Ass'n* v. *City of West Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998), the court upheld the validity of a city ordinance banning the sale within city limits of any handgun classified as a "Saturday Night Special." The court explained that California state regulations over firearms were not intended to "strip local governments of their [state] constitutional power to ban the local sale of firearms which the local governments believe are causing a particular problem within their borders." *Id.* at 604. The court further noted, "'[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.'" *Id.* at 601 (quoting *Galvan* v. *Superior Court*, 70 Cal.2d 851, 864 (1969)). *See also Benjamin* v. *Bailey*, 662 A.2d 1226, 1229 (Conn. 1995) (citing with approval the trial court's reliance on evidence that assault weapons had "'appeared more frequently as a risk factor to police officers on the street, and to innocent victims in densely-populated areas'" in upholding the constitutionality of a statute banning the possession of assault weapons).

It would be as surprising as it is inappropriate for this Court, by incorporating the Second Amendment right to arms against the states, to undermine the authority of state governments over an area so closely connected to the core sovereign power to regulate public health and safety.

Self-defense is one of those areas to which "States lay claim by right of history and expertise" *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring), and state and local legislatures ought to be allowed to adopt the policies that work best for their own communities. To incorporate the Second Amendment against the states would unavoidably involve federal courts in setting uniform national standards for the right to brandish and use handguns in self-defense. Just as the nationally applicable right to free speech has required this Court to set standards for lawful time, place and manner restrictions regarding when, where and how individuals may speak, so too would a nationally applicable right to handguns for self-defense require this Court to set standards for lawful "time, place and manner" restrictions on when, where and how individuals may use their guns in self-defense. Federal courts would be ill suited to the task, even if it were possible. In fact, uniform national standards do not exist that can properly capture the diversity of values and circumstances to which a national rule would have to be applied.

In addressing the propriety of applying the federal Gun-Free Zones Act to the possession of a gun in a local school zone in *Lopez*, Justice Kennedy observed that

> [w]hile it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experiment-

> tation to devise various solutions where the best solution is far from clear.

Id. at 581. The same is true here with respect to whether a particular weapon, such as a handgun, is quintessentially a weapon of self-defense in the setting of a particular community, or quintessentially a weapon of violent crime and tragic accidental harm. Imposing such a judgment on a nationwide basis would be an unprecedented and unwarranted intrusion into an area which "lies at the core" of the states' "sovereign status." *Ice*, 129 S. Ct. at 718.

Moreover, the diverging standards for self-defense demonstrate that there is no definitive version of this right that could be "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325. Far from the rights for which it would be "incongruous to have different standards," *Malloy*, 378 U.S. at 11, the right to self-defense, as discussed *supra*, at 9-16, has always been defined and applied in widely different ways. State standards diverge to the point that a justified act of force in one state may be criminal in another. States have protected the right to self-defense since before the Bill of Rights was adopted. *See Heller*, 128 S. Ct. at 2802-03, 2805 (referencing Blackstone's *Commentaries* calling self-defense "'the first law of nature'" and discussing the history of self-defense provisions in state constitutions adopted before and shortly after the Bill of Rights). Yet at no point in the history of the right has any court questioned whether an individual's basic right to self-defense was infringed because he would have had a stronger case for self-defense in a different state.

What is more, this Court has consistently given states free rein to adopt differing standards in their criminal justice systems, which includes the law of self-defense, without finding violations of the right of Due Process. As this Court has explained,

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Powell v. *Texas*, 392 U.S. 514, 536 (1968) (plurality). It is unthinkable that the option to possess a handgun in one's home can be "implicit in the concept of ordered liberty" when there is no uniform, national standard which defines the circumstances in which that weapon can be used justifiably in self-defense. As such, the Second Amendment right to keep and bear arms should not be incorporated against the states.

II. THE OAK PARK HANDGUN BAN REFLECTS THE CONSIDERED JUDGMENT AND VALUES OF THE OAK PARK COMMUNITY.

In the aftermath of the shooting death of Oak Park attorney James Piszczor in a Chicago courtroom that led to the formation of the Oak Park Citizens Committee for Handgun Control, the Committee spent months gathering information on the issue of handgun control. It learned that 89% of the firearms involved in crimes committed in Oak Park in the first nine months of 1983 were handguns. Motivated by data illustrating that handgun ownership and use posed a serious threat to the community's public health and safety, the Committee petitioned the citizens of Oak Park to support a ban on the private possession of handguns. After obtaining nearly six thousand signatures in support of a handgun ban, the Committee formally presented the petitions to the Oak Park Village Board ("Board") at its March 5, 1984 meeting.

The Board listened to spirited arguments from ban proponents and opponents throughout March and held a formal public hearing on the proposed ban in early April 1984. Two weeks later, the Trustees of the Village enacted Oak Park's ban on the private possession of handguns into law by a vote of 4-3. Controversy over the ban continued, and in July 1985, the Board voted to hold an advisory referendum in order to provide an opportunity for Oak Park voters to decide whether to keep the ban in place.

In the course of the referendum campaign, the Committee brought to the community's attention hundreds of handgun-related incidents which had been reported in local newspapers in the ten-year period before the ban's enactment. The Committee focused attention on handgun misuse by Oak Park residents, especially in and around the home. Among the handgun-related incidents were multiple suicides, *e.g., Police Report*, Oak Leaves (Oak Park), Apr. 24, 1974, at 8-B (22 year-old shoots self with revolver), some accidental deaths and injuries, including the tragic accidental death of a four-year-old child killed by another juvenile playing with a handgun, *e.g., Police Report*, Oak Leaves (Oak Park), June 26, 1974, at 92-B (reporting accidental killing of four-year-old child), many homicides or injuries resulting from domestic disputes or other arguments, *e.g., Oak Park Man Held on Murder Charge*, Oak Leaves (Oak Park), June 17, 1981, at 7 (Oak Parker uses revolver to kill neighbor trying to halt argument over liquor), *Man Accused of Killing His Son, Shooting Wife*, Oak Leaves (Oak Park), Nov. 22, 1983, at 3 (man shoots wife with handgun), and numerous cases in which one or more handguns were stolen from homes and apartments, *e.g.*, *Police Report*, Oak Leaves (Oak Park), Apr. 28, 1976, at 9-C (more than twenty handguns stolen from Oak Park home). The data made clear that unfettered access to handguns in and around Oak Park homes posed a significant threat to the public health and safety of the community.

The Committee also researched local newspapers to determine how often handguns had been lawfully used in self-defense in the same time period and challenged opponents of the ban to come forward with evidence of such use. In contrast to all the harmful handgun-related incidents in and around Oak Park homes which the Committee uncovered, in the same 1974-1983 time frame, there was only one reported instance in which a handgun was lawfully used to ward off an intruder in an Oak Park home. *Police Report*, Oak Leaves (Oak Park), Nov. 6, 1974, at 8-B.

The balance of harms and benefits resulting from possession of handguns in Oak Park homes was clear: Oak Parkers were much more likely to take their own lives with handguns, or to injure or kill another in a domestic dispute or accident, than they were to defend themselves with a handgun kept in the home. The collective judgment of the community expressed in the referendum was to keep the ban by a vote of 8,031 to 6,368. *A Fitting Memorial for Gun Victim James Piszczor*, Wednesday J. (Oak Park), Oak Park Stories Commemorative Issue, 2002, at 28. Oak Park is the *only* American community which has held a referendum on a handgun ban after having actual experience living with a ban. *See Oak Park Voters*

Stand Behind Gun Ban, Chi. Trib., Nov. 6, 1985, at D1.

The people of Oak Park and their elected representtatives carefully considered whether handguns are useful weapons of self-defense and concluded that the harmful costs of handgun possession in the home far outweigh any potential benefits. Their handgun ban does not deprive Oak Parkers of access to other guns which may be used for self-defense, including shotguns and rifles, or other defensive weapons such as tasers, security alarms, etc.

It makes no sense to displace the considered judgment of the citizens of Oak Park, rooted in their local values, circumstances and community experience, and expressed through the most direct form of democracy—the referendum—with the judgment of an unelected judiciary purporting to apply a uniform national standard relating to use of handguns in self-defense. The Constitution does not require so dramatic an intrusion upon the traditional authority of state and local governments to determine for themselves the legal standards for self-defense and the type of weapons which are most appropriate to their local circumstances and which best protect the public health and safety of their communities.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be affirmed.

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ADDENDUM

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Oak Park Crime Statistics 1982-2008

Year	Population	Rate per 100,000	Total Crime Index	Murder & Vol. Manslaughter	Criminal Sexual Assault	Robbery	Agv. Aslt. & Battery	Burglary/breaking and entering	Theft	Motor Vehicle Theft	Arson
1982[1]	54,887	6196.4	3401	0	9	249	65	740	2094	237	7
1983[2]	54,887	7743.2	4250	5	5	293	66	1068	2420	377	16
1984[3]	54,887	7156.5	3928	3	3	302	96	973	2120	415	16
1985[4]	54,887	7367.9	4044	1	24	264	66	1314	1972	383	20
1986[5]	54,887	7655.7	4202	1	18	278	89	1254	2151	401	10
1987[6]	54,887	7588.3	4165	2	18	331	83	996	2295	411	18
1988[7]	54,320	7864.5	4272	0	14	275	92	1159	2319	402	11
1989[8]	53,650	7606.7	4081	0	11	308	72	863	2471	344	12
1990[9]	53,648	6410.3	3439	2	10	276	31	629	2186	292	13
1991[10]	53,648	7929.5	4254	1	13	295	69	859	2715	292	10
1992[11]	53,648	7579.0	4066	1	18	284	65	871	2484	337	6
1993[12]	54,217	6778.3	3675	2	13	209	32	749	2352	305	13
1994[13]	54,385	6678.3	3632	1	11	202	46	609	2397	361	5
1995[14]	54,385	6080.7	3307	1	6	193	30	680	2159	236	2
1996[15]	51,585	6185.9	3191	3	2	180	43	871	1887	196	9
1997[16]	51,585	6149.1	3172	3	8	172	35	732	2020	195	7
1998[17]	51,585	6026.9	3109	0	12	159	17	538	2182	197	4
1999[18]	50,646	4855.3	2459	0	4	149	26	367	1713	190	10
2000[19]	52,524	4674.1	2455	0	6	140	19	411	1662	215	2
2001[20]	52,524	5026.3	2640	1	2	156	16	580	1694	183	8
2002[21]	52,524	4862.5	2554	0	5	180	28	541	1575	218	7
2003[22]	51,601	4629.8	2389	2	9	174	22	501	1509	169	3
2004[23]	50,824	5241.6	2664	1	16	148	37	525	1765	167	5
2005[24]	50,993	3863.3	1970	1	11	130	58	437	1160	165	8
2006[25]	50,757	3983.7	2022	0	12	153	41	351	1365	98	2
2007[26]	50,272	3938.6	1980	1	8	113	37	343	1389	86	3
2008[27]	49,865	4143.2	2066	1	2	160	46	425	1327	102	3

Crime Statistics: 1983 (Year Prior to Enactment of Handgun Ban) Compared to 2008 (Most Recent Crime Statistics)

Year	Pop.	Rate per 100,000	Total Crime Index	Murder & Vol. Manslaughter	Criminal Sexual Assault	Robbery	Agv. Assault &	Burglary & Breaking	Theft	Motor Vehicle Theft	Arson

							Battery	**and Entering**			
1983	54,887	7743.2	4250	5	5	293	66	1068	2420	377	16
2008	49,865	4143.2	2066	1	2	160	46	425	1327	102	3
%?	9.15%	-46.5%	-51.4%	-80.0%	-60.0%	-45.4%	-30.3%	-60.2%	-45.2%	-72.9%	-81.3%

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AMICUS
CURIAE
BRIEF

No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ORGANIZATIONS COMMITTED TO PROTECTING THE PUBLIC'S HEALTH, SAFETY, AND WELL-BEING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN ASSOCIATION OF SUICIDOLOGY, THE SOCIETY FOR ADOLESCENT MEDICINE, THE CHILDREN'S DEFENSE FUND, WOMEN AGAINST GUN VIOLENCE, YOUTH ALIVE!, THE FAMILY VIOLENCE PREVENTION FUND, AND THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS CITY OF CHICAGO AND VILLAGE OF OAK PARK

INTERESTS OF AMICI CURIAE[1]

Amici are not-for-profit organizations united by a commitment to protecting the American public's health, safety, and well-being. Each organization is dedicated to preventing violence and injury by removing handguns from homes and communities across the country.

The American Public Health Association (APHA) is the oldest, largest, and most diverse organization of public health professionals in the world and has been working to improve public health since 1872. The Association aims to protect all Americans and their communities from preventable, serious health threats—including injuries and deaths caused by guns—and strives to ensure that community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States. APHA represents a broad array of health professionals and others who care about their own health and the health of their communities.

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici curiae* state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

The American Academy of Pediatrics (AAP) represents a membership of more than 60,000 primary care physicians, pediatric medical subspecialists, and pediatric surgical specialists. In connection with its goals of preventing violence against children and reducing accidental injury to children, AAP believes that the absence of guns from children's homes and communities is the most reliable and effective measure to prevent firearms-related injuries to children and youth.[2]

The American Association of Suicidology (AAS) seeks to understand and prevent suicide. Founded in 1968, AAS promotes research, public awareness programs, public education, and training for professionals and volunteers. AAS also serves as a national clearinghouse for information on suicide. The membership of AAS includes mental health and public health professionals, researchers, suicide prevention and crisis intervention centers, school districts, crisis center volunteers, survivors of suicide, and a variety of laypersons who have an interest in suicide prevention.

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[2] *See* Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 PEDIATRICS 888, 888 (2000).

The Society for Adolescent Medicine's membership consists of health care professionals specializing in the field of adolescent health. Consistent with its objective of improving adolescent health, it advocates that reducing the availability of firearms in general, and handguns in particular, will reduce the frequency of youth gun violence.[3]

The Children's Defense Fund provides a strong, effective voice for America's children and encourages preventive investment in children's health. CDF monitors gun violence against children and noted in its most recent annual report, *Protect Children Not Guns*, that 3,184 children and teens died from gunfire in the United States in 2006—a 6 percent increase from 2005.[4] This means that every two hours and 45 minutes, one young life was lost—almost nine every day, 61 every week. It means that, in 2006, a preschooler was killed by a gun every six days. Among children, the greatest increase in firearm deaths was among those under age 10. CDF believes that gun violence affects us all by increasing health care costs, disrupting social services, and decreasing national productivity. CDF also believes that adults must protect children from firearms in our homes, schools, communities, and nation by supporting commonsense gun safety measures, removing guns from homes, and focusing public attention on child gun deaths.

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[3] *See* Naomi Duke et al., Soc'y for Adolescent Med., *Adolescent Firearm Violence: Position Paper of the Society for Adolescent Medicine*, 37 J. OF ADOLESCENT HEALTH 171, 173 (2005).

[4] *See* Children's Defense Fund, *Protect Children Not Guns* 2, 3 (2009), available at http://www.childrensdefense.org/child-research-data-publications/data/protect-children-not-guns-report-2009.html.

Women Against Gun Violence (WAGV) is dedicated to preventing gun violence by educating the public, the media, and policymakers about the human, public health, and financial consequences of gun violence. WAGV also mobilizes communities to take action against the dangers of firearms. Through its Speaker's Bureau, youth and adults who have experienced gun violence discuss the dangers of guns with parents and at-risk youth at schools, after-school programs, domestic violence programs, parenting classes, adult education classes, gang intervention programs, legal clinics, religious groups, Rotary Clubs, and health fairs. It works with such groups and individuals to reduce the perceived need and demand for guns by encouraging and teaching gun owners to practice gun safety and safe storage, empowering youth to recognize the consequences of gun use, and encouraging community members to take action to prevent gun violence in schools and communities.

Youth ALIVE!, founded in 1991, is a not-for-profit public health agency dedicated to preventing youth violence and generating youth leadership in California communities experiencing high rates of violence. Youth ALIVE! advocates for strategies to reduce violence and administers two programs: (1) Teens on Target, a peer leadership and education program that trains young people from neighborhoods with high rates of violence to provide peer education on violence prevention and serve as positive peer role models; and (2) Caught in the Crossfire, an intervention program that works with youth who are hospitalized due to violence injuries to reduce retaliation, re-injury, and arrest.

The Family Violence Prevention Fund (FVPF) is a California not-for-profit organization that was established in 1989. The FVPF mobilizes concerned individuals, children's groups, allied professionals, as well as women's rights, civil rights, and other social justice organizations to join the campaign to end violence through public education and prevention campaigns, public policy reform, model training, advocacy programs, and community organizing.

The National Network to End Domestic Violence (NNEDV) is a non-profit organization dedicated to creating a social, political, and economic environment in which violence against women no longer exists. NNEDV is a network of state domestic violence coalitions, and, nationally, it represents over 2,000 member programs. It serves as the voice of battered women and their children as well as those who provide direct services to them. NNEDV has a long history of working at the local, state, and national levels to promote a strong criminal justice response to domestic violence, like reducing homicides by removing firearms from convicted batterers. NNEDV was instrumental to the congressional enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005, and it co-chairs the current national Violence Against Women Act reauthorization efforts. NNEDV has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators, state and local welfare and justice system personnel, and others working to end domestic violence.

Due to their long-standing and continuing commitment to protecting America's health, safety, and well-being, and their recognition that handguns pose a particular threat to all Americans, these *amici* are actively involved in developments that seek to control access to all firearms, most importantly handguns. These *amici* firmly believe that the absence of handguns from homes and communities is the most reliable and effective method to prevent firearm-related injuries.

INTRODUCTION AND SUMMARY OF ARGUMENT

Firearms have a profound effect on the American public's health. In 2006, the latest year for which complete data are available, there were 30,896 firearm-related deaths in the United States, including homicides, suicides, and accidental deaths. Melonie Heron et al., *Deaths: Final Data for 2006*, 57 NAT'L VITAL STAT. REP. 1, 91 (Table 19) (2009).[5] In addition, in 2008, there were more than 78,000 non-fatal shootings serious enough to require a hospital visit. Ctrs. For Disease Control & Prevention, *Web-Based Injury Statistics Query and Reporting System (WISQARS) Nonfatal Injury*

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[5] *Available at* http://www.cdc.gov/NCHS/data/nvsr/nvsr57/nvsr57_14.pdf.

Reports.[6] The total societal cost of such firearm-related violence has been estimated at $100 billion per year. PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 117 (2000).

Scientific evidence is the starting point for the public health approach to problems like gun violence. "The scientific core of public health is epidemiology, which identifies the risk factors, trends, and causes of health problems." DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 9 (2006). Because gun violence is a major public health problem that must be addressed through multiple modalities, including legislation and regulation, *amici* respectfully submit the following empirical information to aid the Court's analysis of the question this case presents.

While the numbers of non-fatal shootings are troubling, this brief focuses on the most extreme consequences of improper firearm use—that is, the taking of human life. The studies detailed below illustrate a powerful link between the prevalence of guns—especially handguns—on the one hand, and a heightened risk of suicide, homicide, and fatal gun shootings, on the other. The research further indicates that women and children, including adolescents, are particularly threatened by firearms. These data suggest that the types of statutes challenged in this case may prevent a substantial number of murders, suicides, and unintentional firearm deaths.

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[6] *Available at* http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html. (Under "Report Options" question 2, choose "Gunshot - Firearm" and then click "Submit Request.")

ARGUMENT

I. PUBLIC HEALTH RESEARCH MAY BE RELEVANT TO ASSESSING THE CONSTITUTIONALITY OF THE STATUTES AT ISSUE.

For the reasons set forth in Respondent's brief, this Court need not and should not reach the question of whether the Second Amendment's substantive scope—left undefined in *District of Columbia v. Heller*, ___ U.S. ___, 128 S. Ct. 2783, 2816-17 (2008)—encompasses and renders unconstitutional the ordinances at issue. Because the decision below turned on a procedural ground, the Court need not delve into substance here. However, if the Court chooses to address the constitutionality of the ordinances, the following empirical information regarding the effect of firearms, and in particular handguns, on the public's health may bear on the constitutional question. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (empirical evidence informs constitutional analysis).

II. GUNS IN THE HOME INCREASE THE RISK OF SUICIDE, HOMICIDE, AND DEATH FROM ACCIDENTAL SHOOTING.

Every gun-related death is a unique tragedy, but taken together, the approximately 30,000 lives lost each year in the United States to firearms represent a public health phenomenon that has attracted serious study. Research reveals that where firearms are more common, so, too, are deaths from suicide, homicide, and firearm-related accidents.

A. Suicide risk is greater in homes with guns and in communities with a higher prevalence of guns.

Suicide is a critically important public health problem, one that state and local governments might reasonably choose to address through legislation. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (states have an "unqualified interest in the preservation of human life"). The majority of the 33,300 suicides in the United States in 2006 were committed with a firearm; in other words, more suicides were committed with a firearm than by all other methods of suicide combined. Melonie Heron et al., *Deaths: Final Data for 2006*, 57 NAT'L VITAL STAT. REP. 1, 5 (Table B) & 89 (Table 18).[7]

Most firearm-related suicides occur in the home. Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929 (2004). In particular, numerous studies have demonstrated that occupants of homes with guns are at a substantially increased risk of suicide compared with occupants of homes without guns. The number of studies demonstrating the relationship between firearm ownership and suicide, together with their variety in approach and consistency in results, is compelling.

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[7] *Available at* http://www.cdc.gov/NCHS/data/nvsr/nvsr57/nvsr57_14.pdf.

Many of these studies use a "case-control" design. In case-control studies, the cases represent suicide victims (or the homes where a suicide has occurred)—regardless of the method of suicide. The controls are individuals (or households) that did not experience a suicide, generally matched in some way to be an appropriate comparison with the cases. This is the same general methodology that helped to establish an increased risk of lung cancer among cigarette smokers.

Case-control studies show that the risk of suicide is greater in homes with guns. According to one such study, firearms were 2.7 times more likely to have been present in the homes of adolescent suicide victims as compared to psychiatric inpatients who had attempted or considered suicide, even after adjusting for other risk factors. David A. Brent et al., *Risk Factors for Adolescent Suicide: A Comparison of Adolescent Suicide Victims with Suicidal Inpatients*, 45 ARCHIVES OF GEN. PSYCHIATRY 581, 585 (1988). A later study employing a larger sample of cases and controls found that adolescent suicide victims remained more than twice as likely as either suicide attempters or non-suicidal psychiatric patients to have had a gun in their home. David A. Brent et al., *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides*, 266 JAMA 2989 (1991). And in another well-known analysis, homes in which a suicide had occurred were found to be 4.8 times more likely to contain a firearm than matched neighborhood control homes that had not experienced a suicide, even after accounting for other risk factors for suicide. Arthur L. Kellermann et al., *Suicide in the Home in Relation* *to Gun Ownership*, 327 NEW ENG. J. MED. 467 (1992).

As one would predict if firearms increase the risk of suicide, living in a home with firearms only increased the risk of suicide by firearms, but was not associated with an increased risk of suicide by other means. In addition, homes where a firearm was stored loaded had an even greater (nine-fold higher) suicide risk. *Id.* at 470. Finally, "homes with one or more hand-guns were associated with a risk of suicide almost twice as high as that in homes containing only long guns." *Id.*

The findings of these studies, each employing a sample from a selected community, are confirmed by two case-control studies using data from the entire nation. One study of a representative sample of deaths in the United States compared suicide victims with those who had died from non-violent causes. Among persons aged 15 years or older, those living in a home with a gun were at a 5.6-fold increased risk of suicide versus death by other causes. Dahlberg et al., *supra*, at 933. This increased risk was particularly prominent for males. Another study, also using a representative sample of suicides in the United States, compared suicide victims with a matched group of living control subjects identified through a national health study. Among that group of adults, suicide victims were more than three times as likely (3.44) to have a gun in their home as the control group. Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 ANNALS OF EMERGENCY MED. 771 (2003). This increased risk was restricted to suicide by firearm. *Id.*

In yet another series of studies, states and regions with higher rates of household firearm ownership were found to have, on average, higher suicide rates. Fotios C. Papadopoulos et al., *Preventing Suicide and Homicide in the United States: The Potential Benefit in Human Lives*, 169 PSYCHIATRY RESEARCH 154 (2009); Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 EPIDEMIOLOGY 517 (2002). This relationship exists even after controlling for differences among states including rates of poverty, urbanization, unemployment, mental illness, and alcohol or drug abuse. Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA: INJURY, INFECTION, & CRITICAL CARE 1029 (2007). In fact, states with the highest prevalence of household firearm ownership had suicide rates that were about 60 percent higher than states with the lowest level of firearm ownership. Men, women and children all have higher suicide rates where household gun ownership rates are higher. Matthew Miller et al., *Firearm Availability and Unintentional Fire-arm Deaths, Suicide, and Homicide Among 5-14 Year Olds*, 52 J. OF TRAUMA: INJURY, INFECTION, & CRITICAL CARE 267 (2002); Matthew Miller et al., *Firearm Availability and Suicide, Homicide, and Unintentional Firearm Deaths Among Women*, 79 J. URB. HEALTH 26 (2002).

In an attempt to minimize the importance of firearm-related suicide, some may argue (incorrectly) that if a firearm is not available, a suicidal person will invariably choose an equally lethal method. This is simply not so. Firearms are among the most lethal methods of suicide. In one study, more than 90 percent of all suicide attempts with a firearm, if serious enough to require at least hospital treatment, result in death. This compares with, for example, a 34 percent fatality rate for suicide attempts by jumping and just two percent for poisoning by drugs. Matthew Miller et al., *The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43 ANNALS OF EMERGENCY MED. 723, 726 (2004). Other studies have confirmed the very high lethality of firearm-related suicide attempts compared with many other common methods. *See, e.g.*, Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 AM. J. PUB. HEALTH 1885 (2000). Because firearms are so lethal, where there are fewer firearms there are fewer completed suicides.

B. Homicide risk is greater in homes with guns, and in communities with a higher prevalence of guns.

Between 1960 and 2004, approximately 500,000 Americans were murdered with guns—more Americans than were killed in all of the wars in the twentieth century combined. DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 45 (2006). From 1991 to 2000, an average of 40 Americans were murdered with guns each day. *Id.* In fact, guns are involved in two thirds of all homicides. Fotios C. Papadopoulos et al., *supra,* at 154. While overall national homicide rates appear to have leveled off since 2000, substantial increases in firearm homicide rates among young black and white men have been detected in recent years (31% and 12%, respectively, between 1999 and 2005), especially in large metropolitan areas. Guoqing Hu et al., *Hidden Homicide Increases in the USA, 1999-2005*, 85 J. URB. HEALTH 597 (2008).

A substantial body of research points to an increased risk of being murdered with a gun in neighborhoods and homes where guns are more prevalent. Arthur L. Kellermann and colleagues compared homes in three metropolitan counties in which a homicide had occurred with matched control homes where no homicide had occurred. After controlling for other known risk factors for violence, homes with guns were 2.7 times more likely to have been the site of a homicide than homes without guns. Arthur L. Kellermann et al., *Gun Ownership As a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084 (1993).

As with suicide, national case-control studies confirm an increased homicide risk associated with guns in the home, though the magnitude of the enhanced risk is smaller than with Kellermann's regional analysis. Dahlberg et al., *supra*; Wiebe, *Homicide and Suicide Risks*, *supra*. Taken together, these results are significant because of the strong link they reveal between the availability of firearms and the risk of being killed with a firearm, even after accounting for other demographic and behavioral factors.

Living in a state with high rates of gun ownership increases the risk of firearm-related homicide as well. One study that examined the relationship between rates of household gun ownership and homicide in all 50 states determined that persons in states with a high prevalence of guns were substantially more likely to die in a homicide than people in states with a low prevalence of guns. These results were driven by substantially higher gun-related homicides, although non-gun homicides were also elevated. For all age groups, persons living in states with a high prevalence of guns were 2.9 times more likely to die in a homicide as compared to persons in states with a low prevalence of guns, 4.2 times more likely to die in a gun-related homicide, and only 1.6 times more likely to die in a non-gun related homicide. *See* Matthew Miller et al.; *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 AM. J. PUB. HEALTH 1988, 1990 (2002).

Another analysis demonstrated that *changes* in state-level homicide rates were associated with changes in gun ownership. According to that study, "a 10 percent increase in the rate of gun ownership is associated with approximately a 2 percent increase in the homicide rate." Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1096 (2001). A more recent study that compared homicide rates with state-level, survey-based estimates of household firearm ownership also noticed a significant relationship between the prevalence of household firearm ownership and firearm homicide victimization rates, a result that held across all ages and for both sexes. Matthew Miller et al., *State-level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOC. SCI. & MED. 656 (2007). These researchers determined that overall, each one-percentage point difference in household firearm ownership was associated with a 3.3% difference in firearm homicide victimization and a 2.2% difference in the rate of homicide victimization, with no noticeable effect on non-firearm homicide victimization. *Id.* at 659.

Another recent study demonstrates how types of gun availability may have different effects in areas with differing levels of urbanization, a result that emphasizes the importance of state by state and city by city gun regulation. Douglas J. Wiebe, *Homicide and Geographic Access to Gun Dealers in the United States*, 9 BMC PUB. HEALTH 199 (2009). Controlling for socio-demographic characteristics, researchers compared U.S. counties by their per capita rates of licensed firearm dealers and their rates of firearm homicides. They identified a powerful link between higher rates of gun dealers and significantly higher rates of firearm homicides in major cities, but a negative association between the two in smaller cities and suburbs. *Id.*

In short, credible research indicates that either living in a home with a gun or living in a state where guns are prevalent dramatically increases one's risk of being murdered with a gun, even when other homicide risk factors are taken into account.

C. The risk of death from accidental shooting is greater in homes with guns, and in communities with a higher prevalence of guns.

Between 1965 and 2000, over 60,000 Americans died from unintentional firearms injuries. DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 27 (2006). As dramatic as these figures may be, the number of persons accidentally injured from firearms is far greater. One study estimated that for every accidental gun fatality, thirteen persons are treated in hospital emergency rooms for accidental shootings. Joseph L. Annest et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 JAMA 1749, 1751 (1995).

Rates of fatal firearm-related accidents are also higher where household gun ownership is greater. A study of the nearly 30,000 unintentional firearm-related deaths between 1979 and 1997, found a statistically significant and robust association between gun availability and rates of unintentional firearms deaths for the United States as a whole and across all age groups. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 ACCIDENT ANALYSIS & PREVENTION 477 (2001). In fact, this study found that, compared to the states with the lowest gun levels, states with the highest gun levels had, on average, nine times the rate of unintentional firearm deaths—results that held for blacks and whites, and for both sexes, and which took into consideration urbanization, poverty, and regional location. *Id.*; *see also* HEMENWAY, *supra*, at 28-29 (analyzing data between 1991 and 2000, concluding risk of fatal firearms accidents was 10 times greater in high gun states as compared to low gun states).

In a case-control study of gun deaths using nationally-representative mortality data, persons who died from an accidental shooting were more than three times as likely (3.7) to have had a gun in their home compared with the control group drawn from a national health interview study. There was also evidence that having more than one gun in the home made the risk of accidental death even greater. Douglas J. Wiebe, *Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713-14 (2003).

II. GUNS POSE A PARTICULAR RISK TO WOMEN.

While guns pose significant risks to many segments of the population, women are particularly vulnerable to being threatened, injured, and killed by firearms. Domestic violence perpetrators use firearms in their attacks with alarming frequency. The Centers for Disease Control and Prevention's National Violence Against Women Survey estimates that approximately 5.3 million intimate partner violence victimizations occur among U.S. women ages eighteen and older every year. Department of Health and Human Services, *Costs of Intimate Partner Violence Against Women in the United States*, March 2003.[8] Firearms are the most common weapon used in intimate partner homicides. James A. Fox and Marianne W. Zawitz, *Homicide Trends in the United States* (2007).[9] From 1990 to 2005, over two-thirds of female intimate partner homicide victims were killed by guns. *Id.* at 58. Among women killed by their husbands, the percentage killed by guns was 68%. *Id.* Among women killed by their ex-husbands, the percentage killed by guns jumps to 77%. *Id.*

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[8] *Available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf.

[9] *Available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf.

The mere presence of or access to a firearm increases fatality rates in abusive relationships. *See* Jacquelyn C. Campbell, ***Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study***, 93 AM. J. OF PUB. HEALTH 1089, 1092 (2003) (abusive partner's access to a firearm increases the risk of homicide eightfold for women in physically abusive relationships).[10] And, because of the deadly nature of firearms, abused women are more likely to be killed if a gun is involved in the altercation. *See* Shannon Frattaroli and Jon S. Vernick, *Separating Batterers and Guns: A Review and Analysis of Gun Removal Laws in 50 States*, 30 EVALUATION REV. 296, 297 (2006) (when domestic violence incidents involve a firearm, the abuse is twelve times more likely to result in a death compared to non-firearm abuse incidents) (citation omitted).

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[10] *Amici curiae* for the Petitioners attempt to explain away the Campbell study's findings with the claim that the high correlation between abuser access to a firearm and murder of the female victim is significant only when "particular adjustments for other risk factors are weighed." Brief of *Amici Curiae* Women State Legislators and Academics in Support of Petitioners at 18. *Amici* attack a methodological feature of this study that actually makes its results more reliable. The study's authors used an iterative model-building strategy consisting of seven different models designed to isolate the variables that increased the risk of intimate partner homicide. *See* Campbell, *supra*, at 1090. Variables "not significantly associated with femicide risk" were dropped from subsequent models so as to better focus on those variables that were statistically significant. *Id.* The researchers' addition of different variables for each model therefore strengthens, rather than weakens, the statistical validity of the study. Its conclusion that "abusers who possess guns tend to inflict the most severe abuse," then, should not be taken lightly. Campbell, *supra*, at 1092. *Amici curiae* for the Petitioners also attempt to cast doubt on the study's findings by stating that the *eightfold* increase in risk of homicide applies only to women who live with their abusers. *See* Brief of *Amici Curiae* Women State Legislators and Academics in Support of Petitioners at 18. Given the frequency with which women share a home with their husbands or partners, that is hardly a meaningful limitation on the study's results.

Guns in abusive homes are also often effective instruments for threatening, intimidating, and coercing domestic violence victims. Such threats may be explicit (*e.g.*, an abuser pointing a firearm at his victim or a loved one) or implicit (*e.g.*, cleaning a firearm or shooting it outside), but they can leave lasting psychic scars, such as post-traumatic stress disorder, all the same. Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62, 66 (2005).

The risks women face when guns are easily available are clear. But *amici curiae* for the Petitioners argue that because women cannot rely on the police to protect them from random attacks by strangers, women need to be able to purchase guns to put themselves on an equal footing with their male attackers. *See* Brief of *Amici Curiae* Women State Legislators and Academics in Support of Petitioners at 9-14. That argument falsely assumes that strangers pose the greatest risk to women's safety. In fact, an analysis of 2004 Bureau of Justice statistics demonstrates that women in the United States are murdered by intimate partners or former partners approximately nine times more often than they are murdered by strangers. Jacquelyn C. Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 TRAUMA, VIOLENCE, & ABUSE 246, 246 (2007).

Amici for Petitioners further argue that women, in particular immigrant women, who are victims of domestic violence may lack the "knowledge or social network" to access violence prevention services. *See* Brief for *Amici Curiae* Women State Legislators and Academics in Support of Petitioners at 11 n.10. They claim that an affordable handgun may be the only means for those women to protect themselves. But the research refutes this position. The vast majority of the time, abused women do not use guns in the home to protect themselves from their abusers; instead, a gun in an abusive home greatly increases the chances that the woman will be murdered or injured with it. *See* Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. TRAUMA 263, 265 (1998) (a gun kept in the home is 22 times more likely to be used in an unintentional shooting, a criminal assault or homicide, or an attempted or completed suicide than to be used to injure or kill in self defense).

Additionally, according to a study of 417 women in California battered women's shelters, over ten times as many had been victimized by a man wielding a gun as had used a gun in self-defense. *See* Susan B. Sorenson & Douglas J. Weibe, *Weapons in the Lives of Battered Women*, 94 AM. J. OF PUB. HEALTH 1412, 1413 (2004) (explaining that 32.1% of victims were hurt by a handgun, whereas only 3.1% had used a handgun in self defense). The unfortunate fact borne out by these statistics is that women suffer disproportionately high rates of injury and death when a gun is present in the home.[11]

III. GUNS POSE SIGNIFICANT RISKS TO CHILDREN AND ADOLESCENTS.

A. As with adult Americans, as firearm prevalence increases, so does children and adolescents' risk of injury and death.

Like adult Americans, children and adolescents face an increased risk of suicide, homicide, and accidental death when firearms are present in the home or more common in their community.

In 2004, for example, 846 children and teens (ages 10-19) committed suicide using a firearm, and over 46 percent of all suicides in adolescents 15 through 19 years of age were committed with a firearm. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Vital Statistics Sys., Nat'l Ctr. for Health Statistics, Web-Based Injury Statistics Query and Reporting System (WISQARS).[12] As with adults, such suicides are strongly associated with the presence of a gun in the home of the victim. *See generally* Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 EPIDEMIOLOGY 517 (2002); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467 (1992). In fact, one study found that the "the more guns in the home, the more likely suicide by firearms was to occur." David A. Brent et al., *Firearms and Adolescent Suicide: A Community Case-Control Study*, 147 AM. J. OF DISEASES OF CHILD. 1066, 1068 (1993).

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[11] Setting aside the fact that possession of a gun in the home increases, rather than decreases, the risk of violence against a woman, *amici* for Petitioners blatantly err in asserting that the ordinances at issue here completely disarm women in Chicago. They state that, "[a]s it is now in Chicago, those inclined to harm women know that all law-abiding women will be unarmed." *See* Brief of *Amici Curiae* Women State Legislators and Academics in Support of Petitioners at 16. The ordinance at issue restricts only handguns and does not restrict Chicagoans, including women, from owning many other types of firearms.

[12] *Available at* http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html. (Under "Report Options," choose 2004 as

Firearms-related (and especially handgun-related) homicides and assaults affect legions of children and adolescents. Between 1987 and 1992, persons aged 16 to 19 had the highest rate of handgun crime victimization, nearly three times the average rate. Michael R. Rand, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, NCJ 147003 (Apr. 1994, rev. Sept. 2002). Between 1993 and 1997, those aged 19 and younger accounted for 20 percent of firearms homicide victims and 29 percent of victims of nonfatal firearms injury from assault. Marianne W. Zavitz & Kevin J. Strom, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearm*

Year of Report, and under "Advanced Options-Age Group Formatting," choose "1-24 in 5-year groups; 25-65+ in 10-year groups," then "Submit Request." Click on the "suicide" hyperlinks in the green boxes in the resulting tables to see the number of deaths by method of suicide.)

Injury and Death from Crime, 1993-1997, NCJ 182993, at 3 (Oct. 2000).

Indeed, "[c]hildren and teens in the United States are killed with handguns more often than with all other weapons combined." Violence Policy Ctr., *Kids in the Line of Fire: Children, Handguns, and Homicide* (Nov. 2001).[13] In 2004, homicide from firearms was the second leading cause of death for persons 15 to 24 years of age—second only to motor vehicle crashes. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention and Control, Web-Based Injury Statistics Query and Reporting System (WISQARS), *Leading Causes of Death Reports, 2004*.[14] Most unintentional firearms-related deaths among children occur in or around the home—50 percent at the home of the victim and 40 percent at the home of a friend or relative—and occur when children play with loaded and accessible guns. Children's Hospital Boston, *Firearm Safety, 2005-2006*.[15]

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[13] *Available at* http://www.vpc.org/studies/fireintr.htm (last visited Dec. 22, 2009).

[14] *Available at* http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html. (Under "Report Options," choose 2004 as Year of Report, and under "Advanced Options-Age Group Formatting," choose "1-14 in 5-year groups; 15-65+ in 10-year groups," then "Submit Request." Click on the "homicide" hyperlink in the red boxes in the resulting tables under age group 15-24 for evidence that firearms were, by far, the leading cause of homicide.)

[15] *Available at* http://www.childrenshospital.org/az/Site905/printerfriendlypageS905P0.html.

The number of guns in an area is positively associated with the likelihood that children in that area will die from a firearm accident. In a study of accidental firearms deaths that occurred between 1979 and 1997, children aged four and under living in the four states with the most guns were 17 times more likely to die from a gun accident than their counterparts living in the four states with the fewest guns. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 ACCIDENT ANALYSIS & PREVENTION 477, 481, Table 3 (2001). That gap remained when comparing mortality rates of children aged five to fourteen. *Id.* In that group, children living in the four states with the highest gun availability were 13½ more times likely to die than those living in the four states with the lowest relative gun availability. *Id.*

B. Gun safety education is ineffective for children.

For most children, "gun safety" is, at best, an elusive concept. Numerous studies illustrate the ineffectiveness of gun safety education. For example, in a study of 48 four- to six-year-old children, researchers assessed the effectiveness of an educational intervention about gun safety on behavior. Marjorie S. Hardy et al., *A Firearm Safety Program for Children: They Just Can't Say No*, 17 J. DEV. & BEHAV. PEDIATRICS 216, 217-18 (1996). Pairs of children were given the opportunity to play in a room with art supplies and various toys, including two toy guns and two real (and disarmed) guns. *Id.* at 217. One child from each pair was randomly assigned to the experimental group. A week after the play time, a researcher and a police officer gave a 30-minute, developmentally-appropriate presentation to the children in the experimental group about the dangers of firearms. *Id.* at 218. The children were told to find an adult if they ever saw a gun. *Id.* They were also given the opportunity to color pictures about firearm safety and draw a picture of an adult that they could turn to if they encountered a gun. *Id.* The children also promised not to touch a gun and signed a certificate that they took home to that effect. *Id.* A week later, the pairs were rejoined to play in the same toy-filled room. *Id.* at 217. Tellingly, there were *no significant differences* in the children's amount of gun play after the intervention. *Id.* at 219. Admonitions to stay away from guns—even when the warnings are delivered by a law enforcement officer—were demonstrably insufficient to prevent gun play. *Id.* at 220.

Other recent studies echo that conclusion. In a study of 8- to 12-year-old boys, seventy-five percent of those who found a gun in a playroom handled it, and nearly half of them pulled the disarmed gun's trigger—even though most had received gun safety instruction. Geoffrey A. Jackman et al., *Seeing Is Believing: What Do Boys Do When They Find a Real Gun?*, 107 PEDIATRICS 1247, 1250 (2001). In another study, 9- to 15-year-old boys were warned not to touch one of two items, either a gun or a particular toy, when a researcher left them in a room for 5 minutes. Marjorie S. Hardy, *Effects of Gun Admonitions on the Behaviors and Attitudes of School-Aged Boys*, 24 J. DEV. & BEHAV. PEDIATRICS 352, 353-54 (2003). But, "of the 30 boys told not to touch the gun, 7 did so anyway; of the 25 boys told not to touch some other object, none did." *Id.* at 354. The investigator of that study concluded that gun-avoidance education programs in schools are likely to have minimal effects on children's actual behavior around guns. *Id.* at 357.

Even the National Rifle Association's Eddie Eagle GunSafe Program, which taught 4- to 7-year-olds to take certain steps if they encountered a gun, has been found to be ineffective. *See generally* Michael B. Himle et al., *An Evaluation of Two Procedures for Training Skills to Prevent Gun Play in Children*, 113 PEDIATRICS 70 (2004); Brian J. Gatheridge et al., *Comparison of Two Programs to Teach Firearm Injury Prevention Skills to 6- and 7-Year-Old Children*, 114 PEDIATRICS e294 (2004). While children could repeat that program's safety messages, it did not alter their risky treatment of firearms.

Overall, when children find guns, they play with them, and they do so despite exposure to gun-safety education. Parents think otherwise. In sharp contrast to the wealth of data demonstrating that gun safety messages are ineffective in preventing children from handling guns, one study found that 87 percent of parents believe their children would not touch a gun if they found one. Susan M. Connor & Kathryn L. Wesolowski, *They're Too Smart for That: Predicting What Children Would Do in the Presence of Guns*, 111 PEDIATRICS e109 (2003). Parents' beliefs and unrealistic expectations of children's developmental levels and impulse control may influence storage decisions or the inclination to address gun safety issues. *Id.*

Because there is no way to immunize children against the dangers of guns, the failure of internal regulation necessitates external regulation. As researchers writing in the premiere pediatrics journal explained,

> There is no evidence that safety lessons are retained by children at the critical times when they confront a loaded weapon. Indeed, the combination of the high stakes involved, death or disability, and the propensity of children to forget rules while playing or upset makes this a dubious approach at best. Because children cannot be made "gun safe," their environments must be made safe by removing the most dangerous guns [*i.e.*, handguns].

Judith Cohen Dolins & Katherine Kaufer Christoffel, *Reducing Violent Injuries: Priorities for Pediatrician Advocacy*, 94 PEDIATRICS 638, 646 (1994). That synopsis, written more than 15 years ago, remains apt to this day.

C. Handguns in the home present a deadly risk to children.

Approximately one out of three handguns is kept loaded and unlocked. Philip J. Cook & Jens Ludwig, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms*, at 7 (May 1997). *See also* Renee M. Johnson et al., *Are Household Firearms Stored Less Safely in Homes with Adolescents*, 160 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 788, 789 (2006) (finding that 28.8 percent of parents with children 12 years or younger—and 41.7 percent of parents with children ages 13 to 17—kept an unlocked firearm in the home). That statistic is particularly troubling since children know where to find their parents' guns. In one 2006 study, 73 percent of children under age 10 reported knowing the location of their parents' firearms, and 36 percent admitted that they had handled the weapons. Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 542, 544 (2006). Accordingly, it is not surprising that 89 percent of unintentional shooting deaths of children occur in the home, or that most of these deaths occur when children are playing with a loaded gun in their parents' absence. Guohua Li et al., *Factors Associated with the Intent of Firearm-Related Injuries in Pediatric Trauma Patients*, 150 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1160, 1162 (1996).

Moreover, keeping guns at home for self-defense has considerable costs. Access to firearms in the home increases the risk of both accidental injuries as well as intentional shootings. A study of youth suicide found that more than 75 percent of guns used by youth in suicide attempts and unintentional injuries were kept in the home of the victim, a relative, or a friend. David C. Grossman et al., *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 875, 875 (1999). Another study of 37 school shootings in 26 states found that, in more than 65 percent of the cases, the shooter got the gun from his or her home or that of a relative. United States Dep't of the Treasury, U.S. Secret Service, *An Interim Report on the Prevention of Targeted Violence in Schools*, at 6 (Oct. 2000).

CONCLUSION

Firearm-related homicide, suicide, and fatal accidental shootings are a serious public health problem in the United States. Guns pose particular risks to women and children that state and local lawmakers might reasonably seek to address through gun-control legislation. Because legislators must rely upon social science data when formulating firearm safety policies, *amici* urge the Court to consider the empirical evidence presented in this brief when it considers the important legal issues that this case presents.

Respectfully submitted.

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Supreme Court of the United States

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OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ET AL.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF OF THE PARAGON FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Paragon Foundation, Inc. is a New Mexico 501(c)(3) non-profit organization created to support and advance the fundamental principles set forth in the Declaration of Independence and Constitution of the United States of America.[1] The Paragon Foundation, Inc. advocates for individual freedom, private property rights, and limited government controlled by the consent of people. The Paragon Foundation, Inc. provides for education, research and the exchange of ideas in an effort to promote and support constitutional principles, individual freedoms, private property rights and the continuation of rural customs and culture, all with the intent of celebrating and continuing the Founding Fathers' vision for America. The Paragon Foundation, Inc. has several thousand current or former members nationwide; its constituents include ranchers and rural landowners. Consistent with its mission, *amicus curiae* is well positioned to bring to the Court's attention relevant material that will assist in the disposition of this case.

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[1] This brief is submitted and filed with the consent of the parties via blanket consents on file pursuant to S. Ct. R. 37.3(a). Counsel of record for all parties received notice at least ten (10) days prior to the due date of the *amicus curiae*'s intention to file this brief. Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The court of appeals' judgment should be reversed because the Second Amendment embodies a pre-existing, fundamental right to keep and bears arms. As such, that right is incorporated as against the States by the Fourteenth Amendment's Due Process Clause. As an individual right rather than a collective one, the right to keep and bear arms is not subject to attack on federalism grounds.

◆

ARGUMENT

I. THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS, PRESERVED BY THE SECOND AMENDMENT, IS A FUNDAMENTAL RIGHT.

The Declaration of Independence, stating that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," is the finest example of natural rights theory applied to public policy. Every individual has "unalienable Rights" that exist not because of government but spring wholly from the human condition itself. It is our humanity that is the fountainhead of those natural rights. As the founders of this country moved from the Declaration of Independence to other formal organizing documents, numerous natural rights were carried forward and enshrined in the Bill of Rights.

At a speech given on June 8, 1789, James Madison proposed certain amendments to the Constitution that would later become the Bill of Rights.[2] His speech and notes from that speech reflect that the proposed amendments preserved and protected certain natural rights and retained the same for individuals.[3] Among those natural rights was a right to keep and bear arms that is substantively similar to the present Second Amendment.[4]

In accord with the natural rights theory, the Court in *Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) stated that:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to

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[2] House of Representatives, Debates, June 8, 1789, reprinted in David E. Young, *The Origin of the Second Amendment: a Documentary History of the Bill of Rights 1787-1792* at 651-663, 654 (2nd Ed. 2001).

[3] *Id.*; http://www.loc.gov/exhibits/madison/images/vc11.jpg.

[4] *Supra* at n. 2.

> be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion. . . .

The Court pointed out that the Second Amendment is among those individual rights that Americans "inherited from our English ancestors" and that the Bill of Rights is not a collection of "novel principles of government" but something personal and individual. The individual right of the people to keep and bear arms was thus incorporated into what the *Robertson* Court called "the fundamental law." *Id.* The Second Amendment does not lay down the right of the people to keep and bear arms as a matter of positive law but reflects that the right is more fundamental. The government is not the fount from which the Second Amendment flows. The Second Amendment functions as a means to preserve the fundamental, individual right to keep and bear arms.

In accord, in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court all but declared the right to keep and bear arms a "fundamental right."

The *Heller* Court at 2798 stated that "[b]y the time of the founding, the right to have arms had become ***fundamental*** for English subjects . . . Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation,' . . . cited the arms provision of the Bill of Rights as one of the ***fundamental*** rights of Englishmen." (emphasis added, internal citations omitted). *Heller* speaks in the constitutional language of fundamental rights.

Moving from there, the *Heller* Court at 2799 stated that "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms," and formally held at 2821-22 that a "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller* lifts the Second Amendment to its appropriate place on par with the other Amendments in the Bill of Rights.

It would be Orwellian to relegate the Second Amendment to a lower tier of constitutional value that is not worthy of incorporation, i.e. all fundamental constitutional rights are equal but some rights are more equal than others. This Court has not embraced such a hierarchy. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). In simplest terms, "[t]he most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

The fundamental character of an enumerated right hinges on whether it is "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149-50, n. 14 (1968). *Heller* is instructive on the issue of "ordered liberty." *Heller* describes formulations of the right to keep and bear arms in English history and at the founding of this country. Those formulations include the "right to enable individuals to defend themselves" and "an individual right protecting against both public and private violence." *Heller* at 2798-99. Those formulations represent a "regime of ordered liberty" contemplated by *Duncan*. "Ordered liberty," at times, may very well hinge on the individual right to keep and bear arms; it is that right that may secure all others.

Coupling *Heller* with recognized, long-standing jurisprudence on fundamental rights confirms that there is no doubt that the Second Amendment right to keep and bear arms is a fundamental right.

II. ENGAGING IN THE FOURTEENTH AMENDMENT INQUIRY PRESCRIBED BY *HELLER*[5] LEADS TO THE CONCLUSION THAT THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS INCORPORATED AS AGAINST THE STATES BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

This Court begins "in all due process cases, by examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (citations omitted) (recognizing enumerated and unenumerated rights); *accord, Duncan* (recognizing enumerated rights). For an exhaustive examination of the right to keep and bear arms of the sort prescribed by *Glucksberg* and *Duncan*, this Court need look no further than its recent opinion in *Heller*. The *Heller* examination squarely places the individual right to keep and bear arms in the fundamental class, worthy of incorporation.

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[5] The inquiry, as formulated by *Heller*, is "[w]ith respect to *Cruikshank's* continuing validity on incorporation . . . we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller* at 2812, n. 23.

The specific freedom – the individual right to keep and bear arms – recognized by *Heller* is also entitled to the special protection afforded by the Due Process Clause of the Fourteenth Amendment by virtue of its place in the Bill of Rights.[6] Therefore, the fundamental, individual right to keep and bear arms, preserved by the Second Amendment, must be incorporated against the States by the Due Process Clause of the Fourteenth Amendment.

To be sure, the Court carefully restrains itself when deciding in favor of incorporating a previously unincorporated fundamental right. *Glucksberg* at 721. However, here, the Court does not run afoul of its avowed restraint because the individual right to keep and bear arms is clearly enumerated in the Bill of Rights. As a constituent member of the Bill of Rights and a fundamental right, the Second Amendment is properly incorporated against the States by the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Duncan* (right to criminal jury).

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[6] *See, Glucksberg* at 719 ("[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes . . . " other unenumerated liberties).

III. RELIANCE ON FEDERALISM TO VALIDATE LOCAL HANDGUN BANS IS MISPLACED.

Federalism is central to this Republic and dearly important to *amicus curiae*. However, federalism is a shield for States against the federal government, not a sword for States against fundamental, individual rights. States cannot sacrifice those rights on the altar of federalism.

The argument that federalism validates local ordinances banning handguns is spurious in light of *Heller*. *Heller* made clear that the right to keep and bear arms is an individual right, not a collective, State right. As such, federalism does not come into play.[7]

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[7] *See, Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring) (" . . . Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment . . . the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.") (citations omitted) and *Whitney v. California*, 274 U.S. 357, 373 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Brandeis, J. and Holmes, J. (joining), concurring opinion) (" . . . it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.").

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 08-1521

In The
Supreme Court of the United States

◆

OTIS MCDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, *et al.*,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF AND APPENDIX OF PROFESSORS OF CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

◆

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BRIEF AND APPENDIX OF PROFESSORS OF CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

I. INTEREST OF *AMICI CURIAE*

Amici curiae, professors of criminal justice, submit this brief in support of the Respondents and assert that the empirical evidence demonstrates that the City of Chicago's handgun ban has decreased handgun homicide in certain key regards.

Amici are scholars who teach, write and speak about criminal justice.[1] James Alan Fox is the Lipman Family Professor of Criminal Justice and Professor of Law, Policy and Society at Northeastern University. Jack Levin is the Irving and Betty Rudnick Professor of Sociology and Criminology at Northeastern University.

II. SUMMARY OF ARGUMENT

The City of Chicago's handgun ban has been an effective part of its efforts to reduce handgun crime since 1982. It has helped reduce handgun homicides involving family members and intimate partners. It has also favorably impacted Chicago's overall handgun homicide rate relative to other cities once economic and demographic factors are considered. The Chicago handgun ban has saved hundreds of lives.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received written notice of intent to file this brief on December 16, 2009. The parties have consented to the filing of this brief.

Chicago's handgun ban also has reduced the supply of handguns, which reduction is correlated with a reduction in handgun crime. The ban has also protected Chicago's citizens from the increase in crime associated with increased availability of handguns.

Finally, the arguments raised by *amici* in support of Petitioners with respect to the efficacy of the handgun ban fail for several reasons. In particular, the data actually show that, post-ban, the number of handgun homicides in homes has decreased and that Chicago residents are now safer in their homes than they were before the ban.

III. ARGUMENT

A. The Chicago Handgun Ban Has Reduced Handgun Violence.

For over 25 years, the City of Chicago's handgun ban has been an effective part of Chicago's efforts to reduce handgun crime. In 1982, the City Council found that the convenient availability of firearms and ammunition had increased firearm-related deaths and injuries. Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. To address the significant problem of handgun violence and to protect its citizens, on March 19, 1982, the City Council enacted the handgun ban here at issue.

Today, although its rates of violent crime are at or near a 30-year low, Chicago, like many large U.S. cities, continues to experience significant amounts of handgun violence. Tracy Meares *et al.*, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program* 1 (2009), http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf. The University of Chicago Crime Lab estimates that "the social costs that gun violence imposes on Chicago [over the last ten years] are on the order of about $2.5 billion each year." University of Chicago, *Gun Violence Among School-Age Youth in Chicago* 5 (2009), http://crimelab.chicago.edu/pdf/Gun_Violence_Report.pdf.

Because the motives giving rise to homicide are varied,[2] no single government response alone is capable of reducing homicide. As a result, over the last several decades, Chicago has relied on various approaches (discussed *infra*) to address the different underlying factors that lead to handgun homicide. Its handgun ban has played an important role in combating gun violence and has reduced handgun violence, saving hundreds of lives.

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[2] The Chicago Police Department ranks the top five motives for homicide in Chicago as street gang altercations, other altercations, domestic altercations, armed robbery, and gangland narcotics. Chicago Police Department, *Murder Analysis in Chicago* 24-25 (2008), https://portal.chicagopolice.org/portal/page/ClearPath/News/Statistical%20Reports/Homicide%20Reports/2008%20Homicide%20Reports/MA08.pdf.

1. Background of the Chicago Handgun Ban.

Chicago's handgun ban prohibits the registration of new handguns. Chicago, Ill., Municipal Code § 8-20-050(c). Chicago's handgun ban exempts handguns that were validly registered prior to the effective date of the handgun ban and requires those lawful owners to renew their registration annually. Chicago, Ill., Municipal Code §§ 8-20-050(c); 8-20-200(a). In addition, the ordinance does not prohibit the lawful ownership of long guns, such as rifles and standard shotguns. *See* Chicago, Ill., Municipal Code § 8-20-050.

Chicago's handgun ban is less restrictive, in certain respects, than the handgun legislation at issue in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008). Chicago does not require registered owners of handguns and long guns to keep their guns unloaded and disassembled or bound by a trigger lock while in their residence. *See* Chicago, Ill., Municipal Code § 8-20-010 *et seq.*; *cf. Heller*, 128 S. Ct. at 2822 (noting that District of Columbia ordinance required lawful firearms to be rendered inoperable in the home, and therefore not available for immediate self defense).

2. The Chicago Handgun Ban Has Effectively Reduced Homicides in Family and Intimate Partner Relationships.

The Chicago handgun ban has been effective in reducing homicides involving family members and intimate partners. The available data indicate that, by diminishing the availability of handguns, the Chicago handgun ban has helped prevent family disputes and domestic violence from escalating to homicide.

(a) Handguns and Fatal Family Violence.

As the Court recently noted, "[f]irearms and domestic strife are a potentially deadly combination nationwide." *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). Handguns contribute to the escalation of violence to a deadly level. *See* Philip J. Cook, *The Technology of Personal Violence*, 14 Crime & Just. 1, 47 (1991). When guns are used in a family or intimate assault, death is twelve times more likely the outcome than if another weapon is used. Linda E. Saltzman *et al.*, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043 (1992). The "combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the high U.S. death rate from violence." F. E. Zimring & G. Hawkins, *Crime is Not the Problem: Lethal Violence in America* 122-23 (1997).

(b) The Number of Homicides Involving Family Members and Intimate Partners in Chicago Has Decreased After the Handgun Ban.

Amicis' analysis of the available data[3] indicates that the number of homicides involving family members and intimate partners[4] declined steadily after the enactment of the handgun ban. *See* Appendix at App. 1, Figure 1.

The drop is even more pronounced when homicides involving semiautomatic and automatic handguns, which are associated with gang and drug activity,[5] are excluded from the data. *See* Appendix at App. 2, Figure 2.

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[3] The Illinois Criminal Justice Information Authority compiled and archived victim-level data on homicides in Chicago from 1965-1995. Carolyn R. Block & Richard L. Block, *Homicides in Chicago, 1965-1995* (2005), http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/06399.xml. Covering 17 years before and 13 years after the enactment of the handgun ban, the database contains information such as the type of weapon used, relationship between perpetrator and victim, whether the homicide was gang related, and location of the homicide.

[4] The term "intimate partners" includes spouses, ex-spouses, boyfriends, and girlfriends. Carolyn R. Block & Richard L. Block, *Homicides in Chicago, 1965-1995: Codebook for Part-1: Victim-Level Data* 84 (2005), http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/06399.xml.

Chicago's decrease in the number of intimate partner handgun homicides with a female victim was also much larger than the nationwide average. While domestic violence rates have been steadily decreasing nationwide, Chicago's intimate partner homicides with female victims have gone down by a much larger percentage. Because of the relatively small data set and its volatility from year to year, *amici* averaged the number of intimate partner/female victim homicides in the six years before the ban (1976-1981) and the twelve years after the ban (1982-1993).[6] The United States experienced a 4.3% drop in intimate partner homicides with female victims from the pre-ban period to the post-ban period. Chicago's drop over the same period was 27.2%.

The analysis by *amici* also showed that the reduction in handgun homicides contributed to an overall reduction in family/intimate partner homicides in Chicago. This suggests that when handguns are not present, a less lethal weapon is used or the dispute does not escalate. Thus, the evidence demonstrates that Chicago's handgun ban saves lives by reducing the number of handgun homicides involving intimate partners and family members.

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[5] *See, e.g.*, The Boston Gun Project and Operation Cease Fire, *Case Study* 1 (2005), http://www.fti.ibis.com/DOWNLOADS/Publications/CaseStudy-BostonGunProject.pdf (finding preference for semiautomatic handguns among gang members).

[6] *Amici* selected 1976 as the starting point because it was the first year that the Supplementary Homicide Reports (SHR) compiled by the Federal Bureau of Investigation (FBI) were available. *Amici* used 1993 as the ending point because the Brady Handgun Violence Prevention Act, which prohibited stalkers and domestic violence perpetrators from possessing any firearm, was enacted on November 30, 1993. 18 U.S.C. § 922(g)(8) and (9).

3. The Chicago Handgun Ban Contributed to an Overall Reduction in the Number of Handgun Homicides.

Chicago's handgun ban has also favorably affected Chicago's overall handgun homicide rate. Although Chicago experienced an increase in handgun homicides in the late 1980s-early 1990s, the increase was part of a nationwide crime surge related to the introduction of crack cocaine. While Chicago's handgun homicide rates were slightly higher than the average of 39 other large cities, those results change once demographic and economic characteristics are considered. After controlling for those factors, the handgun homicide rate in Chicago was actually lower relative to other cities as a result of the handgun ban.

(a) Shortly After the Enactment of the Handgun Ban, Crack-Related Handgun Violence Became a Nationwide Problem.

The trends in Chicago's handgun homicide rate must be examined in the context of national homicide patterns. Beginning in the latter half of the 1980s, cities across the nation experienced a dramatic increase in violent crimes largely associated with the emergence of the crack cocaine market and related gang activity. *See* Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 4-5, 10 (2009) (noting consensus among criminologists that crime spike was due to introduction of crack cocaine). The increase in violent crime was largely driven by handgun-related crime. Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. Crim. L. & Criminology 1175, 1206 (1998).

Crack markets generally emerged first in the largest cities. Blumstein & Rosenfeld, *supra*, at 1206. "[L]arge cities had a major growth [in handgun homicide] beginning in 1986, increasing 85% from 1985 to the flat 1991-1993 peak, and then declining 37% to the low in 1995." *Id.* With respect to smaller cities, the increase in handgun homicides did not occur until two years later, in 1988, and the peak was also later. *Id.* In Chicago, where handgun homicides had declined after the ban in 1982, handgun homicides began to increase after 1987, reflecting the emergence of the crack cocaine market and its impact on the City's homicide rate. *See* Carolyn R. Block & Richard L. Block, *Homicides in Chicago, 1965-1995*, *supra*, at 2.

Amici analyzed the FBI's Supplemental Homicide Reports (SHR) data to compare Chicago to 39 other large cities[7] whose crime statistics were reported in a manner consistent with FBI protocols. From 1976-2008, handgun homicides in Chicago were slightly higher than the 39 city average, but generally rose and fell along with other cities. *See* Appendix at App. 3, Figure 3.

Thus, the suggestion by International Law Enforcement Education & Trainers Ass'n *et al.* as *amici* in support of Petitioners (hereinafter "ILEETA") that it was Chicago's handgun ban, rather than the introduction of crack cocaine, that caused post-ban crime increases, Brief of ILEETA at 21-22, is simply not supported by the data. Rather, as set forth below, Chicago had fewer handgun homicides than other cities when demographic and economic profiles of cities are considered.

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[7] Those cities are Atlanta, Austin, Baltimore, Birmingham, Boston, Charlotte, Chicago, Cincinnati, Cleveland, Columbus, Dallas, Denver, Detroit, Fort Worth, Houston, Indianapolis, Kansas City, Las Vegas, Long Beach, Los Angeles, Memphis, Milwaukee, Minneapolis, Nashville, New Orleans, New York, Newark, Oakland, Oklahoma City, Philadelphia, Phoenix, Pittsburgh, Sacramento, San Antonio, San Diego, San Francisco, San Jose, Seattle, St. Louis, and Washington D.C. Cities in Florida were not included because their data are not consistent with FBI protocols. James Alan Fox *et al.*, *Multiple Imputation of the Supplementary Homicide Reports*, 1976-2005, 25 J. Quantitative Criminology 51, 53 (2009).

(b) When Demographic and Economic Factors Are Considered, the Chicago Handgun Ban Has Had the Desired Impact on the Reduction of Handgun Violence.

Although Chicago tends to have a slightly higher rate of homicide than average, the ban reduced Chicago's rate of handgun homicide.[8] Using FBI data, *amici* compared Chicago to 39 other large U.S. cities and evaluated the data before, during, and after the crack-related crime surge of the late 1980s-early 1990s (discussed *supra*), as well as before and after the Chicago handgun ban was enacted.

Cities differ considerably from one another in terms of their economic and demographic profiles. With respect to crime rates, there are two factors that are especially significant. The most critical is relative size of the economic underclass. "Empirical evidence consistently demonstrates that crime rates, and especially rates of violent crime, are particularly high in areas of concentrated poverty." Rosenthal, *supra*, at 9-10; *see also* Philip J. Cook *et al.*, *Underground Gun Markets*, 117 Econ. J. F558, F562 (2007) ("gun crime in America is disproportionately concentrated in large cities and within these cities occurs disproportionately in highly disadvantaged neighborhoods").

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[8] Some *amici* in support of Petitioners argue that Chicago's handgun ban is ineffective, using direct comparison of the number of homicides in Chicago with those of Los Angeles and New York. Brief of Heartland Institute at 6 n.3; Brief of Buckeye Firearms Foundation Inc. *et al.* at 8, 10. These comparisons do not control for demographic, socio-economic, and geographical variants and thus do not provide a valid basis for assessing the handgun ban's effectiveness.

The second factor – related to economic disadvantage – is the percentage of the population that is African-American. African-Americans, particularly African-American men, are dramatically overrepresented as both victims and perpetrators of homicide. *See* Rosenthal, *supra*, at 9-10; *see also* Chicago Police Department, *Murder Analysis in Chicago*, *supra*, at 31, 40 (finding that 74.8% of homicide victims and 76.1% of homicide offenders were African-American in 2008).[9]

The analysis conducted by *amici* includes two variables to account for these correlates of crime rates. A detailed description of the methodology and results is set forth in the Appendix. *See* Appendix at App. 4-7.

Using these variables, *amici* calculated the reduction in Chicago's handgun homicides attributable to the handgun ban. The data suggest that the Chicago handgun ban reduced the number of handgun homicides in Chicago by approximately 6-9%, depending on which alternative model specification is used. *See* Appendix at App. 1, Figure 1. After the enactment of the Chicago handgun ban, from 1983 to 2008, the handgun ban reduced the homicide rate in Chicago, on average, by nearly 1 person per 100,000 population each year. Over the period 1983-2008, this means that between 677 and 942 handgun homicides were prevented by the ban.

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[9] The nationwide crime spike between the mid-1980s to early-1990s "hit young, African-Americans particularly hard; from 1984 to 1993, the homicide victimization rate per 100,000 for whites aged eighteen to twenty-four rose from 11.9 to 17.1, while the homicide rates for African-American males in the same age range rose from 67.9 to 183.4." Rosenthal, *supra*, at 9, *citing* James Alan Fox, *Demographics and U.S. Homicide in* The Crime Drop in America 300 (Alfred Blumstein & Joel Wallman eds., 2006).

Other studies have made similar findings relative to Chicago's handgun crime rates. Cook *et al.* found that, when controlled for race, urbanicity, and population, Cook County (which is dominated by Chicago and includes the Village of Oak Park) scored six percentage points lower in 1994-1996 for proportions of homicides and robberies involving a firearm than the other 200 largest U.S. counties. Cook, *Underground Gun Markets*, *supra*, at F580.

ILEETA compared Chicago's performance to that of the mean of 24 other U.S. cities. Brief of ILEETA at 17-24. The ILEETA comparison does not account for important variables among cities that are proven indicators of homicide rates. As a result, from a statistical standpoint, ILEETA's use of averages is not a reliable indicator of whether Chicago's handgun ban is effective.[10]

By contrast, statistical analysis of the handgun homicide data by *amici* and others indicates that the Chicago handgun ban saves lives.

B. Chicago's Handgun Ban Reduces the Supply and Increases the Cost of Handguns.

Chicago's handgun ban, combined with confiscation and other law enforcement activities, effectively reduces the supply of handguns in the City. Decreased availability of handguns reduces crime as well as suicide and accidental shootings. *See* Cook, *Underground Gun Markets*, *supra*, at F582 ("The best evidence indicates that an increase in gun prevalence results in more homicides, burglaries, and perhaps suicides as well.") (citations omitted).

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[10] Furthermore, the statement that the difference in crime rates before and after the ban found by ILEETA is "highly statistically significant" is meaningless. Statistical significance is used to determine whether a difference observed in a sample would hold true for the population. When dealing with crime rates, there is no sample; rather, the data being studied constitute all the events that occurred in the population.

1. The Chicago Handgun Ban Makes It More Difficult to Obtain Handguns Illegally.

The Chicago handgun ban inhibits the supply of handguns. Efforts to control the market for handguns follow two basic strategies: supply-reduction and demand-reduction. The supply-side initiatives, such as the Chicago handgun ban and the Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921-22, attempt to limit the availability of guns either across-the-board or to certain specified groups. *See* Anthony A. Braga *et al.*, *The Illegal Supply of Firearms*, 29 Crime & Just. 319, 340-41 (2002). Demand-side approaches, such as gang intervention programs and special prosecution of gun offenders, strive to lessen the need or desire within offender populations to carry and use guns for illegitimate purposes. *See, e.g.*, Cook, *Underground Gun Markets*, *supra*, at F570-71 (describing police intervention to deal with possession of guns by gang members in Chicago).

Chicago employs both supply-side approaches, such as the Chicago handgun ban, and demand-side approaches, such as Project Safe Neighborhoods, which is a Department of Justice funded program that focuses on the reasons offenders use guns and their attitudes toward the law and law enforcers. Meares, *supra*, at 1, 2.

Although guns from jurisdictions with more permissive gun control laws can influence the effectiveness of attempts to regulate the supply of guns, research shows that even when substitute guns from out-of-state enter a jurisdiction with supply-side regulations, such as Chicago, the price of such out-of-state, illegally imported guns is higher, thereby inhibiting demand.

> In cities such as New York and Boston, where the prevalence of gun ownership is low because legal transactions are subject to onerous regulations or are banned, prices in the secondary market are higher than in other east coast locales. The street prices of guns are actually higher than the prices of guns in gun stores. As a result, dealers have long been able to make a profit by buying guns in Virginia or points south and running them northward to the street markets of northeastern cities. The high price of guns in the secondary market in New York and Boston is the direct result of the regulation of the primary market.

Philip J. Cook *et al.*, *Regulating Gun Markets*, 86 J. Crim. L. & Criminology 59, 72 (1995). The increased price of out-of-state guns purchased in jurisdictions with strict gun control measures suggests that even supply-side regulations can decrease the demand for guns by effectively increasing the price for substitute guns. *See id.* at 79.

Moreover, in 2008, Chicago police seized about 7,400 guns and another 6,000 were voluntarily surrendered. Chicago Police Department, *2008 Annual Report: A Year in Review* 36 (2009), https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/

Statistical%20Reports/Annual%20Reports/2008%20 Annual%20Reports/08AR.pdf. Over the past decade, Chicago police have confiscated an average of 10,800 guns per year. *Id.* The crackdown on illegal guns in Chicago has made them harder to obtain and more expensive.

As a University of Chicago report noted:

> With around 250 million guns already in circulation in America (Cook and Ludwig, 2006), it is not surprising that many people have come to believe that it is impossible to keep guns out of the hands of youth, criminals, and other high-risk people. But our own study of the underground gun market in Chicago suggests that, perhaps surprisingly, conventional wisdom may be overly pessimistic. Transaction costs in underground gun markets are substantial: prices are high relative to the legal gun market; wait times are considerable; mistrust is common between buyers and sellers; and many transaction attempts go unfulfilled, even by people who are well-connected in the underground economy.

University of Chicago, *supra,* at 9. Thus, supply-side gun control laws, while unable to completely eliminate the illegal gun market, are nonetheless effective in reducing handgun availability.

2. Increased Availability of Handguns Correlates with Increased Levels of Handgun Violence.

The increased difficultly in obtaining handguns illegally in Chicago is significant because of the correlation between handgun availability and handgun violence. In 2008, handguns were used in 71 percent of murders involving firearms and 47 percent of all reported murders in the United States. *See* FBI Uniform Crime Reports, *Expanded Homicide Data* Table 8 (2008), http://www.fbi.gov/ucr/cius2008/ offenses/ expanded_information/data/shrtable_08.html; *see also* Chicago Police Department, *Murder Analysis in Chicago*, *supra*, at 22 (finding that handguns accounted for 402 out of the 412 homicides committed with a gun in Chicago in 2008). The high rate of handgun homicides in the United States is due, at least in part, to the high rate of handgun ownership. Matthew Miller *et al.*, *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 Am. J. of Pub. Health 1988 (2002) (surveying studies establishing the correlation between firearm availability and homicide). Researchers have found that "increases in gun ownership lead to increases in the number of homicides," and estimate that a ten percent increase in handgun ownership increases the homicide rate by two percent. *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98, 1100-01, 1104 (2001).

Handgun availability is also correlated with the number of homicides, accidental shootings, and suicides in children. Matthew Miller *et al.*, *Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide among 5-14 Year Olds*, 52 J. Trauma 267, 271 (2002). Indeed, within the United States, children aged 5-14 living in the five states with the highest gun levels (Louisiana, Alabama, Mississippi, Arkansas, and West Virginia) were 16 times more likely to die from unintentional firearm injury, 7 times more likely to die from firearm suicide, and 3 times more likely to die from firearm homicide than children in states with the lowest gun levels (Hawaii, Massachusetts, Rhode Island, New Jersey, and Delaware). *Id.* at 271-72. The authors concluded that "on average, where there are more guns children are not protected from becoming, but are rather much more likely to become, victims of lethal violence." *Id.* at 273.

When United States children aged 5-14 are compared with their counterparts in industrialized nations, the firearm-related homicide rate is 17 times higher, the firearm-related suicide rate is 10 times higher, and the firearm-related unintentional death rate is 9 times higher. Matthew Miller *et al.*, *Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide Among 5-14 Year Olds*, *supra*, at 267.

If the Chicago handgun ban were no longer in force, the supply of legal and illegal handguns would naturally increase. Moreover, the price of handguns in illegal sales (for example, to felons and minors) would presumably drop and the supply would increase as a result of legal sales. The supply in the underground market would also increase due to theft of newly purchased legal handguns.

> [T]he legal market for guns and legal ownership patterns affect supply in the underground market through theft. With somewhere between 200 and 250 million guns in private hands in the US, many of which are stored unlocked in order to be readily available for use against criminal intruders, it is not surprising that a large number of guns (over 500,000) are stolen each year.

Cook, *Underground Gun Markets*, *supra*, at F560-61. An increase in legal handgun availability would have the consequential effect of increasing children's access to handguns.

By helping Chicago avoid these undesirable outcomes, the Chicago handgun ban has been an effective means of protecting Chicago's citizens from the increase in crime related to increased availability of handguns.

C. *Amici* in Support of Petitioners Misconstrue the Statistical Data Concerning the Impacts of the Chicago Handgun Ban.

1. Homicides in Homes Have Decreased Post-Ban.

The number of homicides that occurred in victims' homes declined in Chicago after the enactment of the handgun ban. *See* Appendix at App. 8, Figure 4.

The decrease was especially pronounced for those homicides in which handguns other than automatic/semiautomatic firearms (*i.e.* the guns associated with ongoing criminal activity) were used. *See* Appendix at App. 9, Figure 5.

Chicago Police Department data also confirm that the number of homicides in residences has continually declined from 1991, in which there were 359 such homicides, to 2008, in which there were 109 such homicides. Chicago Police Department, *Murder Analysis in Chicago, supra*, at 10.

Thus, the fear of increased crime in the home expressed by some *amici* in support of Petitioners, *see* Brief of Buckeye Firearms Foundation Inc. *et al.* at 8, 25; Brief of Heartland Institute at 12-13; Brief of ILEETA at 22-23; Brief of Professors of Philosophy *et al.* at 5-9, 34, is not supported by the data. Rather, the data show that post-ban, Chicago residents have been safer in their homes.

2. Other Arguments Regarding the Efficacy of Chicago's Handgun Ban Also Fail.

Various *amici* in support of the Petitioners claim that the handgun ban has either been ineffective or has actually increased gun violence and decreased the safety of Chicago's citizens. However, these contentions cannot withstand close scrutiny.

First, the rate of murder of law enforcement officers is not a reliable indicator of whether the handgun ban is effective. Certain *amici* contend that Chicago police officers are killed at a rate higher than the national average. Brief of ILEETA at 24. However, the size of this data set is relatively small. For example, according to the table in the ILEETA brief, over a twelve year period from 1996-2008, twelve law enforcement officers were killed in Chicago. Brief of ILEETA at App. C. At a rate of one episode per year, one additional fatality would cause a 100% rate increase. Meaningful statistical analysis cannot be drawn from data subject to such wide swings with the occurrence or nonoccurrence of rare events.[11] Although the rate of murder of law enforcement has understandable emotional appeal, it does not yield valid conclusions on the handgun ban's effectiveness.

Second, at least one *amici* in support of the Petitioners contends that it is "clear" that re-legalization of handgun ownership "has had no deleterious effect" in the District of Columbia. Brief of ILEETA at 12. However, such a contention merits scant consideration given the brief time period that has elapsed since the Court's decision in *Heller*. It will be years before the effects of *Heller* in the District of Columbia can be determined.

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[11] It was for this reason that when studying handgun homicides involving intimate partners and female victims (which involved a larger data set than law enforcement murders), *amici* aggregated the data.

Finally, certain *amici* in support of Petitioners allege that various scholars in the field of criminology have recanted their support of gun control. Brief of Professors of Philosophy *et al.* at 17-28. Such discussion is neither relevant nor accurate. By way of example, *Amici* Professors assert that the "most dramatic" recantation came from the late Professor Marvin E. Wolfgang. *Id.* at 24. Professor Wolfgang merely commended a group of researchers for their methodology and remained a gun control proponent until his death. Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. Crim. L. & Criminology 188, 191 (1995).

IV. CONCLUSION

Since 1982, the Chicago handgun ban has served as an effective legislative response to the tragedy of urban handgun violence and has saved hundreds of lives. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

App. 1

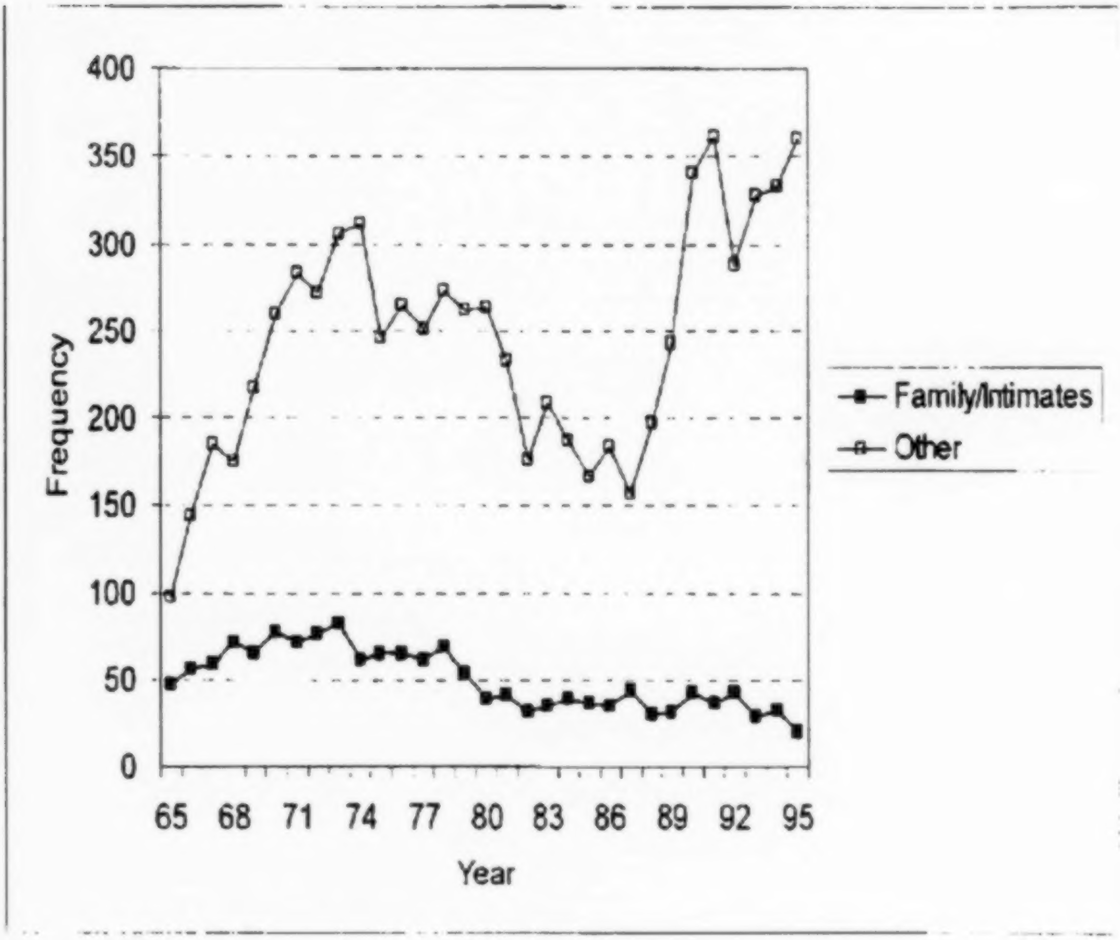

Figure 1: Handgun homicides in Chicago by victim/offender relationship

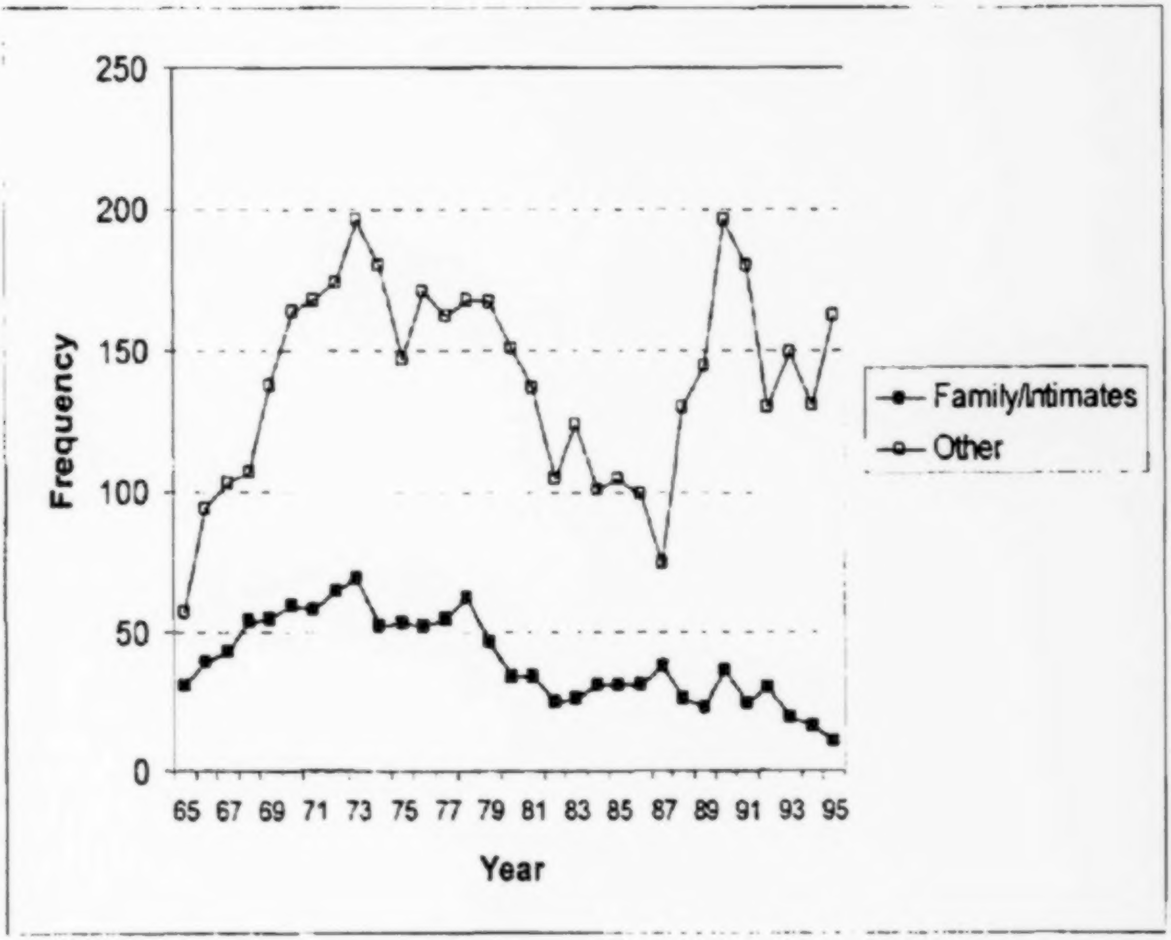

Figure 2: Non-automatic/semiautomatic handgun homicides in Chicago by victim/offender relationship

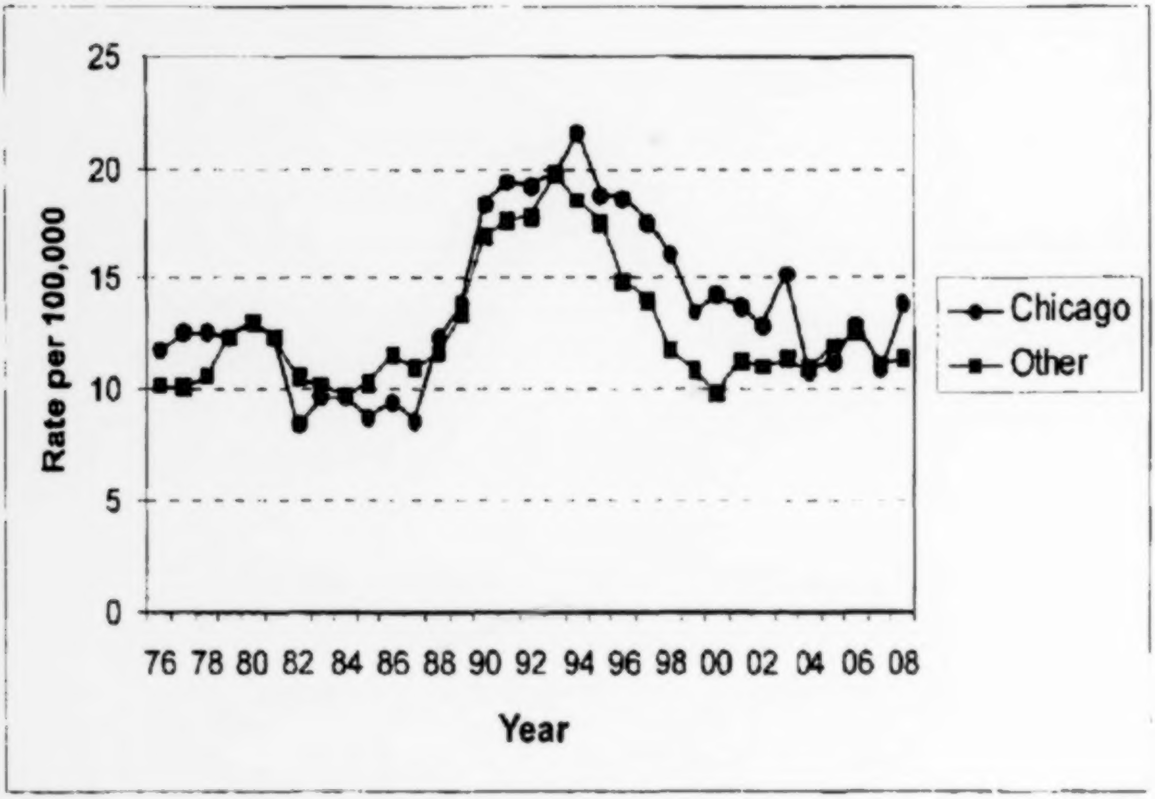

Figure 3: Trends in handgun homicide rate in Chicago and other cities

In order to assess Chicago homicide trends relative to other major American cities as a means for evaluating the impact of the Chicago gun ban, Professor Fox developed a multi-level model for change to distinguish within-city trends from differences between cities associated with demographic and economic factors that typically impact on crime levels. The data set used to estimate the parameters of the model was comprised of 40 cities, including Chicago, all of which had populations over one-quarter million and reported homicide data consistently to the FBI.

The multi-level analysis includes several indicator variables to assess the impact of the Chicago gun ban on handgun homicide rates in that city in contrast to trends in the remaining cities, after adjusting for important control variables and time trends. Specifically, the model includes (in addition to a baseline constant reflecting starting values for city handgun homicide rates in 1976) three trend variables (one for 1976-1984, one for 1985-1993, and one for 1994-2008) to segment trends before, during and after the nation's crack epidemic, as well as two economic/demographic control variables (percent of families below the poverty line and percent black population, both based on the 2000 Census) to adjust for important differences among cities in crime-correlates. Moreover, a dummy variable[1] indicating

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[1] A dummy variable (also known as an indicator variable) takes the values 0 or 1 to represent the absence or presence of

(Continued on following page)

Chicago data, a dummy variable indicating post-ban Chicago data, and a post-ban trend variable specific to Chicago were used in four alternative specifications to measure the overall effect of Chicago's gun ban.

The results of this analysis are shown in Table 1. Models 1 and 2 omit the Chicago dummy indicator, while Models 3 and 4 include it. Moreover, Models 1 and 3 treat the impact of the gun ban as a constant, while Models 2 and 4 treat the impact as changing over time. Regardless of specification, the Chicago handgun ban appears to have reduced the rate of handgun homicide in that city, relative to handgun homicide trends in other cities, all adjusted for time period and the two demographic/economic correlates. The estimated coefficient for BAN (-0.9053 and -0.9648 for the Chicago dummy absent and the Chicago dummy present, respectively) represents the average difference in handgun homicide rates (just under 1 homicide per 100,000 residents), while alternatively the coefficient for TBAN (-0.0894 and -0.0941 for the Chicago dummy absent and the Chicago dummy present, respectively) indicates the average change in the handgun homicide rate for each year post-implementation (about .09 homicides

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some categorical effect expected to impact upon the outcome variable. The coefficient associated with a dummy (or indicator) variable reflects the change in the dependent variable (*e.g.*, handgun homicide rate per 100,000) attributable to the presence of the dummy variable (*e.g.*, presence of the gun ban).

fewer per 100,000 population for each year following the ban).

The cumulative reduction in Chicago's handgun homicides attributable to the gun ban as well as the percent reduction in handgun homicides attributable to the ban are calculated for each of the four specifications. Comparing across models, the Chicago gun ban has reduced the number of handgun homicides in Chicago by approximately 6-9%. Accordingly, dozens of homicides have been prevented each year as a result of the gun ban over the period 1983-2008. This means that between 677-942 handgun homicides were prevented by the ban.

	Model Specification			
	1	2	3	4
	Without Chicago Dummy Variable		With Chicago Dummy Variable	
Variables in Model	Constant ban effect	Gradual ban effect	Constant ban effect	Gradual ban effect
INTERCEPT (baseline at 1976)	10.4987	10.5033	10.4858	10.4875
TYEARS1 (growth 1976-1984)	0.0140	0.0146	0.0140	0.0147
TYEARS2 (growth 1985-1993)	0.2953	0.2954	0.2953	0.2955
TYEARS3 (growth 1994-2008)	0.1080	0.1070	0.1081	0.1070
CPCTBLK (Percent Black Pop – centered)	0.0844	0.0845	0.0845	0.0844
CPCTFAMPR (Percent Poor Families – centered)	0.5252	0.5252	0.5245	0.5249
CHICAGO (1 for Chicago, 0 otherwise)			0.5034	0.6254
BAN (1 for Chicago 1983 on, 0 otherwise)		-0.9053		-0.9648
TBAN (Years post ban for Chicago, 0 otherwise)	-0.0894		-0.0941	
Cumulative effect of Chicago gun ban 1983-2008:				
Estimated reduction in handgun homicides	-895	-677	-942	-722
Estimated pct. reduction in handgun homicides	-8.4%	-6.4%	-8.9%	-6.8%

Table 1: Coefficients for alternative specifications of handgun ban impact model and model-specific estimated effects of Chicago gun ban

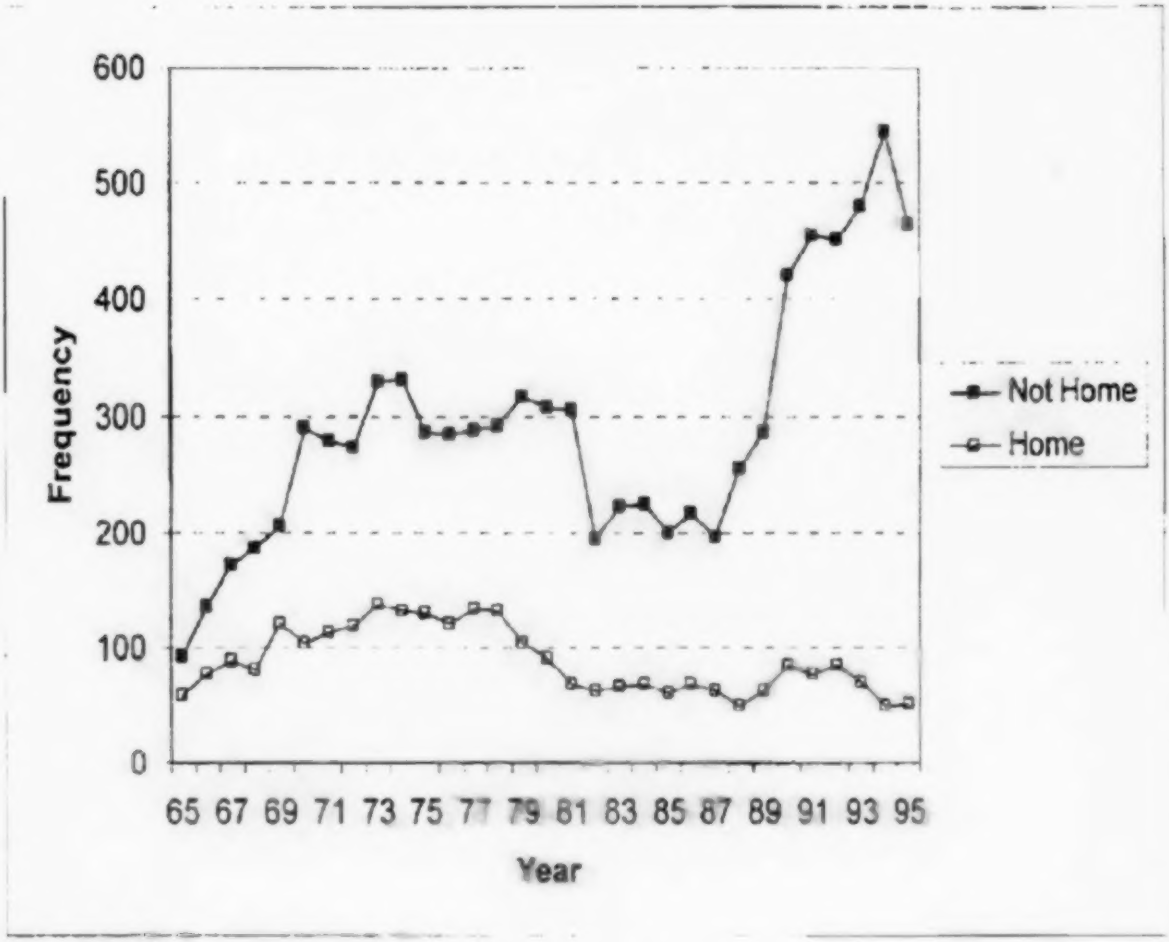

Figure 4: Handgun homicides in Chicago by location

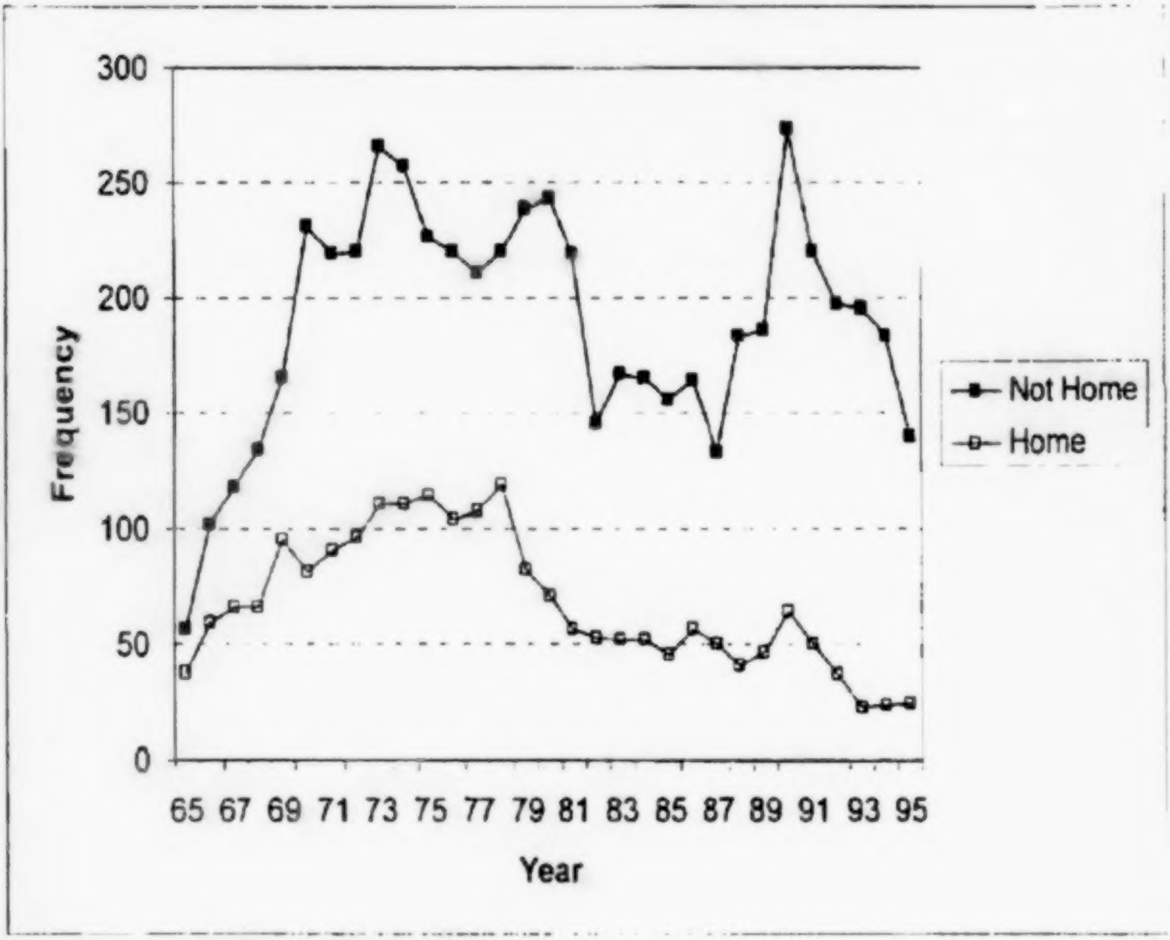

Figure 5: Non-automatic/semiautomatic handgun homicides in Chicago by location

AMICUS
CURIAE
BRIEF

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◆

OTIS MCDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC., AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO, ET AL.,

Respondents.

◆

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

◆

BRIEF OF PROFESSORS OF PHILOSOPHY, CRIMINOLOGY, LAW AND OTHER FIELDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

◆

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INTEREST OF THE AMICI

Amici curiae are distinguished scholars from various fields who are concerned about ensuring accuracy in the scholarship advanced in important matters of public policy such as those involved in this case.[1]

David Bordua is Professor Emeritus of Sociology at the University of Illinois at Champaign. He is the author or co-author of, among other works, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in J. Byrne and R. Sampson (ed.), *The Social Ecology of Crime* (1986); *Gun Control and Opinion Measurement*, 5 Law & Pol'y Q. 345 (1983); and *Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties*, 2 Law & Pol'y Q. 147 (1979).

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Kris Kobach is a professor of law at the University of Missouri (Kansas City) School of Law.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The NRA Civil Rights Defense Fund made financial contributions to support the preparation of this brief.

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Leonard J. Nelson III is a professor of law at the Cumberland School of Law at Samford University.

Daniel C. Palm is a professor of political science at Azusa Pacific University. He is the project coordinator of the Claremont Institute's Doctors for Responsible Gun Ownership project.

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SUMMARY OF THE ARGUMENT

This brief represents the combined views of the *amici* professors of philosophy, criminology, social and political science, and law.

The *amici* professors of philosophy, political science, and law wish to make two points. The first is that the Founding Fathers embraced the right of self-defense as among the most fundamental of human rights, and thought that right included a right to possess firearms as the means of self-defense. The second point is that the prevailing view among contemporary philosophers is that the right of self-defense implies a right to possess firearms.

The *amici* professors of social science, criminology and law wish to make three further points. First, the vast majority of murder or serious gun crimes are committed by the deranged and by long-time criminals, two groups who are already prohibited from owning firearms to the extent legally possible. Accordingly, there is little, if any, statistically identifiable danger stemming from the possession of firearms by ordinary adults. Second, this statistical reality has now been acknowledged in the criminological world, even by many criminologists who are openly hostile to private gun ownership. Many scholars now accept the fact that, according to the data, bans on firearms for the general population are misdirected and do not control or reduce violent crime. Finally, *amici* critique as fundamentally flawed and unreliable a recently published study erroneously suggesting that gun ownership automatically increases one's chances of becoming a victim of gun crime. In reality, there is no basis to believe that ordinary, law-abiding citizens who happen to own guns are at any greater risk of being assaulted, but there is a strong basis to believe that disarming such law-abiding citizens increases the risk of danger to them and their families.

ARGUMENT

I. Philosophers, Both at the Time of the Founders and at Present, Have Understood that the Cardinal Right to Self-Defense Embodies a Right to Arms.

As this Court correctly indicated in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Second Amendment is related to, and derives from, the natural right of self-defense. Indeed, the Founders viewed self-defense as not merely a fundamental right but as one of the most central of the fundamental rights. They and the philosophers they followed believed that man consented to join in society in order to better preserve his life. And from that notion flowed their belief that society could never abolish the right to defend life.[2]

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[2] "Self-defense, therefore, as it is justly called the primary law of nature, so it is not, *neither can it be*, taken away by the law of society." William Blackstone, *Commentaries on the Laws of England* 121, 143–44 (Clarendon 1765–69) (emphasis added). *See also* Sir Michael Foster, *Crown Cases* 273–74 (London 1776) (same: language tracks Blackstone's almost identically); 2 James Kent, *Commentaries on American Law* 1 (1827) (same: language tracks Blackstone's almost identically); St. George Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Law of the Federal Government* 300 (1803) ("The right of self-defense is the first law of nature."); Thomas Hobbes, *Leviathan* 88, 95 (Collier 1962) (the right to self-defense is inalienable—"a covenant not to defend myself with force from force is void."). For

To religiously-oriented thinkers like Samuel Adams, self-defense was as much a duty as a right. Colonial preachers reasoned that God gives men life and, accordingly, to fail to defend life was to denigrate God's gift and to frustrate His plan. So man's duty was always to defend life as best he could. Thus, men had both right and duty of self-defense, but no right to voluntarily desist from it, thereby sacrificing life.[3]

To the Founders, the right of self-defense was not a linguistic triviality. Instead, it was a right to effective—in other words, *armed*[4]—self defense. This

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similar quotes, *see* Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87, 87–104 (1992).

[3] *See* Kates, *Ideology*, *supra* note 2, at 89–92.

[4] *See, e.g.*, Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 149 (1994) (quoting Sam Adams as listing among the "Natural Rights of the Colonists as Men" the rights to life, liberty and property," "together with the right to support and defend these in the best manner they can"). *See also* Stephen P. Halbrook, *That Every Man Be Armed* 58 (1984) (quoting colonial newspapers justifying Sam Adams' recommendation that individuals should arm themselves in response to British enforcement of the Stamp Tax on the ground that "'[i]t is a natural right [of the people] ... to keep arms for their own defence"), and at 102–04 (quoting 19th Century American legal treatises to the same effect; and Nov. 5, 1776 editorial from the *Pennsylvania Evening Post*, describing the right to arms as "a natural right") (quoted in David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559, 596 (1986)).

Quotation of such sentiments from 18th and 19th Century Americans, and philosophers they revered, may be multiplied almost endlessly: *see Ideology*, *supra* note 2 at 90–94 (quoting Montesquieu, Blackstone, Algernon Sidney, Cesare Beccaria and kind of effective self-defense, rather than being a mere abstraction, is what truly equalizes (at the very least) victim and attacker—for example, a 110-pound woman and her 200-pound male attacker, or one victim against many attackers.

Indeed, to the Founders, the right to be armed was an integral part of the right to self-defense, as is illustrated in a 1790 lecture by an original member of this Court, Justice James Wilson. Justice Wilson was a law professor, member of the Constitutional Convention, and the primary author of the Pennsylvania Constitution. He explained the right to use deadly force to repel a homicidal attacker as a natural, inalienable

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Thomas Paine), and Stephen P. Halbrook, *A Right To Bear Arms* 54 (1989) (noting the same view in William Eden's 1772 *Principles of Penal Law* and the effect of Eden and Montesquieu on Jefferson's views). Compare Thomas Hobbes' definitions of the Right of Nature and the Law of Nature: "THE RIGHT OF NATURE, which writers commonly call *Jus Naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, his own life.... A LAW OF NATURE (*Lex Naturalis*) is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his own life, *or taketh away the means of preserving the same*; and to omit that by which he thinketh that it may be best preserved." Thomas Hobbes, *Leviathan* 66 (1651) (emphasis added) (quoted in Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 119 (1987). Compare also John Locke's assertion that by the laws of nature everyone is both: a) "*bound to preserve himself* and ..."; b) "may not unless it be to do Justice on an Offender, take away, or impair the life, *or what tends to the preservation* of the Life, the Liberty, Health, Limb or Goods of another." John Locke, Second Treatise of Government, in *Two Treatises of Government* 289 (P. Laslett rev. ed. 1960) (quoted in Lund, *Self-Preservation* at 118 n.35).

right:

> [I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. This law, however, is expressly recognized in the Constitution of Pennsylvania. "The right of the citizens to bear arms in defense of themselves shall not be questioned."[5]

This view was held beyond the time of the Founders and has continued into the present. Indeed, in *Heller* this Court cited various 19th Century American writings equating the right to arms and the right to self-defense from which it was derived.[6] And the dominant view among modern philosophers that have seriously addressed the issue is that the right of self-defense implies a right to possess firearms.[7]

Given their background in natural-rights philosophy, the understanding that the Second Amendment guarantees a right to possess the means of self-defense was universal among its authors, their contemporaries and later commentators down to the twentieth century.[8] Only when gun control became a political issue in the twentieth century did anyone suggest that the Second Amendment did not guarantee law abiding, responsible adults a right to arms for the defense of self, home and family.

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[5] 3 James Wilson, *The Works of the Honourable James Wilson, L.L.D.* 84 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804).

[6] 128 S. Ct. at 2793–94.

[7] *See, e.g.*, Michael Huemer, *Is There A Right to Own A Gun*, 29 Soc. Theory & Prac. 297, 297–99 (2003); Lester Hunt & Todd C. Hughes, *The Liberal Basis of the Right to Bear Arms*, 14 Pub. Affairs Q. 1, 1–25 (2000); Lance Stell, *Self Defense and Handgun Rights*, 2 J.L. Econ. & Pol'y 265, 267–77 (2006); Samuel C. Wheeler, *Self-Defense Rights and Coerced Risk-Acceptance*, 11 Pub. Affairs Q. 431 (1997); Samuel C. Wheeler, *Arms as Insurance*, 13 Pub. Affairs Q. 111 (1999); Timothy Hall, *Is there a Right to Bear Arms?*, 20 Pub. Affairs Q. 293 (2006).

II. Criminological Data Undermines the Frequently-Cited Bases for Blanket Gun Prohibitions and Supports the Private Ownership of Firearms By Ordinary Citizens.

A. The vast majority of homicides and violent gun crimes are committed not by ordinary, law-abiding citizens, but by those with criminal backgrounds and mindsets.

For decades gun control advocates have been perpetuating a view that has great emotional affect but little actual support, namely, the view that:

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[8] *See* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 258–63 (2004) (noting that, in contrast to the individual right view, advocates of the states' right/collective rights theories have not produced a single example of those theories being mentioned by any eighteenth-century American). *Compare* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359 (1998) (comprehensive review of a century of post-1789 references to the Amendment which finds none stating the states' right theory).

> most homicides are not committed by the "hardened" criminal who would seek out a gun or other lethal weapon whether or not it was legal, but rather by ordinary, "law abiding" citizens who kill on impulse rather than by intent [because a firearm was available in a moment of ungovernable anger].[9]

As is true with this specific example, such published claims rarely have any valid reference to supporting criminological data, if any reference at all.[10] The reality

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[9] Amitai Etzioni & Richard Remp, *Technological Shortcuts To Social Change* 107 (1973). *See, e.g.*, Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 Akron L. Rev. 113, 118–19 & n.28 (2005) (citing as authoritative such unsupported claims by Professor K. Kaufer Christoffel (who heads her own gun-ban advocacy group), such as the claim that "most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection").

[10] One exception to the general dearth of supporting references was a fraudulent citation in a pamphlet by the then-mayor of New York which attributed (without any specific page citation) to the 1972 F.B.I. Uniform Crime Report the finding that "most murders (73% in 1972) are committed by previously law abiding citizens." John V. Lindsay, *The Case for Federal Firearms Control* 22 (1973) (reprinted at pp. 1549 et seq. in Hearings Before the Sub-Committee To Investigate Juvenile Delinquency of Committee of the Judiciary, U.S. Senate, 94th Congress, First Session, v. II (1975)).

However, the F.B.I.'s 1972 Uniform Crime Report (UCR) did not even exist when the Lindsay pamphlet purported to cite it; and when the 1972 UCR eventually was released its section titled "Careers in Crime" showed that 74.7% of murder arrestees that year had prior arrest(s) for a violent felony or burglary, exclusive is that this view simply does not comport with the available data.

What perpetrator data dating back to the 19th Century shows is that murderers were not previously law abiding, responsible adults; rather, "most murderers differ little from other major *criminals*."[11] So invariably have perpetrator studies dating back to the 19th Century found that murderers are overwhelmingly persons with life histories of prior crime that this is now counted as one of the standard criminological axioms.[12] The data supporting this now-axiom was summarized by one noted criminologist as follows:

> the use of life-threatening violence in this country is, in fact, embedded in a general pattern of criminal behavior and largely restricted to a criminal class...virtually all individuals who become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses. ... The frequency, seriousness and variety of offending are all

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of their arrests for other offenses. *See* FBI, *Crime in the United States 1972*, 35–38 (1973).

[11] Thomas B. Marvell & Carlisle E. Moody, *The Impact of High Out-of-State Prison Population on State Homicide Rates*, 36 Criminology 513, 517 (1998) (emphasis added); *see id.* at 518 n.5 (defining "major criminal" as "similar to what others call professional criminals, career criminals, or violent predators").

[12] *See, e.g.*, David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 Homicide Stud. 263, 267*ff* (1998).

> strongly predictive of life-threatening violent offending. Even in the case of life-threatening domestic violence, most of those violent offenders have a history of prior involvement in criminal behavior and serious violent crimes.[13]

And this axiom continues to be valid. Earlier this year the Hastings Law Journal published an article detailing studies subsequent to those Prof. Elliott summarizes.[14] Like the prior studies, the later ones continue to demonstrate his point that "virtually all" murderers have prior criminal records or are deranged. Examples of the studies noted in the Hastings article:

- Psychological studies summarized as finding that 80-100% of juvenile murderers are psychotic or have psychotic symptoms.[15]

- *New York City*: From a New York Times study of the 1,662 murders in that city in the years 2003-2005: "More than ninety percent of the killers had criminal records."[16]

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[13] Delbert S. Elliott, *Life Threatening Violence is* Primarily *a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 1098 (1998) (emphasis added).

[14] Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1342–43 (2009).

[15] Wade C. Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 Homicide Stud. 160, 170–73 (1998).

- *Massachusetts*: "Some 95% of homicide offenders ... [in a Kennedy School study had been] arraigned at least once in Massachusetts courts before they [murdered].... On average ... homicide offenders had been arraigned for 9 prior offenses...."[17]

- *Illinois*: Of that state's murderers over the years 1991-2000, the great majority had prior felony records.[18]

- *Baltimore*: Police records show that 92% of 2006 murder suspects had criminal records.[19]

- *Milwaukee*: From a police compilation of data on 2007 and past years' murders: "Most suspects had criminal records, and a quarter of them were on probation or parole."[20]

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[16] Jo Craven McGinty, "New York Killers, and Those Killed, by Numbers," *New York Times*, April 28, 2006, at A1.

[17] Anthony A. Braga, et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, MA*, 9 Police Q. 20, 29–31 (2006).

[18] Philip Cook, et al., *Criminal Records of Homicide Offenders*, 294 J. Am. Med. Ass'n 598, 599–600 (2005).

[19] Gus G. Sentementes, "Patterns persist in city killings," *Baltimore Sun*, Jan. 1, 2007 at A1.

[20] John Dietrich, "Before the Next Bullet Kills," *Milwaukee Journal Sentinel*, Dec. 19, 2007, at A1.

- *Atlanta*: 80% of 1997 Atlanta murder arrestees had previously been arrested at least once for a drug offense, and 70% had three or more prior drug arrests, in addition to all their arrests for other crimes.[21]

And, even more recently:

- *Delaware*: Reporting on shootings prior to 2009, including many where victims had only been wounded rather than killed, 80% of shooters had arrest records going all the way back to their juvenile years; 57% had been charged at least twice with drug offenses.[22]

To the extent that counter-arguments are published, oftentimes such arguments merely note the fact that murders often involve people who knew each other and arise from arguments and/or occur in homes.[23] But such facts are not particularly instructive because criminals—even killers—certainly have acquaintances, arguments and homes. In fact, the broadest study of national data on gun murders that occurred in homes between acquaintances found that "the most common victim-offender relationship" was "where both parties knew one another because of prior illegal transactions."[24]

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[21] Dean G. Rojek, *The Homicide and Drug Connection*, in Paul H. Blackman, et al. (eds.), *The Varieties of Homicide and Its Research: Proceedings of the 1999 Meeting of the Homicide Research Working Group* 124, 128 (2000).

[22] Adam Taylor & Ira Porter, "Growing audacity among city gunmen," *The News Journal*, http://www.delawareonline.com/article/20090920/NEWS01/909200364/1006/NEWS, Sept. 20, 2009.

[23] *See, e.g.*, Robert J. Spitzer, *The Politics of Gun Control* 186*ff.* (1995), and Karl P. Adler, et al., *Correspondence*, 272 J. Am. Med. Ass'n 1409 (1994).

In sum, the best and most comprehensive studies show that the overwhelming majority of murderers are individuals with criminal backgrounds, and not ordinary, law abiding, responsible adults. Accordingly, it is not only irrational to seek to disarm such responsible adults in order to avoid homicides and violent gun crimes, it is in fact counter-productive and dangerous because it strips the innocent of the most effective and efficient means of defending themselves against violent predators.

B. Firearms uniquely give a victim a reliable, realistic advantage over an attacker.

Firearms are unique among weapons; only firearms allow weaker people to most easily and effectively resist predation by stronger ones. As one evaluation puts it:

> Reliable, durable, and easy to operate, modern firearms are the most effective means of self-defense ever devised. They require minimal maintenance and, unlike knives and other weapons, do not depend on an individual's physical strength for their effectiveness. Only a gun can allow a

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[24] Kates & Cramer, *Criminological Considerations*, *supra* note 14 at 1344 (quoting Gary Kleck, *Targeting Guns: Firearms and Their Control* 236 (1997)).

> 110 pound woman to defend herself against a 200 pound man.[25]

The available empirical evidence establishes that: (1) America's "firearms are used over half a million times in a typical year against home invasion burglars; usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired"[26]; (2) annually, 3-6 times as many victims use handguns to defend against criminals as criminals use handguns to commit crimes[27]—so guns do up to six times more good than harm; and (3) "[r]esistance with a gun appears to be most effective in preventing serious injury [to victims, and] ... for preventing property loss...."[28]

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[25] Linda Gorman & David B. Kopel, *Self-defense: The Equalizer*, 15 F. Applied Res. & Pub. Pol'y 92, 92 (2000). *Compare* Don B. Kates, *The Limits of Gun Control: A Criminological Perspective* in Timothy Lytton, ed., *Suing the Firearms Industry* 70 (2005): "A gun is the only mechanism that gives a weaker victim parity with an attacker (even if the attacker also has a gun). *The next best alternative, a chemical spray, is ineffective against precisely those who are most likely to engage in violent attacks: people who are under the influence of drugs or alcohol or who are extremely angry.*" (emphasis added).

[26] David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. Law 43, 166 (2007) (citing Robert M. Ikeda, et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 Violence & Victims 363 (1997) (reporting results of a study conducted by the CDC)).

[27] Kates in Lytton, *supra* note 25 at 68–69 (collecting studies); *see also* Gary Kleck & Don B. Kates, *Armed: New Perspectives On Gun Control* at Ch. 6 (2001) (detailed review of evidence).

[28] Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes*, 42 Criminology 861,

C. Research makes gun ban advocates recant.

In the late 1970s, the U.S. Justice Department funded the University of Massachusetts Social and Demographic Research Institute to review and evaluate the entire extant literature on gun control in the U.S. and elsewhere. The Institute's resulting report observed:

> It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. *There is no persuasive evidence that supports this view.*[29]

That evaluation's authors, Professors Wright, Rossi, and Daly, subsequently published a commercial version of their report to which they added their personal recantation: "The progressive's indictment of American firearms policy is well known and is one that both the senior authors of this study *once shared.* This indictment [suggests that only] the gun lobby prevents us from embarking on the road to a safer and more

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902 (2004). *See also* Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. Crim. Just. 351, 362 (2000) ("The use of a gun by the victim significantly reduces her chance of being injured.").

[29] From the Abstract to the Executive Summary of James D. Wright, Peter Rossi & Kathleen Daly, *Weapons, Crime and Violence in America: A Literature Review and Research Agenda* at 2 (Wash. D.C., GPO 1981) (emphasis added).

civilized society. *The more deeply we have explored the empirical implications of this indictment, the less plausible it has become.*"[30] In fact, Prof. Wright later published even more adverse evaluations of gun prohibition.[31]

In 1979, the criminologist who would become the premier analyst of gun control, Florida State University's Gary Kleck, published his earliest paper on the subject, suggesting that widespread firearms ownership may contribute to overall levels of criminal homicide.[32] Five years later however, Prof. Kleck repudiated this suggestion because his own and others' research demonstrated that widespread firearms ownership does not increase homicide levels.[33]

Prof. Kleck later summarized the state of modern knowledge in a presentation to the National Academy of Sciences. His comments are so particularly illustrative of an initially-hostile mind changed by an honest evaluation of the data as to be worthy of extended quotation:

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[30] Wright, Rossi & Daly, *Under the Gun: Weapons, Crime and Violence in the United States* 319–20 (1983) (emphasis added).

[31] James D. Wright, *Ten Essential Observations On Guns in America*, *Society* 63 (Mar.–Apr. 1995), and *Second Thoughts About Gun Control*, 91 The Pub. Int. 23 (1988).

[32] Gary Kleck, *Capital Punishment, Gun Ownership and Homicide*, 84 Am. J. Soc. 882 (1979).

[33] Gary Kleck, *Handgun-Only Control: A Policy Disaster in the Making* in Don B. Kates (ed.), *Firearms and Violence: Issues of Public Policy* at 167–199 (1984).

Up until about 1976 or so, there was little reliable scholarly information on the link between violence and weaponry. Consequently, everyone, scholars included, was free to believe whatever they liked about guns and gun control. There was no scientific evidence to interfere with the free play of personal bias. It was easy to be a "true believer" in the advisability of gun control and the uniformly detrimental effects of gun availability (or the opposite positions) because there was so little relevant information to shake one's faith. When I began my research on guns in 1976, like most academics, *I was a believer in the "anti-gun" thesis, i.e.* the idea the gun availability has a net positive effect on the frequency and/or seriousness of violent acts. It seemed then like self-evident common sense which hardly needed to be empirically tested. However, as a modest body of reliable evidence (and an enormous body of not-so-reliable evidence) accumulated, many of the most able specialists in this area shifted from the "anti-gun" position to a more skeptical stance, in which it was negatively argued that the best available evidence does not convincingly or consistently support the anti-gun position. This is not the same as saying we know the anti-gun position to be wrong, but rather that there is no strong case for it being correct. The most prominent representatives of the skeptic position would be James Wright and Peter Rossi, authors of the best scholarly review of the literature [citing the commercially published version of the Wright, Rossi and Daly comprehensive evaluation footnoted here at note 30].

[Subsequent research] has caused me to move beyond even the skeptic position. I now believe that the best currently available evidence, imperfect though it is (and must always be), indicates that general gun availability has no measurable net positive effect on rates of homicide, suicide, robbery, assault, rape, or burglary in the U.S. This is not the same as saying gun availability has no effects on violence—it has many effects on the likelihood of attack, injury, death, and crime completion, but these effects work in both violence-increasing and violence-decreasing directions, with the effects largely canceling out. For example, when aggressors have guns, they are (1) *less* likely to physically attack their victims, (2) *less* likely to injure the victim given an attack, but (3) *more* likely to kill the victim, given an injury. Further, when *victims* have guns, it is less likely aggressors will attack or injure them and less likely they will lose property in a robbery. At the aggregate level, in both the best available time series and cross-sectional studies, the overall net effect of gun availability on total rates of violence

> is not significantly different from zero. The positive associations often found between aggregate levels of violence and gun ownership appear to be primarily due to violence increasing gun ownership, rather than the reverse. Gun availability does affect the rates of *gun* violence (e.g. the gun homicide rate, gun suicide rate, gun robbery rate) and the fraction of violent acts which involve guns (e.g. the percent of homicides, suicides or robberies committed with guns); it just does not affect total rates of violence (total homicide rate, total suicide rate, total robbery rate, etc.).[34]

In 1991, Prof. Kleck reiterated these views in his comprehensive evaluation of the evidence which was acclaimed by the American Society of Criminology, and even by critics, as the definitive work on the criminology of firearms.[35] (It was succeeded in 1997 by a revised and enlarged paperback edition which remains the definitive treatment of the area.[36]).

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[34] Prof. Kleck's remarks to the National Academy of Sciences were initially unpublished. He graciously allowed them to be quoted them in Don B. Kates, Henry E. Schaffer, et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 Tenn. L. Rev. 513, 525–26 (1995) (emphasis added).

[35] Gary Kleck, *Point Blank: Guns and Violence in America* (1991). The book received the ASC's Hindelang award as the most important contribution to criminology in recent years. See other reviews in: Raymond Kessler, Book Review, 82 J. Crim. L. & Criminology 1187 (1992); Alan Lizotte, Book Review, 22 Contemp. Soc. 339–40 (May 1993); and Gary A. Mauser, *Gun Control in the United States*, 3 Crim. L. Forum 147, 148–49 (1991).

Reviews of the book by anti-gun advocates include Lawrence W. Sherman, Book Review, 18 The Criminologist 15

Kleck's two books remain virtually unchallenged as the dispositive and comprehensive summaries of the state of criminological learning about the relation between firearms and violent crime. Kleck's views are confirmed by later studies such as Moody & Marvell's exhaustive 2005 statistical analysis: "The estimated net effect of guns on crime ... is generally very small and insignificantly different from zero."[37]

The high water mark of anti-gun thought among academics was the 1968-69 Eisenhower Commission's call for handgun prohibition. One of the Commission's advisors, Professor Hans Toch of the School of Criminology at the State University of New York (Albany), has noted that he fully endorsed the

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(1993) (describing Prof. Kleck's work as "thorough scholarship and detailed critiques of the literature. As a comprehensive reference, there is nothing like it. It will stand for years as indispensable reading for anyone concerned about guns and violence"); and H. Laurence Ross, Book Review, 98 Am. J. Soc. 661, 662 (1992) (stating that "if only as a resource concerning the gun control literature, this book is a necessary acquisition for [libraries] ... and for any serious scholar working in the area").

[36] Gary Kleck, *Targeting Guns: Firearms and Their Control* (1997).

[37] Carlisle Moody & Thomas Marvell, *Guns and Crime*, 71 Southern Econ. J. 720, 735 (2005). *See also* Carlisle E. Moody, *Firearms and Homicide* in Bruce Benson & Paul Zimmerman, eds., *Handbook on the Economics of Crime* (forthcoming); and John R. Lott Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Law* (3d ed. 2010) (forthcoming).

Commission's official conclusion "that the heart of any effective national firearms policy for the United States must be to reduce the availability of the [handgun, the] firearm that contributes most to violence.... [R]educing the availability of the handgun *will* reduce firearms violence." But, Prof. Toch continues, subsequent research has progressively impacted this: "rates of male firearms ownership tend to be inversely correlated with violent crime rates, a curious fact if firearms stimulate aggression. *It is hard to explain that where firearms are most dense, violent crime rates are lowest, and where guns are least dense violent crime rates are highest.*"[38]

Toch further notes that in contrast to male ownership, women's gun ownership is very low where crime rates are low, but high where crime is prevalent. But "[t]his does not imply that urban women are responsible for the urban crime problem" writes Professor Toch; rather "it demonstrates that when violent crimes are high, women arm themselves for protection." Moreover, Professor Toch sees women arming themselves as rational and successful because armed self-defense works:

> [W]hen used for protection, firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime. Furthermore, the fact that national patterns show little violent crime

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[38] All of Professor Toch's comments cited here appear in his paper (co-authored with his colleague Alan J. Lizotte), *Research and Policy: The Case of Gun Control*, in Peter Sutfeld & Philip Tetlock, eds. *Psychology & Social Policy*, at 232*ff* (1992).

> where guns are most dense implies that guns do not elicit aggression in any meaningful way.... Quite the contrary, these findings suggest that *high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.*[39]

Perhaps the most dramatic recantation came from Professor Marvin E. Wolfgang who, until his death, was generally deemed the doyen of American criminologists. He himself wrote of his antagonism toward firearms,

> I am as strong a gun-control advocate as can be found among the criminologists in this country. If I were Mustapha Mond of Brave New World, I would eliminate all guns from the civilian population and maybe even from the police. *I hate guns....*[40]

Nevertheless, asked by the Journal of Criminal Law and Criminology to evaluate a Kleck/Gertz paper on defensive firearms use, Prof. Wolfgang confessed that he was thoroughly impressed. "I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well."[41] (Incidentally, Prof. Kleck's endorsement of the viability and value of armed self-defense has subsequently received confirmation in publications by Professors Lawrence Southwick and John Lott, and by the Canadian work of Prof. Gary Mauser.[42] Summarizing his research, Prof. Southwick writes: "The use of a gun by the victim significantly reduces her chance of being injured" or victimized.[43])

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[39] *Id.* at 234 & n.10 (emphasis added).

[40] Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. Crim. L. & Criminology 188, 188 (1995) (emphasis added).

Most recent is the recantation of Professor David Mustard, who admitted that, when he began his research at the University of Chicago in 1995, he "passionately disliked firearms and fully accepted the conventional wisdom that increasing the gun-ownership rate would necessarily raise violent crime and accidental deaths."[44] After researching the actual data, Prof. Mustard concluded the opposite:

> My views on this subject were formed primarily by media accounts of firearms, which unknowingly to me systematically emphasized the costs of firearms while virtually ignoring their benefits. I thought

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[41] *Id.* at 192 (evaluating Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150 (1995)).

[42] Gary A. Mauser, *Armed Self-Defense: the Canadian Case*, 24 J. Crim. Justice 393, 404 (1996); Southwick, *supra* note 28 at 362. *See also* Tark & Kleck, *supra* note 28 at 902.

[43] Southwick, *supra* note 28 at 362.

[44] David B. Mustard, *Culture Affects Our Beliefs About Firearms, But Data Are Also Important*, 151 U. Pa. L. Rev. 1387, 1390 (2003).

> it obvious that passing laws that permitted law-abiding citizens to carry concealed weapons would create many problems. It is now over six years since I became convinced otherwise and concluded that shall-issue laws—laws that require permits to be granted unless the applicant has a criminal record or a history of significant mental illness—reduce violent crime and have no impact on accidental deaths.[45]

These recantations correspond with the now-dominant trend of modern criminological thought on the relation between firearms and crime. In 2002, Oxford University Press published *Can Gun Control Work?* by Professor James Jacobs, director of NYU's Center for Research on Crime and Justice. Answering his title question, Prof. Jacobs concluded that, while certain controls can have modestly positive effects, no gun laws "work" in the sense of greatly reducing violent crime. As to banning handguns, or all guns, to the general public, he views such measures as disastrously counter-productive.[46]

In 2004, the National Academy of Sciences released its evaluation based on review of 253 journal articles, 99 books, 43 government publications and some empirical research of its own. *It could not identify any gun control that had ever reduced violent crime, suicide*

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[45] *Id.* at 1390–91.

[46] James B. Jacobs, *Can Gun Control Work?* 153*ff* (2002).

or gun accidents.[47] The same conclusion was reached in a 2003 evaluation by the Centers for Disease Control of then-extant studies.[48]

In 2007, Professor Gary Mauser, a Canadian criminologist, and an author of this brief (Kates) published a study reviewing gun ownership and controls over various nations and eras dating back to the invention of firearms in the 14th Century.[49] We concluded that gun bans on the general populace had never reduced violent crime anywhere and that there appears to be a *negative* correlation between such violence and the widespread availability of firearms. Among other things, we found that European nations with very strict gun control and very low gun ownership had murder rates three times *higher* than less restrictive European nations with three times higher gun ownership per capita. We suggested that nations plagued with high violent crime tend to respond with severe gun controls but that these just do not solve the violent crime problem. In fact, this subject was addressed in great detail in an *amici curiae* brief cited several times by Justice Breyer in *Heller*.[50]

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[47] Charles F. Wellford, John V. Pepper, & Carol V. Petrie (eds.), *Firearms and Violence: A Critical Review* (2004).

[48] Centers for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, (2003), www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a 2.htm. It should be noted that the CDC has again and again reiterated its political position that gun ownership should be gradually eliminated. It is in this context that one must view this report's literal conclusion that none of the hundreds of studies it reviewed were done well enough to justify the authors' conclusion that the controls studied do not reduce violent crime.

[49] Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y 649, 651–94 (2007).

In sum, the findings of modern criminological research strongly support the right of ordinary, law abiding citizens to effectively defend themselves—a policy underlying the Second Amendment as construed in *Heller*.[51]

D. The highly misleading 2009 Branas study.

Fifteen years ago three professors from Harvard and Columbia Medical Schools, a criminologist, and a University of North Carolina bio-statistician published a critique of the entire "public health" literature against guns. Noting that public health journals and lobbyists had committed themselves to lobbying for the banning and confiscation of guns, the article appraised the public health literature on firearms as follows:

> [T]he anti-gun health advocacy literature is a "sagecraft" literature in which partisan academic "sages" prostitute scholarship, systematically inventing, misinterpreting, selecting or otherwise manipulating data to validate preordained political conclusions.

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[50] *See* 128 S. Ct. at 2857–60 (Breyer, J., dissenting) (citing Brief of Criminologists, Social Scientists, Other Distinguished Scholars and the Claremont Institute as *Amici Curiae* in Support of Respondent).

[51] Of course, these data equally supports laws—which *Heller* endorsed—against possession of guns by convicted violent felons and the mentally unbalanced. *See* 128 S. Ct. at 2816–17.

> Consciousness that one represents the forces of light against those of darkness can overwhelm not only the canons of scholarship but even the ordinary demands of personal honesty and integrity: Given the urgent needs of political advocacy, all too often academic health "sages" feel no compunction about asserting falsehoods, fabricating statistics and falsifying references to counterfeit support for them.[52]

If the study published by Dr. Charles C. Branas in 2009[53] was not driven by such political (rather than scientific) methodology, it nonetheless suffers from the same end result: The study is fundamentally flawed and simply unreliable. In the event that the Branas study is cited with approval in any briefing in this case, *amici* provide the following critique.

Based on a study of Philadelphia shootings, what the Branas article claims is that ordinary people who possess guns are 4.5 times more likely to be assaulted and shot than are similarly situated non-gun owners. Even a cursory audit reveals that this conclusion is not supported by the data.

The victims were "shot in an assault," not shot in accidents with their own guns. Nor were those victims studied shot in any connection with their own guns. As the "study" was designed, it included anyone shot within a quarter-mile of their house if there was a gun in the house or a quarter-mile from their vehicle if it had a hunting rifle in it. This methodology raises various obvious questions, including: How did attackers know that their victims were gun owners, and what would cause an attacker be drawn to attack a gun owner? Branas' conclusion that gun possession (or mere ownership, apparently) itself somehow "causes" the gun possessor to be 4.5 times more likely to be assaulted is clearly based on a defective understanding of causation.

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[52] Kates, et al., *Guns and Public Health*, *supra* note 34 at 522 (citing William R. Tonso, *Social Science and Sagecraft in the Debate Over Gun Control*, 5 Law & Pol'y Q. 325 (1983)).

[53] Charles C. Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034 (2009).

Fortunately there is a more plausible explanation: Branas' own article reveals that 53% of the shooting victims confessed to having a criminal record.[54] How many more had such records but did not reveal them is unknowable since Branas and his team apparently did no background check. We do know, however, that 93% of those murdered by gunshot in Philadelphia had criminal records as of 1993.[55]

We also know—indeed it is a "criminological axiom" from more than 50 years of studies—that criminals associate with each other and prey on each other.[56] Data from the Virginia Department of Justice showed that the risk of gunshot injury is *22 times higher*—not 22 *percent* higher, but 22 *times* higher—for males who are involved in crime than [for] those who are not.[57]

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[54] *Id.* at 2036.

[55] *See* Phillip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* ch. 2 (2000); *see also* McGonigal, Michael D., et al., *Urban Firearm Deaths: A Five-Year Perspective*, 35 J. Trauma 532, 532–36 (1993).

[56] Kennedy & Braga, *Homicide in Minneapolis*, *supra* note 12 at 269 (citing Marvin E. Wolfgang, *Patterns in Criminal Homicide* (1958), and discussing how "Wolfgang documented basic

Various studies reveal the predation of criminals on each other:

- *Los Angeles*: 71% of minors injured in drive-by shootings were documented members of violent street gangs.[58]
- *Charlotte*: Of 545 adult gunshot victims over a one year period, 71% had criminal records.[59]
- *Atlanta*: 60% of homicide victims had a criminal record of drug violation.[60]
- *Chicago*: The Chicago Police Department's

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characteristics of homicide which have now become criminological axioms [including that] a relatively high proportion of [both homicide] offenders and victims have a prior criminal record").

[57] Cook & Ludwig, *Real Costs*, *supra* note 55 at 21) (citing unpublished Virginia Department of Justice study) (emphasis added).

[58] H. Range Hutson, et al., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 New Eng. J. Med. 324, 325 (1994).

[59] Unpublished study by University of North Carolina-Charlotte professors Richard C. Lumb and Paul C. Friday, cited in Kates, et al., *Guns and Public Health*, *supra* note 34 at 587, n.325.

[60] Rojek in Blackman, *supra* note 21.

murder analyses dating back to the mid-1960s consistently show upwards of two-thirds of homicide victims with criminal records and/or other indicia of criminal behavior.[61]

- *New Orleans*: 85% of autopsied murder victims in the years 1992-1993 were positive for metabolites of cocaine.[62]

- *Baltimore*: Of 211 patients who came to a major urban trauma center for treatment of gunshot or knife wounds or other violent trauma, 61.9% tested positive for narcotics with another 8.6% testing positive for alcohol; 11.7% had had both alcohol and narcotics.[63]

The most intensive local study of which we are aware is from San Francisco where, of gunshot victims in 1999, two-thirds had a prior criminal history. Three further findings of this 1999 study are indicative: By 2001, 63% of the gunshot victims who recovered had been re-arrested in San Francisco for some other crime.

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[61] Personal review of yearly Chicago Police Department reports. *See, e.g.*, https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Homicide%20Reports/2008%20Homicide%20Reports/MA08.pdf at 42–43 (showing percentage of murderers with prior arrest records from 1991 to 2008 fluctuating between a low of 71.3% in 1994 and a high of 93.8% in 2002).

[62] Personal communication from Tulane University sociologist James D. Wright, Jan. 9, 1998, based on his conversation with the chief medical examiner.

[63] Carl A. Soderstrom, et al., *Psychoactive Substance Use Disorders Among Seriously Injured Trauma Patients*, 277 J. Am. Med. Ass'n 1769, 1769–74 (1997).

And, among all the gunshot victims, those with prior criminal histories were twice as likely to have suffered multiple gunshot wounds as those without such a history—and were seven times more likely to have been wounded in connection with a drug transaction.[64]

Likewise, studies in major trauma care centers report the same people (i.e., criminals) come in time after time with successive bullet or knife wounds or other intentional trauma. So frequently is this the case that some studies actually describe such trauma as a chronic recurrent *disease* peculiar to unemployed, uninsured law breakers.[65]

These facts provide indispensable perspective on the erroneous conclusions of the Branas article. If, as the Virginia Department of Justice found, those gun-toting individuals involved in a criminal milieu are *22 times* (or even close to that number) more likely to end up with a gun-crime injury than are law-abiding people, then Branas' conclusions—which do not properly separate criminal gun owners from law abiding gun owners—are simply not reliable.

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[64] Study by the San Francisco Health Department from its Firearm Injury Reporting System reported at http://www.sfdph.org/dph/files/reports/StudiesData/Firearms/CvrTitleTblContLinks.pdf at 111*ff.*

[65] R. Stephen Smith, et al., *Recidivism in an Urban Trauma Center*, 127 Arch. Surg. 668, 670 (1992) (describing the conclusions in D. W. Sims, et al., *Urban Trauma: A Chronic, Recurrent Disease*, 29 J. Trauma 940 (1989) and M.C. Morrisey, et al., *The Incidence of Recurrent Penetrating Wound Trauma in an Urban Trauma Center*, 31 J. Trauma 1536 (1991)). *See also* G. V. Poole, et al., *Trauma is a Recurrent "Disease"*, 113 Surgery 608 (1993); W.A. Goins, et al., *Recurrent Intentional Injury*, 84 J. Nat'l Med. Ass'n 431 (1992); and D.S. Reiner, et al., *Trauma Recidivism*, 65 Am. Surg. 556 (1990).

CONCLUSION

Defending one's own life and the lives of others is an inherent, natural right—a right which entails the ability to do so *effectively*. Firearms provide the most effective and efficient means to defend life from attack, and, given the actual historical data, there is no sound support for blanket prohibitions against the ability for ordinary, law-abiding citizens to keep and bear arms.

Amici respectfully submit that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 08-1521

IN THE
SUPREME COURT OF THE UNITED STATES

OTIS MCDONALD, ET AL.,
Petitioners,
V.
CITY OF CHICAGO, ILLINOIS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* REPRESENTATIVES CAROLYN McCARTHY, MIKE QUIGLEY, AND 53 OTHER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are Representative Carolyn McCarthy, Representative Mike Quigley, and 53 additional members of the 111th Congress, and have several important interests in this case.[1]

First, as members of Congress bound by oath or affirmation "to support th[e] Constitution," U.S. Const. art. VI, cl. 3, *Amici* have an interest in assisting the Court to arrive at an appropriate construction of the Second and Fourteenth Amendments and resolution of this case.

Second, Congress has for decades exercised the power assigned it by the Constitution to regulate, and in some cases ban, the use or possession of certain weapons. In so doing, Congress has regularly considered, interpreted, and applied the Second Amendment in view of its obligation to support the Constitution.

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[1] A list of members of Congress appears in the Appendix to this brief. *Amici* file this brief with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Amici submit this brief in their individual capacities, not on behalf of Congress itself, but their views are informed and animated by their experiences as members of Congress and their interest in Congress's standing as an institution.

Third, Congress has consistently sought through legislation to support the authority of the states to restrict possession and use of firearms in the interests of public safety. The judiciary has recognized Congress as a coordinate and coequal branch of government, and generally assumes Congress "legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). *Amici* have an interest in ensuring that the Court considers Congress's experience interpreting and applying the Second and Fourteenth Amendments.

SUMMARY OF THE ARGUMENT

The United States Constitution does not bar citizens from enacting gun control legislation at the local level, through their elected state and municipal representatives, that is reasonably necessary to protect their lives and well being from the risks of gun violence common to their localities. The Second Amendment was not understood either at time of the founding or following ratification of the Fourteenth Amendment as abrogating the traditional state police power to legislate for the safety of all persons, including through firearms regulations and prohibitions on categories of arms.

Over the last century, Congress has enacted legislation setting certain minimum standards for gun possession and gun commerce, including prohibitions on certain classes of weapons and on the sale and possession of firearms by, among others, felons, the mentally ill, and misdemeanant domestic violence offenders. These restrictions do not violate the Second Amendment. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); *United States v. Hayes,* 129 S. Ct. 1079, 1082 (2009) (upholding conviction under statute prohibiting possession of firearms by persons convicted of misdemeanor domestic violence offenses).

In addition to setting federal requirements for gun possession and gun commerce, Congress has repeatedly sought to aid states and municipalities in the enforcement of stricter regulations when the citizens of those localities determine that, in view of local conditions, additional restrictions are reasonably necessary for the public safety. Such state regulations, including prohibitions on specific categories of weapons, pose no threat to Congress's war or militia powers.

Reversing the decision below would not only cast doubt upon the constitutionality of the decision of the citizens of Chicago that, within the confines of their city, the dangers of handguns outweigh any benefits that may be supposed to flow from their possession, but also could throw into question virtually every state and local firearm regulation. Given the inherent dangerousness of firearms, and the number of deaths from gun accidents, crimes, and suicides each year, such uncertainty in the ability of states and localities to respond to localized threats to public health and safety could be catastrophic. As a matter of sound policy and constitutional theory, the right of Chicago's citizens to determine through their elected representatives what kinds of dangerous weapons may be in common use for lawful purposes within their city must be respected.

ARGUMENT

I. The Second Amendment Has Never Been Understood to Abrogate the Police Powers of the States to Enact Gun Control Legislation that is Reasonably Necessary For the Public Safety

At the time of the founding, before the advent of cheap and concealable firearms or the urbanization that increased the risks associated with such weapons, state gun regulations were common.[2] The period following the founding saw an increase in these restrictions because changes in technology and population density rendered such restrictions necessary for the public safety. Thus, as firearms grew smaller and more dangerous, and cities more populous, states and cities responded to the growing threat of armed crime by enacting extensive firearm regulations, including prohibitions on categories of weapons.[3]

The passage of the Fourteenth Amendment did not alter the common understanding that states possess a broad authority to restrict firearm ownership and use. Contrary to *amici* for Petitioners, the contemporaneous legislation and legislative history does not demonstrate a focus on protecting an absolute right to bear arms. (*See* Br. for *Amici Curiae* Sen. Kay Bailey Hutchison *et al.* ("Hutchison Br.") 6-12.) Instead, Congress plainly sought to protect former slaves and their descendents from discriminatory laws, and to ensure they were able to participate in civil society on an equal basis. Thus, the legislation passed alongside the Fourteenth Amendment, the Civil Rights Act and the Freedmen's Bureau Act, prohibited states from enacting or enforcing *discriminatory* legislation, including discriminatory gun control legislation, but did not abrogate generally applicable gun control regulations enacted for the protection of all people.

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[2] *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 505 (2004).

[3] *See* CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 133-52 (collecting state statutes).

In passing the Civil Rights Act of 1866, the 39th Congress sought to guarantee "all persons born in the United States and not subject to any foreign power ... *shall have the same right[s]*, in every State and Territory in the United States ... *enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added). The same Congress ensured, by passing the Freedmen's Bureau Act, that rights "shall be secured to and enjoyed by all the citizens of such State or district *without respect to race or color, or previous condition of slavery.*" Freedmen's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176-77 (1866) (emphasis added).

The protections of these rights extended beyond the protections of the Bill of Rights. The Civil Rights Act forbids discrimination in the conferral of the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act of 1866 § 1. Though some of these rights have their roots in the federal Constitution, others do not.

The immediate point of these acts was not to incorporate the Second Amendment against the states, but to ensure the states could not create different classes of citizens by discriminating among them, a problem at the forefront of discussions in the Congress at the time. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (stating the Civil Rights Act "is scarcely less to the people of this country than Magna Charta was to the people of England. It declares who are citizens"); *id.* at 1837 ("Mr. Speaker, this nation must settle the question whether among her own citizens there may be a discrimination in the enjoyment of civil rights. It should not be settled in the spirit of passion or prejudice, but in the light of liberty and justice").

While it is true that some members of Congress expressed concern during these debates about state laws restricting the possession of firearms, the legislative history makes clear those laws were targeted because they were *discriminatory*, not because of any relation to the Bill of Rights.[4] For example, *amici* cite the remarks of Congressman Eliot of Massachusetts, who recounted an "'ordinance relative to the police of recently emancipated negroes or freedmen within the corporate limits of the town of Opelousas,' Louisiana, that provided '[n]o freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police.'" Cong. Globe, 39th Cong., 1st Sess. 516-17 (1866). The same ordinance offended because it limited the rights of former slaves to rent property, sell merchandise, and drink alcohol within the town limits. *Id.*

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[4] *Amici* in support of Petitioners mistakenly rely on a statement by Senator Zachariah Chandler that "'[t]he right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'" (Hutchison Br. 7.) In fact, Senator Chandler was quoting this line from a speech delivered outside of Congress and offered it as a reason to deny former slaves the right to vote in the District of Columbia, *see* CONG. GLOBE, 39th Cong., 1st Sess. 217 (1866), which, he argued, would cause "the term 'the people' [to] be made to include the negro race throughout the Union, and thereby pervert the intention of the framers of the Constitution as declared in the preamble," *id.* at 216.

Moreover, while some states adopted constitutions at the time of or following the ratification of the Fourteenth Amendment which included a right to bear arms, the majority of those constitutional provisions specifically granted the state legislatures the power to regulate the exercise of that right.[5] Even when new state constitutions contained a right to bear arms not expressly subject to legislative regulation, state legislatures enacted gun control measures.[6] Thus, the individual states did not view their ratification of the Fourteenth Amendment as abrogating their right to enact non-discriminatory gun control laws responsive to local conditions.

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[5] *See* FLA. CONST. of 1885, art I, § 20 (providing a right to "bear arms" and affording the legislature the power to "prescribe the manner in which they may be borne"); IDAHO CONST. of 1889, art. I, § 11 ("[T]he legislature shall regulate the exercise of this right by law."); TEX. CONST. of 1868, art. I, § 13 (subjecting "the right to bear arms" to such "regulations as the legislature may prescribe"); UTAH CONST. of 1895, art. I, § 6 ("[T]he legislature may regulate the exercise of this right by law."); *see also* GA. CONST. of 1877, art. I, § 22; KY. CONST. of 1891, § 1.7; LA. CONST. of 1879, art. III; MISS. CONST. of 1890, art. III, § 12; TENN. CONST. of 1870, art. I, § 26; TEX. CONST. of 1876, art. I, § 23; *see also* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-204 (2006) (gathering state constitutional provisions).

[6] *See, e.g.*, 1885 Or. Laws p. 33, § 1; *McDonald v. State*, 102 S.W. 703, 703 (Ark. 1907) (quoting Ark. Act of Apr. 1, 1881, §§ 1-2); *State v. Johnson*, 16 S.C. 187, 188 (S.C. 1881) (quoting S.C. Act of December 24, 1880, 17 Stat. 447 (1880) (South Carolina)).

II. Congress Has Long Recognized and Supported the Right of States to Enact Locally Appropriate Measures Restricting Gun Possession and Use

Congress has consistently recognized and supported the authority of the states to restrict possession and use of firearms in the interests of public safety. Over the last century, Congress has thus enacted both minimum federal standards and measures expressly designed to enhance the ability of states and municipalities to enact and enforce stricter gun controls they judge suitable to local safety needs.

A. Congress Supported State and Local Gun Control Legislation Between the World Wars

Following World War I, state legislatures showed a renewed interest in handgun control legislation for the protection of public safety.[7] In response to concerns about the effective enforcement of such state and local laws, in 1927 Congress enacted the first federal law relating to gun control. That law, which remains in effect, declared "pistols, revolvers and other firearms capable of being concealed are ... nonmailable." Act of Feb. 8, 1927, ch. 75, § 1, 44 Stat. 1059, 1059 (codified as amended at 18 U.S.C. § 1715). Introducing the bill in the House of Representatives, Representative Miller of Washington stated:

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[7] Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 135 (1975).

> The purpose of this bill ... is to prohibit the use of the mails as a transportation medium for firearms capable of being concealed on the person; and the reasons that have prompted the introduction of this measure are patent to everybody. Because of the prevalence of crime through the country ... every well-regulated city these days has local regulations regarding the local sale of firearms, many of them drastic. But ... the mails have always been open to the transportation of these weapons, and they can be readily obtained through the mails by a class of people who can not obtain them locally; and this bill is to undertake to cure what we think is a bad state of affairs.[8]

According to the House Report:

> Pistols, revolvers, and other firearms capable of concealment on the person ... constitute mailable matter which the

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[8] *Carrying of Pistols, Revolvers, and Other Firearms Capable of Being Concealed on the Person in the Mails: Hearings on H.R. 4502 Before a Subcomm. of the H. Comm. on the Post Office and Post Roads*, 69th Cong. 3 (1926).

> post office is required to transport and deliver to the addressee when offered for mailing. In many States and municipalities this post-office service operates to defeat the local laws and regulations prohibiting the purchase and possession of such articles.[9]

Citing the House Report, this Court concluded that "the purpose of the bill ... was to avoid having the Post Office serve as an instrumentality for the violation of local laws which prohibited the purchase and possession of weapons." *United States v. Powell*, 423 U.S. 87, 91 (1975). Supporters of the bill had effectively argued "the postal department[] ought to refuse to assist in the violation of law and ought to respond to the appeals from the cities."[10] Thus, from its first legislative act concerning gun control, Congress has recognized and supported the right of states and municipalities to restrict or prohibit the possession and sale of firearms in response to localized threats to public safety.[11]

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[9] H.R. REP. NO. 69-610, at 1 (1926).

[10] 67 CONG. REC. 9695 (1926) (statement of Rep. Lowrey).

[11] *Amici* in support of Petitioners argue that Congress supported an absolute right to own pistols in the home during this period and cite in support of that argument firearm legislation enacted in 1932. (Hutchison Br. 29.) That legislation, however, regulated firearms in the District of Columbia and is irrelevant to the issue of state and local

Congress also affirmed that handguns are especially dangerous weapons, particularly in urban environments. One expressed general purpose of the 1927 Act was to prevent criminals in large cities from easily obtaining mail-order small firearms. Several speakers pointed out that the statute was not designed to preclude mailing of shotguns or rifles, which were appropriate for home defense. Representative Miller, for example, stated the pistol "is not like the shotgun, the rifle, or any firearm used in hunting."[12] In support of the bill, Representative Ragon argued, "[i]f you want something in the home for defense, there is the shotgun and the rifle."[13]

Congress subsequently enacted the first nationwide legislation restricting gun possession and gun commerce. The National Firearms Act of 1934, ch. 757, 48 Stat. 1236, limited commerce in machine guns and sawed-off shotguns and established a mandatory national registration program for all dealers in such weapons. Four years later, Congress enacted the more expansive Federal Firearms Act of 1938 ("FFA"), ch. 850, 52 Stat. 1250, which required all firearm dealers to obtain a license and prohibited them from knowingly shipping firearms in interstate

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firearm legislation under the federal system. *See* Act of July 8, 1932, ch. 465, 47 Stat. 650.

[12] 66 CONG. REC. 727 (1924).

[13] 66 CONG. REC. 729 (1924).

commerce to some felons, fugitives, and persons under indictment. *Id.* §§ 2(d), 3(a). Felons and fugitives were likewise prohibited from receiving any weapon that had been shipped in interstate commerce. *Id.* § 2(f).

In addition, under the FFA licensed gun dealers were prohibited from shipping or transporting a firearm to a resident of a state that required a license to purchase that weapon unless the license was produced to the dealer. *Id.* § 2(c). Dealers that sold firearms to persons who did not produce the licenses required by state law faced federal criminal penalties in addition to any state law penalties. *Id.* § 5. The aims of the FFA were thus to establish minimum federal gun controls "and *to aid state and local efforts at tighter control* by prohibiting transactions that would violate local laws."[14]

Amici in support of Petitioners argue that the Property Requisition Act of 1941, ch. 445, 55 Stat. 742, demonstrates that Congress supported a universal right to possess any sort of weapon for self-defense but the text of the statute proves otherwise. The statute provides that nothing within it shall be construed to authorize the requisitioning of any firearm owned for personal protection or sport "*the possession of which is not prohibited ... by existing law.*" *Id.* § 1 (emphasis added).

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[14] Zimring, *supra* note 7, at 140 (emphasis added).

Moreover, while *amici* in support of Petitioners find the exclusion of personal firearms from the Property Requisition Act "remarkable" because those firearms would have been useful to the national defense (Hutchison Br. 29), the legislative history establishes that the exclusion was adopted because Congress understood the requisition of privately owned firearms was *not* necessary for any purpose. For example, when the question of requisitioning lawfully owned firearms arose during the debates concerning the Act, Representative Elston asked Robert P. Patterson, the Under Secretary of War:

> [Y]ou do not anticipate that it would ever be necessary for the Government to requisition any firearms of any kind in the light of the present program of turning out Garand rifles and other arms and ammunition in huge quantities?[15]

Patterson replied: "That is true."[16]

Patterson explained that, given the number of weapons currently owned by the government, a shortage of firearms for military use "would be almost inconceivable."[17] There is thus nothing at all remarkable about the exclusion of lawfully owned firearms from the Property Requisition Act.

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[15] *Authorizing the Requisition of Personal Property: Hearings on S. 1579 and H.R. 4959 Before the H. Comm. on Military Affairs*, 77th Cong. 12 (1941).

[16] *Id.*

[17] *Id.* at 13.

B. Congress Continues to Support State and Local Gun Control Legislation

Congress revisited gun control in the 1960s and strongly affirmed, once again, the right of states and localities to enact legislation restricting the possession and use of firearms. In 1966, the Senate Committee on the Judiciary recommended a bill to amend the FFA with the purpose of reducing the likelihood that firearms would "fall into the hands of the lawless or those who might misuse them" and to "assist the States and their political subdivisions to enforce their firearms control laws and ordinances."[18] The bill was specifically aimed at the handgun because "[i]ts size, weight, and compactness make it easy to carry, to conceal, to dispose of, or to transport," which "make it the weapon most susceptible to criminal misuse."[19] As the Committee concluded, "[t]he handgun as the most formidable and most frequently used tool of the criminal is well recognized and established by first, the existence in many States of laws controlling it; and, second, by statistics showing its dominance as the weapon used in unlawful activities."[20] The Committee thus recommended a bill that would, among other things, prohibit sales of handguns to an expanded list of federally disqualified persons and prohibit the shipment of handguns to out-of-state residents if the receipt or possession of the handgun would be illegal under the laws of the state of the purchaser's residence.[21]

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[18] S. REP. NO. 89-1866, at 1 (1966).

[19] *Id.* at 4.

[20] *Id.*

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197, which imposed stricter federal restrictions than those previously recommend by the Senate Committee on the Judiciary and provided substantial support for state and local gun control measures. Title VII of the Act made it unlawful for any person who had been convicted of a felony, dishonorably discharged from the armed forces, or declared incompetent, and for any illegal alien or former citizen who had renounced his citizenship, to possess a firearm and imposed criminal penalties for such possession. *Id.* § 1201.

In addition, Title IV of the Act, entitled "State Firearms Control Assistance," sought to aid states in the enforcement of additional locally appropriate gun controls. In Title IV, Congress found and declared that (1) existing federal laws did not "adequately *enable the States to control* [firearms] traffic within their own borders through the exercise of their police power," (2) "the ease with which any person can acquire firearms other than a rifle or shotgun ... is a significant factor in the prevalence of lawlessness and violent crime in the United States," (3) "only through adequate Federal control over interstate and foreign commerce in these weapons ... can ... *effective State and local regulation of this traffic be made possible,*" (4) "the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the *effectiveness of State laws and regulations, and local ordinances,*" and (5) "the sale or other disposition of concealable weapons ... to nonresidents of the State ... has tended to make ineffective *the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms.*" *Id.* § 901 (emphasis added).

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[21] *Id.* at 1-2.

To further the ability of states and municipalities to enforce local gun control legislation, Congress prohibited any person from transporting or importing into his state of residence any firearm obtained outside of that state, other than a rifle or shotgun, or any firearm that it would be unlawful for him to purchase or possess in the state or locality in which he resided. *Id.* § 922(a)(3). Congress likewise prohibited licensed firearms dealers from selling or delivering any firearm, other than a rifle or shotgun, to any person who did not reside in the state in which the licensee's business was located, and prohibited interstate shipments of any firearm to any person who was not a licensed dealer. *Id.* § 922(a)(2),(b)(3). Finally, Congress prohibited licensed firearms dealers from selling any firearm to any person if the sale or possession of the firearm would be unlawful at the place of delivery or sale or in the state or locality of the purchaser's residence. *Id.* § 922(b)(2).

"In effect, the interstate mail-order shipments of firearms (other than rifles and shotguns) and ammunition would be banned so that *State and local authorities may better exercise the controls they deem desirable over the acquisition and possession of such firearms.*"[22] The Act was also "designed *to prevent the avoidance of State and local laws controlling firearms* other than rifles and shotguns by the simple expediency of crossing a State line to purchase one."[23] As Senator Tydings explained, the purpose of these provisions was "simply to help the states enforce whatever gun laws each wishes to enact."[24]

Congress subsequently enacted the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-928, 26

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[22] S. REP. NO. 90-1097, at 85 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2203 (emphasis added).

[23] S. REP. NO. 90-1097, at 86, *as reprinted in* 1968 U.S.C.C.A.N. at 2204 (emphasis added).

[24] S. REP. NO. 90-1097, at 129, *as reprinted in* 1968 U.S.C.C.A.N. at 2248; *see also* 113 CONG. REC. S13404 (daily ed. Sept. 21, 1967) (Sen. Tydings explaining that the restrictions on interstate handgun sales "will help the States enact and enforce whatever local laws are necessary to control gun crimes within the States").

U.S.C. §§ 5801-5872). The Gun Control Act substantively continued each of the prohibitions in the Omnibus Crime Control Act previously described. Among other things, the Gun Control Act makes it unlawful for any licensed dealer to (1) ship or transport any firearm in interstate commerce to any non-licensee; (2) sell any firearm to any person in any state in which the purchase or possession of such firearm by such person would be in violation of any state or local law or ordinance; and (3) sell a firearm to an out-of-state resident, with an exception for rifles and shotguns sold to residents of contiguous states if the purchaser's state of residence permitted the sale or delivery by law. The Gun Control Act also makes it unlawful for any person, other than a licensed dealer, to transport or import a firearm purchased or obtained in another state into his state of residence. *Id.* at § 922. Thus, with enactment of the Gun Control Act, Congress continued to recognize and support the right of states and local governments to restrict the sale and possession of firearms.

In the debates preceding the passage of the 1968 legislation, legislators from both parties uniformly expressed support for local legislation in this area. As Senator Thurmond argued, "Conditions and traditions vary widely from State to State, and the needs of one State should not necessarily be imposed upon another. The Federal Government should take no measures which pressure or require States to adopt uniform Federal standards."[25]

Senator Moss argued:

> [C]riminal and other misuse of firearms is essentially a local or generally regionalized problem. Utah presents an entirely different situation than does southern California or New York City, for example.[26]

Since the 1960s, Congressional support for state and local gun control legislation has continued unabated.[27] Such support is plainly evident even in the legislation cited by *amici* in support of Petitioners. The Firearm Owners Protection Act of

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[25] S. REP. NO. 90-1501, at 104 (1968); *see also Federal Firearms Act: Hearings on S. 1 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 90th Cong. 910 (1967) (Senator Dominick arguing "[e]ach State should be left to deal with firearms in a manner which it determines to be best suited to its particular circumstances").

[26] 114 CONG. REC. S3729 (daily ed. Apr. 2, 1968).

[27] The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796 (codified at 18 U.S.C. § 922(x) (2006)), for example, added new restrictions on the possession of handguns by juveniles subject to certain enumerated exceptions. However, "if a state or local law bans or restricts transfer or possession to a juvenile, even under the enumerated circumstances, then the exceptions to the federal offense are not available." H.R. REP. NO. 103-389, at 4 (1994); *see also* 18 U.S.C. § 922(x)(3)(A)(iv).

1986 ("FOPA"), Pub. L. No. 99-308, 100 Stat. 449, for example, amends the provisions of the Gun Control Act concerning the sale of rifles and shotguns by licensed dealers to out-of-state purchasers. *Id.* § 102(4)(B). FOPA requires that such sales be made in person and that the sales comply with the laws of the states in which the purchaser and the seller reside. *Id.* Moreover, FOPA, as amended by a bill passed on the same day, permits individuals, not otherwise disqualified, to transport firearms between states but only if the possession of the firearm is lawful in both the place of origin and the place of destination and it is unloaded and inaccessible during transport. *See* Act of July 8, 1986, Pub. L. No. 99-360, § 1, 100 Stat. 766 (codified at 18 U.S.C. § 926A).

Thus, while *amici* in support of Petitioners argue FOPA prevents states from restricting the lawful ownership of guns, (Hutchison Br. 32), it does no such thing. As Representative Volkmer, one of the primary sponsors of the Act, explained:

> [W]e had never intended ... to make any change in any local or State law. We didn't want to do that. ... I did not want to impose any additional requirements on any State nor take away any from any other State. Let the States make those decisions, let the

> local municipalities make those decisions.[28]

Nor does the Protection of Lawful Commerce in Arms Act of 2005 ("PLCA"), Pub. L. 109-92, 119 Stat. 2095, show Congress to be retreating from its longstanding position that states are entitled to enact gun control measures that are reasonably necessary for public safety. The PLCA prohibits lawsuits against firearm manufacturers for damages arising from the criminal or unlawful misuse of firearms by third parties. 15 U.S.C. §§ 7902(a), 7903(5)(A). The Act does not apply, however, to actions involving a firearm manufacturer or seller that "knowingly violated *a State* or Federal statute applicable to the sale or marketing of [firearms]." *Id.* § 7903(5)(A)(iii) (emphasis added). As Senator Craig argued in support of the Act, "[m]anufacturers or sellers of firearms or ammunition could still be sued if they violated Federal or State law."[29]

Amici in support of Petitioners argue the PLCA evidences Congressional support for incorporation of the Second Amendment because Congress specifically invoked its power under the Fourteenth Amendment's enforcement clause. (Hutchison Br. 31.) But the PLCA lists as one of its purposes, among many others,[30] the protection of manufacturers' *First* Amendment rights, which Congress has the authority to enforce under Section 5 of the Fourteenth Amendment. 15 U.S.C. § 7901(b)(5).

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[28] *Legislation To Modify the 1968 Gun Control Act: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 785 (1985).

[29] 150 CONG. REC. S1539 (daily ed. Feb. 25, 2004).

In any event, Congress did not rely on its enforcement power under the Fourteenth Amendment to enact the PLCA. To the contrary, the *only* constitutional authority identified for the Act by the House Committee on the Judiciary is the commerce clause, U.S. Const. art. I, sec. 8, cl. 3.[31]

Finally, *amici* in support of Petitioners rely on legislation enacted by Congress concerning the seizure of firearms during disasters by agencies receiving federal funds. (Hutchison Br. 31.) But that statute applies only to firearms "the possession of which is *not prohibited* under Federal, *State, or local law.*" 42 U.S.C. § 5207(a)(1) (emphasis added). As Representative Jindal, the sponsor of the legislation in the House, explained:

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[30] The Act also lists among its purposes the preservation of the separation of powers, preventing unreasonable burdens on interstate and foreign commerce, and exercising Congressional powers under the full faith and credit clause. *See* 15 U.S.C. § 7901(b)(4), (b)(6) and (b)(7).

[31] H.R. REP. NO. 109-124, at 40 (2005). The Committee issued the Report concerning H.R. 800. The bill enacted, S. 397, contains the same substantive provisions as H.R. 800.

> This bill does not create nor does it delete any existing rights or State laws. So for example if there are existing State laws prohibiting guns in State shelters, this bill would do nothing to remove that prohibition. For example, many States already have existing laws prohibiting guns or firearms in schools, in sports arenas, or in other areas commonly used as shelters. Nothing in this bill would override that prohibition.[32]

Senator Vitter similarly explained that the Senate version of the bill, which he sponsored, "would not prevent funding for law enforcement officers who confiscate firearms because someone is in violation of Federal, State, or local law."[33]

Moreover, while *amici* in support of Petitioners rely on the disaster relief provisions and on the exclusion of lawfully owned firearms from the Property Requisition Act, they fail to acknowledge that Congress has expressly provided that firearms possessed or transferred in violation of state law may be subject to criminal forfeiture. *See* 18 U.S.C. § 924(d).

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[32] 152 CONG. REC. H5758 (daily ed. July 25, 2006).

[33] 152 CONG. REC. S7458 (daily ed. July 13, 2006).

III. Incorporation of the Second Amendment is Not Necessary to the Effective Exercise of Congress's War and Militia Powers

Amici in support of Petitioners argue that state restrictions on firearm possession threaten to impede Congress's ability to exercise its powers under the war and militia clauses of the Constitution by depriving Congress of access to an armed citizenry familiar with the proper use of firearms. (Hutchison Br. 33.) Even if such access were essential to Congress's ability to exercise its enumerated martial powers, incorporation of the Second Amendment would be neither necessary nor sufficient to guarantee private ownership of and familiarity with arms capable of use in defense of the nation.

Incorporation of the Second Amendment is not necessary to ensure that firearms suitable for the national defense are privately owned because the possession of such firearms is already lawful in every state. The constitutions of forty-four states provide a right to bear arms.[34] Even in states without such a constitutional provision, the private ownership of firearms is not prohibited by law.[35] Indeed, Chicago permits the ownership of long guns, which are suitable for national defense.

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[34] Volokh, *supra* note 5, at 192.

[35] *See* CAL. PENAL CODE § 12050 (West 2010) (providing for licenses to carry pistols and revolvers); IOWA CODE § 724.4(4) (2009) (providing a number of exceptions to the prohibition on the carrying of weapons, including when a person "goes armed with a dangerous weapon in the person's own dwelling or place of business, or on land owned or

If a citizenry armed with some particular kind of firearm were somehow necessary for the effective exercise of its martial powers, Congress could achieve this result by enacting legislation to mandate firearm ownership. Indeed, Congress has done so in the past. In 1792, Congress exercised its authority to legislate in this area by enacting the Militia Act of 1792, which specifically required that every "free able-bodied white male citizen of the respective States … shall severally and respectively be enrolled in the militia" and

> That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than

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possessed by the person" or has a permit to carry such weapons); MD. CODE ANN., PUB. SAFETY § 4-203(b) (West 2009) (enumerating exceptions to the prohibition on the carrying of weapons, including when "a permit to wear, carry, or transport the handgun has been issued"); MINN. STAT. § 624.711 (2009) ("It is not the intent of the legislature … to confiscate or otherwise restrict the use of pistols or semiautomatic military-style assault weapons by law-abiding citizens."); N.J. STAT. ANN. § 2C:58-4 (2009) (providing for permits to carry handguns); N.Y. PENAL LAW § 400.00(b) (McKinney 2009) (providing the circumstances under which a person may obtain a license to obtain and carry a pistol or revolver).

> twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Militia Act, ch. 33, § 1, 1 Stat. 271, 271 (1792).

No state firearm legislation would prevent Congress from again exercising its powers under the war and militia clauses. In fact, militia jurisprudence set the stage for the development of the doctrine of federal preemption. In *Houston v. Moore*, a militia case decided in 1820, this Court considered whether or not the state of Pennsylvania could, under authority of a Pennsylvania statute, convict a delinquent militia man for violating the federal Militia Act of February 28, 1795. 18 U.S. (5 Wheat.) 1, 12-14 (1820). After thorough debate, the Justices agreed state militia law would be preempted by federal law in all cases of actual conflict between the state and federal militia acts. *Id.* at 24. The Court then held that the Pennsylvania militia legislation was preempted by Congress. *Id.* ("Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress.").

The doctrine of preemption has continued to develop, precluding any doubt that an act of Congress under its enumerated martial powers would preempt contrary state legislation. *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 617-18 (1842) ("[I]f congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) ("[T]he States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution").

Incorporation of the Second Amendment would also not be sufficient if a citizenry privately armed and effectively trained in firearm use were indeed necessary for the exercise of Congress's martial powers. The Second Amendment does not mandate the private ownership of weapons suitable for national defense. And in most states a citizen may lawfully own a firearm without having any understanding of how to properly and safely use it.[36]

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[36] *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 B.Y.U. J. PUB. L. 43, 55 n.52 (2007) ("While ... most states require safety training in order to obtain a permit to carry a concealed handgun for protection in public places, very few states require a safety test

Because the Second Amendment requires neither firearm ownership nor firearm training, its incorporation would not remedy any theoretical impediment to the exercise by Congress of its enumerated martial powers.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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or formal training to possess a handgun, and almost none impose a test or training requirement for long guns.")

APPENDIX

THOSE JOINING IN AMICI CURIAE BRIEF

The following members of the United States Congress join in this brief:

Representative Gary L. Ackerman (NY-05)
Representative Timothy H. Bishop (NY-01)
Representative Robert A. Brady (PA-01)
Representative Lois Capps (CA-23)
Representative Michael E. Capuano (MA-08)
Representative Yvette D. Clarke (NY-11)
Representative Wm. Lacy Clay (MO-01)
Representative Gerald E. Connolly (VA-11)
Representative Joseph Crowley (NY-07)
Representative Elijah E. Cummings (MD-07)
Representative Danny K. Davis (IL-07)
Representative Diana DeGette (CO-01)
Representative Eliot L. Engel (NY-17)
Representative Sam Farr (CA-17)
Representative Chaka Fattah (PA-02)
Representative Luis V. Gutierrez (IL-04)
Representative Mazie K. Hirono (HI-02)
Representative Michael M. Honda (CA-15)
Representative Steve Israel (NY-02)
Representative Jesse L. Jackson, Jr. (IL-02)
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Representative Henry C. Johnson, Jr. (GA-04)
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In The
Supreme Court of the United States

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OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

AMICUS CURIAE BRIEF OF ROCKY MOUNTAIN GUN OWNERS AND NATIONAL ASSOCIATION FOR GUN RIGHTS IN SUPPORT OF PETITIONERS

◆

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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AMICUS CURIAE BRIEF OF ROCKY MOUNTAIN GUN OWNERS AND NATIONAL ASSOCIATION FOR GUN RIGHTS IN SUPPORT OF PETITIONERS

Rocky Mountain Gun Owners ("RMGO") and the National Association for Gun Rights ("NAGR") respectfully submit this amicus curiae brief in support of Petitioners.[1]

◆

IDENTITY AND INTEREST OF AMICI CURIAE

RMGO is Colorado's largest State-based gun lobby. RMGO is a non-profit, member-supported advocacy group, organized under the laws of the State of Colorado and recognized by the Internal Revenue Service as a 501(c)(4) organization. It is dedicated to protecting the natural right to keep and bear arms through grass-roots and professional lobbying. RMGO also conducts concealed handgun training classes. The NAGR assists State-based gun-rights organizations, including RMGO and many others in the

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[1] In compliance with Supreme Court Rule 37, MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief.

American West, by providing information and lobbying support locally and in Washington, D.C.

RMGO's and NAGR's members firmly believe that the individual right to keep and bear arms in defense of themselves, their loved ones, and their property against crime and tyranny is a fundamental natural right, necessary to ordered liberty and protected for all Americans by the Constitution. For them, that right is central to what it means to be an American citizen. Many of these members live and work in the American West and they have an abiding understanding of the deeply rooted nature of the right to keep and bear arms, both in their own lives and in the cultural heritage of the American West.[2]

◆

SUMMARY OF THE ARGUMENT

This Court has correctly decided that the Second Amendment protects the individual right to keep and bear arms; however, as this Court interprets that right in this and subsequent cases, it should be mindful that the right is fundamentally important to American citizens. Limitations on the right to keep and bear arms fly in the face of the natural right to self-defense, the nature of American citizenship, and 200 years of American jurisprudence.

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[2] For purposes of this Brief, the Western United States, or West, generally consists of States west of the 100th meridian, including Alaska but excluding Hawaii. Though it is acknowledged that the West is home to much cultural, historical, and geographic diversity, a uniquely Western culture unquestionably exists. That culture is described herein.

In the American West, the right to keep and bear arms continues to be an essential component of citizenship. Strict protection of the right to possess firearms and a broad protection of an individual's right to use self-defense are universal values in the West. An examination of the law and culture of the West reveals several common themes, the most prominent being a total lack of tolerance for the sort of onerous prohibitions and registration requirements at issue in the instant case. Moreover, the trend from the antebellum period to modern day has been toward ever stronger legal protection for the right to keep and bear arms. Ultimately, the law and culture of the West reflects the views of the drafters of the Second Amendment and the drafters of the Fourteenth Amendment: That the right to keep and bear arms is both an individual and fundamental right, the exercise of which makes self-defense possible and protects against tyranny.

◆

ARGUMENT

I. THE ORIGINAL UNDERSTANDING OF THE RIGHT TO KEEP AND BEAR ARMS AND THE IMPACT OF THE ANTEBELLUM PERIOD.

This Court's decision in *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783, 2798-99 (2008), provides a thorough historical examination of the right to bear arms, concluding quite correctly that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects" and that the individual right had been protected by the Second Amendment. The colonial experience and the American Revolution strengthened the notion that an armed populace is essential to ordered liberty. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration* in *Guns: Who Should Have Them* 127, 132 (David B. Kopel, ed., Prometheus Books 1995). Yet, as this Court noted in *Heller*, this fundamental right was curtailed by slave States prior to the Civil War. 128 S.Ct. at 2810-11.

Many commentators have noted that antebellum gun control had a decidedly racist motivation. *See, e.g.*, Cottrol & Diamond, at 136; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol'y 17, 17-25 (1995). "The idea was to restrict the availability of arms to blacks, both slave and free, to the extent consistent with local conceptions of safety." Cottrol & Diamond, at 136. "Local conceptions of safety" in slave States often required free blacks to be totally disarmed, e.g., in Texas, Mississippi, Florida, Maryland, Virginia, and Georgia. *Id.* at 136-37. States that stopped short of total disarmament of blacks instead required licenses to keep and bear arms, e.g., in Florida until 1831 (when a total ban was enforced) and in Delaware. *Id.* at 137. Other States instituted harsh punishments for blacks who used firearms to aide slave rebellions or who bore arms against whites, e.g., in Kentucky. *Id.* at 136. This racist trend toward gun control continued with the post-bellum "black codes." *Id.* at 140. Despite the clear intention of the drafters of the Fourteenth Amendment to end racially motivated gun control, by the time ***Plessy v. Ferguson***, 163 U.S. 537, 551-52 (1896), gave constitutional legitimacy to the black codes, significant attacks had been made on the Second Amendment in the name of racial prejudice. *See* Clayton E. Cramer, et al., *"This Right Is Not Allowed By Governments That Are Afraid Of The People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 George Mason L. Rev. (forthcoming 2010) (manuscript at 21, available at http://ssrn.com/abstract=1491365).

Yet, the West avoided much of this racially motivated gun control. *See* Cramer, *Racist Roots*, at 17. Slavery was outlawed in the West until 1857, when *Scott v. Sanford* extended slavery to the Territories. 60 U.S. (19 How.) 393, 449-50 (1857). Perhaps because slavery was not, with the exception of Texas, a central institution in the Western territories and States, the racially motivated abridgments of the fundamental right to keep and bear arms that pervaded the slave States were much less prevalent in the Western territories and States. *See* Cramer, *Racist Roots*, at 17. The direct application of the Constitution in the Western territories may also have prevented racist factions from ravaging the right to keep and bear arms in the West. *See Territory of Hawaii v. Mankichi*, 190 U.S. 197, 218-19 (1903) ("most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation. . . ."); *see also Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850); *Am. Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

Whatever the reason, the right to keep and bear arms has been a fixture of Western law and life since at least the declaration of Texas independence in 1836 and the drafting of the Kansas Territorial Constitution in 1855. *See The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming in the United States of America* 3543, 1179 (Francis Newton Thorpe, ed., Government Printing Office 1909). An examination follows of what the right to keep and bear arms has meant – and continues to mean – to the law and culture of the West.

II. THE ORIGINAL UNDERSTANDING OF THE RIGHT TO KEEP AND BEAR ARMS HAS BEEN PRESERVED IN THE AMERICAN WEST.

The Bill of Rights directly limits only the powers of the national government. *Baron v. Baltimore*, 32 U.S. 243, 248 (1833). The Fourteenth Amendment, through both the Due Process Clause and the Privileges or Immunities Clause, makes many of the provisions of the Bill of Rights, as well as other fundamental limitations on government power, applicable to the States. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001). This Court, however, has never ruled that the Second Amendment is incorporated against the States because the Court's cases dealing with the Second Amendment in this context pre-date modern Fourteenth Amendment jurisprudence. *See Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

Modern Fourteenth Amendment jurisprudence asks whether a right is "fundamental to the American scheme of justice," or "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968). This inquiry considers the right's historical acceptance in the United States, its recognition by the individual States (including any trend regarding State recognition), and the nature of the interest secured by the right. *Id.* at 149, 154 (citing current state practice as evidence that the jury right is fundamental); *see also Benton v. Maryland*, 395 U.S. 784, 794 (1969) (citing current state practice as evidence that the prohibition on double jeopardy is fundamental). A panel of the Ninth Circuit described this as a "culturally specific inquiry [that] compels us to determine whether the right is 'deeply rooted in this Nation's history and tradition.'" *Nordyke v. King*, 563 F.3d 439, 450 (9th Cir. 2009), *reh'g en banc granted*, 575 F.3d 890 (2009) (citing *Glucksberg*, 521 U.S. at 721).

Though the original understanding of constitutional text is the most intrinsically sound method of construction, *see, e.g., South Carolina v. United States*, 199 U.S. 437, 448 (1905), a more far-reaching cultural and historical examination has been undertaken in the Fourteenth Amendment incorporation analysis. *See, e.g., Duncan*, 391 U.S. at 149. Such an examination of the American West reveals that possession of arms for self-defense and protection against tyranny, the primary philosophically underpinnings of the Second Amendment as interpreted in *Heller*, have historically been, and remain to this day, fundamental elements of Western law and culture. Under the *Duncan* test, this is strong evidence that Second Amendment rights are necessary to "ordered liberty," historically accepted by the States, and continue to be recognized by the States as "privileges or immunities of citizens of the United States." U.S. Const. amend. XIV; *Duncan*, 391 U.S. at 149.

A. The Law of the West Demonstrates Strong Acceptance Among Western States of the Right to Keep and Bear Arms for Self-Defense and Defense Against Tyranny.

An examination of the law of the West reveals a direct connection between the right to bear arms and the "Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. Several common themes emerge that are relevant in the instant case, the most prominent being a total lack of tolerance, by both courts and legislatures, for the sort of onerous prohibitions and registration requirements at issue here.[3]

Of the eighteen States comprising the American West, only California lacks an explicit constitutional protection for the right to keep and bear arms. Robert A. Creamer, *History is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. Rev. 905, 920-25 (2004). Of the remaining seventeen States, the Texas provision is the earliest, ratified in 1836. Texas Const. art. I, § 23 *reprinted in* Thorpe, at 3543. The second oldest in the West is that of Kansas, drafted in 1855. Kan. Const. Bill of Rights, § 4 *reprinted in* Thorpe, at 1179. Oregon's constitution, including protection for the individual right to keep and bear arms, was ratified in 1857. Or. Const. art. I, § 27 *reprinted in* Thorpe, at 3000. The rest of the Western States entered the Union after the start of the Civil War, and all of these States' constitutions guard the individual's right to bear arms. Alaska Const. art. I, § 19 (ratified 1959); Ariz. Const. art. II, § 26 (ratified 1912); Colo. Const. art. II, § 13 (ratified 1876); Idaho Const. art. I, § 11 (ratified 1889); Mont. Const. art. II, § 12 (ratified 1889); Neb. Const. art. I, § 1 (amended 1988); Nev. Const. art. I, § 11 (amended 1982); N.M. Const. art. II, § 6 (ratified 1912); N.D.

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[3] Several important aspects of state firearms law are summarized immediately below. A narrative overview of the firearms laws of the Western States that are particularly relevant to the instant case is provided at Part III.

Const. art. I, § 1 (amended 1984); Okla. Const. art. II, § 26 (ratified 1907); S.D. Const. art. VI, § 24 (ratified 1889); Utah Const. art. I, § 6 (ratified 1895); Wash. Const. art. I, § 24 (ratified 1889); Wyo. Const. art. I, § 24 (ratified 1889). The long and consistent history of State protection for the right to keep and bear arms, and the degree to which State constitutions explicitly protect an individual's right to bear arms, provide compelling evidence that the right to keep and bear arms is fundamental.

Paramount among the rights protected by these State constitutional provisions is the protection of the right to possess firearms, both inside and outside the home, for lawful purposes. Several Western States explicitly prohibit the regulations at issue in the instant case, i.e., the licensing of firearm possession in the home. *See* Idaho Const. art. I, § 11 ("No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition."); N.D. Cent. Code § 62.1-03-01(2)(b); S.D. Codified Laws § 22-14-11; Utah Code Ann. § 76-10-500(1)(b); Wash. Rev. Code § 9.41.050.

The right to carry arms openly in public has existed in the law as long as the right to bear arms has existed, *see, e.g., Heller*, 128 S.Ct. at 2816, and the right to carry loaded firearms openly without a permit is protected by law in every Western State, with the exception of California, North Dakota, and Texas. *See* Alaska Stat. § 11.61.220; Ariz. Rev. Stat. § 13-3102(F); Colo. Rev. Stat. § 29-11.7-104; Idaho Code Ann. § 18-3302; Kan. Stat. Ann. § 21-4201; Mont. Code Ann. § 45-8-317; Neb. Rev. Stat. § 69-2430; Nev.

Rev. Stat. § 202.350(1)(d)(3); N.M. Stat. § 30-7-2; Okla. Stat. Ann. tit. 21, § 1289.7; Or. Rev. Stat. § 166.250(a); S.D. Codified Laws § 22-14-9; Utah Code Ann. § 76-10-505; Wash. Rev. Code § 9.41.050; Wyo. Stat. Ann. § 6-8-104. Moreover, traditional legal protections for carrying arms openly have been supplemented by the modern trend, adopted in every Western State, to also allow law-abiding citizens to carry concealed weapons outside the home. *See* Alaska Stat. § 18.65.700; Ariz. Rev. Stat. § 13-3112; Cal. Penal Code § 12025; Colo. Rev. Stat. § 18-12-203; Idaho Code Ann. § 18-3302; Kan. Stat. Ann. §§ 75-7c01 to -c26; Mont. Code Ann. § 45-8-317; Neb. Rev. Stat. § 69-2430; Nev. Rev. Stat. § 202.3657; N.M. Stat. § 29-19-4; N.D. Cent. Code § 62.1-04-03; Okla. Stat. Ann. tit. 21, § 1290.3; Or. Rev. Stat. § 166.250(a); S.D. Codified Laws § 23-7-7; Tex. Govt. Code Ann. § 411.172; Utah Code Ann. § 53-5-704; Wash. Rev. Code § 9.41.070; Wyo. Stat. Ann. § 6-8-104.

Thus, the right to keep and bear arms for purposes of self-defense, both inside and outside the home, remains an important value in the West, protected by law and outside the State's power to permit or deny. For Westerners, there are few other rights as important as the right, as individuals, to keep and bear arms and they have protected the right accordingly through law.

Likewise, Western courts have not hesitated to protect an individual's right to keep and bear arms for self-defense or as protection against government tyranny. For example, the Oregon Supreme Court has explained that the purpose of the constitutional protection of the right to keep and bear arms in its State constitution is to protect self-defense and as a check on government power. *State v. Hirsch*, 114 P.3d 1104, 1114 (Or. 2005) (citing *State v. Kessler*, 614 P.2d 94, 97 (Or. 1980)). Similarly, the South Dakota Supreme Court has concluded that the State constitution, including the right to bear arms, protects an individual's right to self-defense. *Conaty v. Solem*, 422 N.W.2d 102, 104-05 (S.D. 1988). These holdings are in accord with those of other Western states, as discussed in Part III.

All of the States, to various degrees, sanction the use of deadly force as a last resort for self-defense. *See, e.g.*, *Beard v. United States*, 158 U.S. 550, 563 (1895) (establishing no duty to retreat under federal law based on decisions from various states); Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 327 (1996).[4] Many Western States have expanded the right to self-defense through "make my day" or "castle doctrine"

> [4] A man may repel force by force in defense of his person, habitation, or property against anyone or many who manifestly intend and endeavor to commit a known felony by violence or surprise or either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them he happen to kill him, such killing is justifiable.

Beard, 158 U.S. at 563 (quoting 2 Whart. Cr. Law § 1019).

laws that give individuals a broad right to use deadly force for self-defense within the home, even if not a last resort. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. Econ. & Pol'y 331, 336-39 (2006). Currently, at least eleven of the eighteen Western States have some form of "make my day" or "castle doctrine" statutes on the books, eight of which have been enacted in the past four years. Most States having such laws are "stand your ground" States that do not impose a duty to retreat. Alaska Stat. § 11.81.335; Ariz. Rev. Stat. § 13-418; Colo. Rev. Stat. § 18-1-704.5; Idaho Code Ann. § 6-808; Kan. Stat. Ann. § 21-3218; Mont. Code Ann. § 45-3-103; N.D. Cent. Code § 12.1-05-07; Okla. Stat. Ann. tit. 21, § 1289.25; S.D. Codified Laws § 22-18-4; Texas Penal Code Ann. § 9.31; Utah Code Ann. § 76-2-405.

Furthermore, many Western courts have interpreted an individual's right to self-defense outside the home broadly. *See, e.g., State v. Starks*, 627 P.2d 88, 91 (Utah 1981) (defendant may use deadly force in self-defense even after defendant armed himself and went to a location where he knew he would find the deceased); *State v. Bristol*, 84 P.2d 757, 762-63 (Wyo. 1938) (defendant who armed himself, sought out his enemy, and was attacked, unprovoked, by his enemy, could use deadly force against his enemy in self-defense); *Thomas v. State*, 51 S.W. 1109, 1110 (Tex. Crim. App. 1899) (deadly force may be used in self-defense even if defendant seeks out deceased to provoke difficulty, so long as there was no actual provocation).

The only limitation on the right to keep and bear arms universally accepted by Western courts and legislatures is a ban on felons possessing firearms. *See, e.g., People v. Blue*, 544 P.2d 385, 391 (1975). Yet, even felons may not be disarmed as a class when their purpose in possessing firearms is defense of person or property. *E.g., id.*; *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988); *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982); *State v. Cartwright*, 418 P.2d 822, 829 (Or. 1966).

Ultimately, the law of the West reflects the views of the Second Amendment held by the Framers of the Constitution and the Fourteenth Amendment. *See* Cramer, *This Right Is Not Allowed*, at 1. Specifically, the right to keep and bear arms is both an individual and fundamental right, the exercise of which makes self-defense possible and protects against tyranny. As detailed above, the trend from the antebellum period forward has been toward ever stronger protections for the right to keep and bear arms.

B. The History and Culture of the West Demonstrate Strong Acceptance Among Western States of the Right to Keep and Bear Arms for Self-Defense and Defense Against Tyranny.

Even before "an Anglo-American regime of ordered liberty" emerged in the West, the gun culture had taken root. In a very real way, this made the gun a prerequisite to the development of Anglo-American society.

Prior to 1754, Indian tribes used guns, acquired through trade with French fur traders, for defense against attacking tribes. David B. Kopel, *The Samurai, The Mountie, and the Cowboy* 307-08 (Prometheus Books 1992). After the French defeat in the French and Indian War, Indians acquired guns from British traders. *Id.* In part because of the presence of armed Indians, "life itself would have been impossible for the new people who would be called 'Americans,'" because the new settlers frequently had to defend themselves with their own guns. *Id.* at 309. Western expansion was regularly met with resistance, and thus arms were essential for self-defense from the 17th Century. *Id.*

Likewise, the rapid westward expansion, occurring around the time the Fourteenth Amendment was drafted, debated, and ratified, surpassed the government's ability to enforce the law. *Id.* at 323. Even in frontier towns that employed some form of official police, the law enforcement officers that did exist often lacked the resources to pursue criminals beyond the town border or were too corrupt themselves to do so. *Id.* at 323, 326. Thus, settlers were left to "repel force by force when the intervention of society in his behalf, [was] too late to prevent an injury." *Heller*, 128 S.Ct. at 2799 (internal quotation omitted).

To this day, self-defense remains a core value amongst many Westerners. In December 2007, when an attacker opened fire at a church in Colorado Springs, one of the church members, who had volunteered to carry her firearm to defend the congregation, saved hundreds of lives when she shot and wounded the attacker. Judith Kohler, *Police: Gunman Had Been Thrown Out of Missionary School*, Dec. 10, 2007, Denver Post. Similar examples of private citizens using their guns to defend themselves abound throughout the West. *See, e.g., Conaty*, 422 N.W.2d at 104-05; *Starks*, 627 P.2d at 91; *Bristol*, 84 P.2d at 761-62; *Thomas*, 51 S.W. at 1109-10; The Armed Citizen Archive, http://www.nraila.org/ArmedCitizen/ (last visited Nov. 18, 2009).

This respect for self-defense and self-reliance is inherent in the nature of the West particularly, but also the United States more generally. The West is one of the most sparsely settled, rural areas in the United States. Of the 16 States with the lowest population density, 15 are located in the West. U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2000*, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-9|US-9S&-_lang=en (last visited Nov. 18, 2009). As such, Western culture is primarily a "land-based culture" closely associated with ranching and farming activities. Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. Land Resources

& Envtl. L. 183, 208 (2005); H.R. Res. 411, 109th Cong. (2005) ("Ranching is an important part of the culture and economy of many rural communities throughout the American West, and the rural West depends on a healthy and thriving ranching industry."). Much like the "individualist philosophy of our Founders," *Silveira v. Lockyer*, 328 F.3d 567, 571 (9th Cir. 2003) (Kleinfeld, J., dissenting), this rural Western culture emphasizes individualism, independence, self-sufficiency, and self-governance. Morrow, *The Environmental Front*, at 209-216.

A report by the National Institute of Justice shows that these characteristics also typify the modern gun culture. Specifically, the Institute concluded that the modern gun culture is "best typed as rural rather than urban: . . . emphasiz[ing] independence, self-sufficiency, mastery over nature, [and] closeness to the land. . . ." Kopel, at 305 (citing James Wright, Peter Rossi & Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 113 (Aldine 1983)). Additionally, even to this day, the gun culture generally distrusts government and is skeptical of government's intentions. Erik Luna, *The .22 Caliber Rorschach Test*, 39 Hous. L. Rev. 53, 77 (2002). "To many gun owners, firearms [and the threat of their use] represent the last line of defense against official tyranny . . . ," although actual armed conflicts with the government are rare. *Id.*

It is likely that widespread possession of guns amongst the populace often serves to deter government tyranny without resorting to actual violence.

David Harmer, *Securing A Free State: Why the Second Amendment Matters*, 1998 B.Y.U. L. Rev. 55, 92 (1998). Perhaps that is why one prominent 20th Century conflict that arose with the Federal government in the West was largely non-violent. During the Sagebrush Rebellion, Westerners revolted against the federal government's restrictive land-use policies. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 Geo. L.J. 1003, 1018-19 n.72 (2003). No shots were fired, and the issues were addressed in federal court. *Id.*

Unlike the Sagebrush Rebellion, violence has ensued when force was initiated by the federal government. *Harris v. Roderick*, 126 F.3d 1189, 1192-94 (9th Cir. 1997). In 1992, at Ruby Ridge, Idaho, private citizens exercised their right to bear arms in an attempt to defend themselves against an overzealous government siege. *Id.* Tragically, government agents killed a fourteen-year-old boy, a mother holding her infant daughter, and the family dog. *Id.* at 1194.

As these examples illustrate, defense against tyranny to protect individual liberty is thus also fundamental to Western culture and to the "Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

III. AN OVERVIEW OF WESTERN FIREARMS LAW - THE ORIGINAL AND CONTEMPORARY UNDERSTANDING OF THE RIGHT TO KEEP AND BEAR ARMS.

Alaska

Alaska law recognizes the right to keep and bear arms and tolerates very few limits on the right. Alaska Const. art. I, § 19. The Alaska Constitution protects the right to keep and bear arms with the same language as the Second Amendment, but the Alaska Constitution goes further. *Id.* In 1994, Alaskans reinforced the prohibition that "the right of the people to keep and bear arms shall not be infringed" by adding this language to the state constitution: "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State." *Id.* Courts have interpreted this language to allow very limited regulation of firearms, such as prohibiting possession of firearms by intoxicated persons or by violent felons. *See Morgan v. State*, 943 P.2d 1208, 1212 (Alaska Ct. App. 1997); *Gibson v. State*, 930 P.2d 1300, 1301 (Alaska Ct. App. 1997).

Alaska law has long recognized the right to carry a firearm, either openly or concealed, for any lawful purpose. *See* Alaska Stat. § 11.61.220. No permit is required to carry a handgun in Alaska, although the state issues permits that are valid in other States. *See* Alaska Stat. § 18.65.700. Moreover, Alaska law recognizes the natural right to use deadly force in self-defense. *See* Alaska Stat. § 11.81.335.

Arizona

The laws of the New Mexico Territory, which included Arizona until 1863, protected the right to use armed self-defense. *See* Laws for the Government of the Territory of New Mexico art. II, § 1 (1846), *available at* http://avalon.law.yale.edu/19th_century/kearney.asp ("Every person who shall kill another in the necessary defense of his own life, or that of any other persons, or of his own house or property, or in the legal execution of any process, or in order to prevent great bodily harm to himself or another, shall be deemed guiltless."). This legal protection for armed self-defense was continued in the Arizona Constitution of 1912 and the Arizona statutes. *See* Ariz. Const. art. II, § 26; Ariz. Rev. Stat. § 13-404, -418.

Arizona law has long expressed a preference for the wearing of arms openly, and this is one of the few limitations on the right to keep and bear arms that Arizona courts have tolerated. *State v. Moerman*, 895 P.2d 1018, 1021 (Ariz. Ct. App. 1994); *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990). Despite this preference for open carry, Arizona is one of a majority of States, including all Western States, that readily issue permits to carry concealed firearms to law-abiding citizens. *See* Ariz. Rev. Stat. § 13-3112. No permit is required or available for open carry. *See* Ariz. Rev. Stat. § 13-3102(F).

Arizona law prohibits felons from possessing firearms unless their civil rights have been restored. *State v. Rascon*, 519 P.2d 37, 38 (Ariz. 1974). Arizona courts have also allowed local governments to enact time, place, and manner restrictions on the right to keep and bear arms. *See City of Tucson v. Rineer*, 971 P.2d 207, 212 (Ariz. Ct. App. 1998) (upholding ban on possession of firearms in municipal parks). Although, this makes Arizona an outlier among Western states. *Cf. In re Brickey*, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional a prohibition on carrying deadly weapons within a municipality); *City and County of Denver v. State*, No. 03-3809, slip op. at 8 (Colo. Dist. Ct. Nov. 5, 2004), *aff'd without opinion by an equally divided court*, 139 P.3d 635 (Colo. 2006) (striking down ban on concealed carry in vehicles and public parks).

California

There is no protection for the right to keep and bear arms in the California Constitution. However, state law specifically protects the right to possess a handgun in a person's residence or place of business without a permit. *See* Cal. Penal Code §§ 12026, 12031(h), 12031(l). Loaded firearms may not be carried outside the home without a permit; however, unloaded firearms may be carried openly in public without a permit. *See* Cal. Penal Code §§ 12025, 12050. California courts have allowed felons to be denied the right to possess firearms. *People v. Flores*, 86 Cal.Rptr.3d 804, 807 (Cal. Ct. App. 2008).

Colorado

The Colorado Supreme Court has held consistently for more than seventy years that the Colorado Constitution protects the right to possess a firearm for self-defense. Colo. Const. art. II, § 13; *Robertson v. City and County of Denver*, 874 P.2d 325, 333 (Colo. 1994); *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936). Even in cases where Colorado courts have tolerated regulation of the right to keep and bear arms, "outright prohibitions on the possession of all firearms have been held to violate constitutional protections." *Robertson*, 874 P.2d at 330 n.10. Prohibitions on the keeping and bearing of arms violate the Colorado Constitution because outright prohibitions "den[y] the right as opposed to regulating it." *Id.*; *see also Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972) (striking down ban on deadly weapons outside the home); *Nakamura*, 62 P.2d at 247 (striking down ban on firearm ownership by unnaturalized foreign-born residents).

Colorado courts have allowed regulation of narrow categories of weapons, possession by felons, and local regulation of open carry; however, no Colorado regulation of the right to keep and bear arms can abrogate the right to use self-defense. *See, e.g.*, *Robertson*, 874 P.2d at 333 (upholding regulation of certain guns because there remain "literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense"); *Trinen v. City and County of Denver*, 53 P.3d 754, 756 (Colo. Ct. App. 2002) (upholding concealed carry regulations because of self-defense exception). Even felons may not be disarmed as a class when their purpose in possessing firearms is defense of person or property. *People v. Blue*, 544 P.2d 385, 391 (1975).

Open carry is generally legal in Colorado without a permit, Colo. Rev. Stat. § 29-11.7-104, and concealed carry permits are readily available to law-abiding residents. Colo. Rev. Stat. § 18-12-203. Moreover, Colorado law recognizes the natural right to use deadly force in self-defense. *See* Colo. Rev. Stat. §§ 18-1-704 to -705.

Idaho

The Idaho Constitution, ratified in 1889, was amended in 1978 to strengthen legal protection of the right to keep and bear arms. Idaho Const. art. I, § 11; *State v. Grob*, 690 P.2d 951, 954 (Idaho Ct. App. 1984) (noting 1978 amendment narrowed the scope of permissible firearms regulation). Yet, even before the 1978 amendment, it was well established that the government could not regulate the right to keep and bear arms so as to deny the right completely. *See In re Brickey*, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional prohibition on carrying deadly weapons within any city, town, or village). The use of arms for self-defense has also long been a fixture of Idaho law. *See State v. Woodward*, 74 P.2d 92, 97 (Idaho 1937) ("The law does not require any one to submit meekly to indignities or violence to his person; he may lawfully repel them or it with as much of such character of necessary resistance as is at the time available to him.").

Firearms regulations that have been sanctioned by Idaho courts focus on the use of firearms to commit felonies and the carrying of concealed weapons. *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945) (upholding municipal concealed firearms ordinance); *Grob*, 690 P.2d at 954 (affirming ten-year sentence for using a firearm during commission of a felony).

The Idaho Constitution protects the right to openly carry a firearm, and the state legislature has created a permit system for concealed carry of firearms. Concealed carry permits are readily available to law-abiding citizens. *See* Idaho Code Ann. § 18-3302. Idaho law also acknowledges the natural right to use deadly force in self-defense. Idaho Code Ann. § 19-201 to -203; *State v. Woodward*, 74 P.2d 92, 96 (Idaho 1937).

Kansas

In Kansas, the constitutional guarantee of the right to keep and bear arms dates to 1855, when statehood was first proposed. Kan. Const. Bill of Rights, § 4 *reprinted in* Thorpe, at 1179.[5] In 1905, the

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[5] An amendment to clarify that the right to keep and bear arms is an individual one has been proposed for the November 2, 2010, ballot: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose; but

(Continued on following page)

Kansas Supreme Court adopted the view, rejected in *Heller*, that "the people" guaranteed the right to bear arms in the Kansas and United States Constitutions were the militia. *City of Salina v. Blaksley*, 83 P. 619, 620-21 (Kan. 1905); *Heller*, 128 S.Ct. at 2799. Nonetheless, Kansas courts have struck down laws that prohibit the transportation of arms outside the home. *City of Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979). Moreover, Kansas statutes have been protective of the right to keep and bear arms.

Carrying a firearm in public without a permit generally is legal in Kansas, so long as the firearm is not concealed. Kan. Stat. Ann. § 21-4201; *but cf. State v. Doile*, 648 P.2d 262 (Kan. Ct. App. 1982) (upholding municipal regulation of concealed firearms outside the home). Kansas has followed the modern trend to allow concealed carry with a permit. Kan. Stat. Ann. §§ 75-7c01 to -c26. Kansas law also recognizes the right to use deadly force in self-defense. Kan. Stat. Ann. §§ 21-3211 to -3213.

Montana

Montana entered the Union in 1889 and guaranteed the right to keep and bear arms in its constitution with a provision that closely echoes Colorado's.

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standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Senate Concurrent Resolution No. 1611 (2009).

Mont. Const. art. II, § 12; Colo. Const. art. II, § 13. This right was included among the Montana "Declaration of Rights" because it is a fundamental right that is among the "significant components of liberty . . . any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts." *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12 (Mont. 2002) (internal quotations omitted).

Very few Montana cases have construed article II, section 12. Among those that have, courts truly have applied the "highest level of scrutiny" to this "significant component of liberty." *Id.* In *State v. Rathbone*, despite the State's authority to regulate the taking of wild game, the Montana Supreme Court held that a statute regulating the taking of elk must include an exception for defense of self and property. 100 P.2d 86, 90 (Mont. 1940) ("If the plea of justification for the killing of an elk or other destructive wild animal cannot be relied upon by a defendant in an action charging him with such killing, the constitutional provisions referred to become a nullity."). Although Montana law does allow felons to be denied the right to possess firearms, Mont. Code Ann. § 46-18-801, courts have interpreted this provision strictly, requiring the sentencing court to explicitly prohibit the possession of firearms. *See United States v. Brooks*, 890 P.2d 759, 762 (Mont. 1995).

Firearms are loosely regulated in Montana. Open carry is protected by the State constitution, and concealed carry is largely unregulated, even though concealed carry enjoys no constitutional protection. Mont. Code Ann. § 45-8-317. The Montana legislature has gone so far as to summarily "license" all law-abiding citizens within the meaning of the federal Gun-Free School Zones Act, 18 U.S.C. § 922(q), so as to nullify most of the provisions contained in that Act. Mont. Code Ann. § 45-8-360. Montana law also recognizes the right to use deadly force in self-defense. Mont. Code Ann. §§ 45-3-102 to -104.

Nebraska

Nebraska's right to keep and bear arms provision was added to the State constitution in 1988. Neb. Const. art. I, § 1. As such, it provides little guidance about the nature of the right to keep and bear arms as it was understood by the framers of the Second and Fourteenth Amendments. Nevertheless, consistent with other Western courts, Nebraska courts have approved only very narrow regulation of the right to keep and bear arms. *State v. LaChapelle*, 451 N.W.2d 689, 691 (Neb. 1990) (upholding short-barreled shotgun ban); *State v. Comeau*, 448 N.W.2d 595, 596 (Neb. 1989) (upholding felon-in-possession ban; serial number requirement).

As in most Western States, firearms may be carried openly outside the home in Nebraska, and the state legislature has created a permit system for concealed carry of firearms. *See* Neb. Rev. Stat. § 69-2430. Concealed carry permits are readily available to law-abiding citizens. *See id.* Nebraska law also acknowledges the natural right to use deadly force in self-defense. Neb. Rev. Stat. §§ 28-1409 to -1411. Local governments have the authority to regulate only the discharge, but not the possession, of unconcealed firearms. Neb. Rev. Stat. § 17-556.

Nevada

Nevada's constitutional protection of the right to keep and bear arms was added in 1982, and there are no Nevada cases directly interpreting that right. Nev. Const. art. I, § 11. Nevertheless, the Nevada legislature has statutorily provided robust protection for the right to keep and bear arms. All regulation of the possession of weapons is reserved to the state legislature. Nev. Rev. Stat. §§ 269.222, 268.418. Moreover, the state legislature has done little to regulate the right; the few Nevada firearms regulations are similar to those of other Western States: Felons are prohibited from possessing firearms, concealed carry is regulated, and there are some limitations on where firearms can be carried. Nev. Rev. Stat. §§ 202.360 (felon-in-possession); 202.350(1)(d)(3) (concealed carry); 202.265 (restrictions on firearms in schools and child care facilities).

As in most Western States, Nevada law does not prohibit the open carrying of firearms, and the state has a permit system for concealed carry. *See* Nev. Rev. Stat. § 202.350(1)(d)(3). Concealed carry permits are readily available to law-abiding citizens. *See* Nev.

Rev. Stat. § 202.3657. Nevada law also acknowledges the natural right to use deadly force in self-defense. Nev. Rev. Stat. § 200.120.

New Mexico

The laws of the New Mexico Territory protected the right to use armed self-defense. *See* Laws for the Government of the Territory of New Mexico art. II, § 1 (1846), *available at* http://avalon.law.yale.edu/19th_century/kearney.asp ("Every person who shall kill another in the necessary defense of his own life, or that of any other persons, or of his own house or property, or in the legal execution of any process, or in order to prevent great bodily harm to himself or another, shall be deemed guiltless."). This legal protection for armed self-defense was continued in the New Mexico Constitution of 1912 and the New Mexico statutes. *See* N.M. Const. art. II, § 6; N.M. Stat. § 14-5170 to -5172. An amendment in 1971 added language explicitly protecting the right to keep and bear arms for hunting, recreational use, and "other lawful purposes." N.M. Const. art. II, § 6 (amended 1971). Prohibition on local regulation of the right was added in 1986. *See* N.M. Const. art. II, § 6 (amended 1986).

Open carry is generally legal in New Mexico without a permit, and concealed carry permits are readily available to law-abiding residents. N.M. Stat. §§ 30-7-2, 29-19-4. Local regulation of openly carried firearms has been held to violate the right to keep and bear arms. *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971). Moreover, even though the State constitution does not protect concealed weapons, New Mexico courts have recognized a right to possess unloaded concealed weapons in public and loaded concealed weapons in the home or while traveling. *State v. Ramirez*, 444 P.2d 986, 989 (1968) (noting that state law protects the right to carry an unloaded concealed weapon); *Lopez v. Chewiwie*, 186 P.2d 512, 513 (1947) (acknowledging that state law protects the right to carry deadly weapons in residence and when traveling); *State v. Starr*, 173 P. 674, 679-80 (1917) (noting the right of travelers to carry weapons).

New Mexico courts have allowed the State to regulate firearms carried in bars and other licensed establishments. *See State v. Dees*, 669 P.2d 261, 264 (N.M. Ct. App. 1983) (ban on firearms in licensed liquor establishments). However, this regulation does not apply to unloaded firearms, or individuals licensed to carry concealed firearms. N.M. Stat. § 30-7-2(A)(5), (B).

North Dakota

The 1889 North Dakota Constitution initially did not protect the right to keep and bear arms; however, the right of self-defense is inherent in the explicit declaration of rights, which included the right of "*defending life and liberty*; acquiring, possessing and *protecting property* and reputation; *pursuing and* *obtaining safety. . . .*" N.D. Const. art. I, § 1 (emphasis added) *reprinted in* Thorpe, at 2854. The 1889 North Dakota Constitution also reserved to the people the right to "alter or reform [government] whenever the public good may require." *Id.* Explicit protection for the right to keep and bear arms was eventually added to the constitution. N.D. Const. art. I, § 1 (amended 1985).

Like all Western States, North Dakota has no permitting system for possessing firearms within the home. *See* N.D. Cent. Code § 62.1-03-01(2)(b). A permit is required, however, to carry a loaded firearm outside the home. N.D. Cent. Code § 62.1-04-03. Perhaps because its constitution did not at first explicitly protect the right to keep and bear arms, North Dakota is an outlier among Western States in that it does not allow open carry without a license. Like most other Western States, North Dakota courts have permitted the State to regulate the possession of firearms by felons. *State v. Ricehill*, 415 N.W.2d 481, 484 (N.D. 1987). North Dakota law also acknowledges the natural right to use deadly force in self-defense. N.D. Cent. Code § 12.1-05-07.

Oklahoma

Oklahoma courts have recognized the right to possess a firearm only inside the home. *Pierce v. State*, 275 P. 393, 395 (Okla. Crim. App. 1929). Courts have been reluctant to strike down any regulation of the right to bear arms in public because of a peculiar grant of authority in the Oklahoma Constitution that allows the legislature to regulate the carrying of weapons. Okla. Const. art. II, § 26; *see State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 975 P.2d 900, 902 (Okla. 1998) (state may regulate the carrying of firearms outside the home).

Although the Oklahoma Constitution has been interpreted to only protect the right to possess a firearm inside the home, the state legislature has protected the right to possess an unloaded firearm in a vehicle. *See* Okla. Stat. Ann. tit. 21, § 1289.7. Also, the legislature has followed the modern trend and made permits to carry concealed handguns readily available to law-abiding citizens. *See* Okla. Stat. Ann. tit. 21, § 1290.3. As in other Western States, Oklahoma also protects the right to use deadly force in self-defense. *See* Okla. Stat. Ann. tit. 21, § 1289.25.

Oregon

Written in 1857, the Oregon Constitution protects the right to keep and bear arms in no uncertain terms. Or. Const. art. I, § 27 *reprinted in* Thorpe, at 3000. In the State's early history, firearms statutes were "directed at prohibiting dueling and increasing punishment for crimes that involved the use of dangerous weapons." *State v. Hirsch*, 114 P.3d 1104, 1121 (Or. 2005). It was not until 1885 that the legislature regulated concealed firearms carried in public. *Id.* To this day, open carry remains generally unregulated. Or. Rev. Stat. § 166.250(a). The right to keep and bear arms remains inviolate in the home. *State v. Kessler*, 614 P.2d 94, 100 (Or. 1980).

Oregon courts have repeatedly prohibited the legislature from enacting "a total proscription of the mere possession" of firearms. *See, e.g., State v. Blocker*, 630 P.2d 824, 826 (Or. 1981). Only felons and the violent mentally ill may be disarmed as a class; however, courts have suggested that the right to bear arms for self-defense against an imminent threat can never be denied. *See State v. Cartwright*, 418 P.2d 822, 829 (Or. 1966); *State v. Owenby*, 826 P.2d 51, 53 (Or. Ct. App. 1992). This steadfast protection for the right of self-defense is consistent with Oregon statutes that protect the right to use deadly force in self-defense. Or. Rev. Stat. §§ 161.205, .209, .219.

South Dakota

South Dakota has protected the right to keep and bear arms since its admission to the Union in 1889. S.D. Const. art. VI, § 24. The South Dakota Supreme Court has allowed the legislature to regulate felons' possession of firearms, although even felons may not be disarmed as a class if their purpose in possessing firearms is self-defense. *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988).

Open carry is generally legal in South Dakota and no permit is required or available. S.D. Codified Laws § 22-14-9. State law explicitly protects the right to possess a handgun in the home without a permit. S.D. Codified Laws § 22-14-11. Concealed carry is regulated by state law, but permits are readily available to law-abiding citizens. S.D. Codified Laws § 23-7-7. South Dakota law also protects the right to use deadly force in self-defense. S.D. Codified Laws § 22-16-34.

Texas

Texas has guaranteed the right to keep and bear arms since it became an independent republic in 1836. Constitution of the Republic of Texas, Declaration of Rights, § 14 (1836) *reprinted in* Thorpe, at 3543; Tex. Const. art. I, § 23. The protection of the right to keep and bear arms reflects the historical English and American tradition of an armed and free populace, but also is a consequence of the denial of the right by the Mexican Government. Texas Declaration of Independence *reprinted in* Thorpe, at 3529 ("It [the Mexican Government] has demanded us to deliver up our arms, which are essential to our defense, the rightful property of freemen, and formidable only to tyrannical governments."). Given this strong tradition of arms bearing in defense of freedom, Texas law allows only limited regulation of the right to keep and bear arms.

The right to carry arms has long been recognized in Texas. *Cockrum v. State*, 24 Tex. 394, 402 (Tex. 1859) ("The right to carry a bowie-knife for lawful defense is secured, and must be admitted."). Although in the antebellum period, the right was circumscribed, due in large part to racial pressures. *See*

English v. State, 24 Tex. 394, 401-02 (1859); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol'y 17, 17-25 (1995) (discussing *English*). Texas arms jurisprudence has focused mainly on the way in which arms are carried, *State v. Duke*, 42 Tex. 455, 458 (Tex. 1874) (upholding requirement that defensive pistols be carried openly), and by whom, *Wilson v. State*, 44 S.W.3d 602, 605 (Tex. App. 2001) (upholding regulation of possession of firearms by felons). Texas law also allows the legislature to regulate certain types of arms. *See Masters v. State*, 653 S.W.2d 944, 946-47 (Tex. App. 1983) (upholding ban on carrying swords in public); *Morrison v. State*, 339 S.W.2d 529, 532 (Tex. Crim. App. 1960) (upholding machine gun regulations). Although, such regulation is constitutionally suspect if it reaches arms "appropriate for open and manly use in self-defense. . . ." *Duke*, 42 Tex. at 458.

Unlike most Western States, Texas does not allow the open carrying of firearms. Tex. Penal Code Ann. § 46.035. Instead, Texas requires firearms to be carried concealed and with a permit that is readily available to all law-abiding citizens. Tex. Govt. Code Ann. § 411.172. Self-defense is a robust defense in Texas, available even if force is used against property, not a person. Tex. Penal Code Ann. § 9.31; *Boget v. State*, 74 S.W.3d 23, 31 (Tex. Crim. App. 2002).

Utah

As ratified in 1895, the Utah Constitution protected the right to keep and bear arms, but allowed the legislature to "regulate the exercise of this right by law." Utah Const. art. I, § 6 *reprinted in* Thorpe, at 3702. An amendment clarified that the right applies to individuals. Utah Const. art. I, § 6 (amended 1984). Although, both before and after the 1984 constitutional amendment, Utah courts allowed only limited regulation of the individual right to keep and bear arms. *See State v. Beorchia*, 530 P.2d 813, 814 (Utah 1974) (holding aliens may be denied weapons); *State v. Willis*, 52 P.3d 461, 462 (Utah Ct. App. 2002) ("This statute only restricts that right under very limited circumstances – such as a felony indictment or conviction.").

Open carry of an unloaded firearm is generally legal in Utah and no permit is available or required. Utah Code Ann. § 76-10-505. State law explicitly protects the right to possess a handgun in the home without a permit, and only the state legislature may regulate firearms. Utah Code Ann. § 76-10-500(1)(b); *University of Utah v. Shurtleff*, 144 P.3d 1109, 1115 (Utah 2006). Concealed carry is regulated, but permits are readily available to law-abiding citizens. Utah Code Ann. § 53-5-704. Utah also protects the right to use deadly force in self-defense. Utah Code Ann. §§ 76-2-402, -405 to -407.

Washington

The Washington Constitution's protection of the right to keep and bear arms dates to 1889. Wash. Const. art. I, § 24. The Washington Supreme Court has held that possession of firearms in the home "falls squarely within the confines of the right guaranteed." *State v. Rupe*, 683 P.2d 571, 596 (Wash. 1984). State law reinforces this protection. *See* Wash. Rev. Code § 9.41.050. State law also protects the right to purchase firearms without obtaining a permit. Wash. Rev. Code § 9.41.110(12). Moreover, firearms may be carried openly without a permit. Wash. Rev. Code § 9.41.050; *but see State v. Spencer*, 876 P.2d 939, 942 (Wash. Ct. App. 1994) (open carry of certain rifles may be regulated). Concealed carry is regulated; however, permits are readily available to law-abiding citizens. Wash. Rev. Code § 9.41.070. While courts have allowed regulation of the carrying of arms, a ban on mere possession would violate the Washington Constitution. *See City of Seattle v. Montana*, 919 P.2d 1218, 1224 (Wash. 1996). Washington also protects the right to use deadly force in self-defense. Wash. Rev. Code §§ 9A.16.020, .050.

Washington courts have upheld limited regulation of firearm possession by violent felons. *State v. Krantz*, 164 P.2d 453, 455 (Wash. 1946). Yet, even this restriction on the right to keep and bear arms is limited by several factors. Felons may raise the defense of necessity to a charge of possession of a firearm. *State v. Jeffrey*, 889 P.2d 956, 958 (Wash. Ct. App. 1995). Moreover, while the state may prohibit violent felons from possessing firearms, the state may not prohibit felons from owning firearms. *State v. Spiers*, 79 P.3d 30, 35 (Wash. Ct. App. 2003) (state may prohibit possession by felons, either convicted or accused, but not ownership).

Wyoming

Protection for the right to keep and bear arms was included in the first Wyoming Constitution of 1889. Wyo. Const. art. I, § 24. That protection has remained consistently strong, reinforced by state law that prevents local governments from denying the right to keep and bear arms. *See* Wyo. Stat. Ann. § 6-8-401. Firearms may be carried openly without a permit throughout the state. *See* Wyo. Stat. § 6-8-104. Concealed carry has been regulated since 1890, however permits are readily available to law-abiding citizens. *See id.*; *Mecikalski v. Office of Attorney General, Div. of Criminal Investigation*, 2 P.3d 1039, 1040 (Wyo. 2000) (citing 1890 Wyo. Territorial Sess. Laws, Ch. 73 § 96 (11th Legislative Assembly)). Wyoming also protects the right to use deadly force in self-defense. Wyo. Stat. Ann. § 6-2-602.

Wyoming courts have upheld limited regulation of firearm possession by violent felons. *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982). However, courts have suggested that the right to bear arms for self-defense against an imminent threat can never be denied. *Id.* at 871.

◆

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX OF STATE CONSTITUTIONAL PROVISIONS

Alaska Const. art. I, § 19.

> A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.

Ariz. Const. art. II, § 26.

> The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Colo. Const. art. II, § 13.

> The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Idaho Const. art. I, § 11.

> The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed

> while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

Kan. Const. Bill of Rights, § 4.[6]

> The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.

Mont. Const. art. II, § 12.

> The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

---

[6] An amendment to clarify that the right to keep and bear arms is an individual one has been proposed for the November 2, 2010, ballot: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Senate Concurrent Resolution No. 1611 (2009).

Neb. Const. art. I, § 1.

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Nev. Const. art. 1, § 11.

> Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.

N.M. Const. art. II, § 6.

> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

N.D. Const. art. I, § 1.

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending

> life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Okla. Const. art. II, § 26.

> The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.

Or. Const. art. I, § 27.

> The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the military shall be kept in strict subordination to the civil power.

S.D. Const. art. VI, § 24.

> The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

Tex. Const. art I, § 23.

> Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

Utah Const. art. I, § 6.

> The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms.

Wash. Const. art. 1, § 24.

> The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

Wyo. Const. art. 1, § 24.

> The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

AMICUS
CURIAE
BRIEF

⑬

Supreme Court, U.S.
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In The Supreme Court of the United States

OTIS MCDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Is the Second Amendment right to keep and bear arms incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses?

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between government and citizens.

---

[1] Counsel of record to the parties in this case have filed letters with the Court granting "blanket" consent to the filing of *amicus curiae* briefs in this case. By letters dated October 7, 2009, The Rutherford Institute advised counsel of record for the parties of its intent to file the instant *amicus curiae* brief. No counsel to any party authored this brief in whole or in part.

The Rutherford Institute works to preserve the most basic freedoms of our Republic: in the present case before this Court, the right of a private party to keep and bear arms in the privacy of one's own home, free from interference and restriction by the states.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the Petition For a Writ of Certiorari of Petitioners Otis McDonald *et al.*

SUMMARY OF ARGUMENT

The right to keep and bear arms is protected by the Second Amendment to the United States Constitution. Since the adoption of the Bill of Rights, this Court has recognized that a substantial number of the Amendments must be applicable to and restrain the several states of the United States, either through the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment. In *Heller v. District of Columbia*, 128 S.Ct. 2783 (2008), this Court expressly extended the application of the Second Amendment's right to keep and bear arms to the federal government, holding therein that citizens of the District of Columbia had the inherent right, as individuals, to keep and bear arms in their homes.

In the instant case, the City of Chicago maintained in the courts below and before this Court that it has the power to forbid citizens of that city from possessing handguns in their homes. The City's firearm restriction is indistinguishable from that of the District of Columbia considered in *Heller*. The City of Chicago asks this Court to hold that the individual right secured by the Second Amendment – a right that pre-dates the adoption of the Constitution and Bill of Rights[2] – is not protected as against the authority of state and local lawmakers. Under the City's argument, virtually nothing prevents states and localities from barring citizens from possessing handguns in their homes, even for purposes of self-defense and irrespective of the serious crime problems encountered by residents of that city and other cities and states throughout the nation.

Rather than permit an illogical and indefensible jurisprudence under which the rights of citizens would be protected against infringement by the federal government whilst simultaneously being susceptible to erosion and nullification by state and local governments, this Court should now recognize that the Fourteenth Amendment's Privileges or Immunities Clause or Due Process Clause incorporates the Second Amendment and makes the fundamental individual right secured by that Amendment enforceable against the states and their political subdivisions. In keeping with this country's historical roots and traditions, this Court should not permit a state government to ride roughshod over a bedrock principle of liberty, a right deemed by Blackstone to be "one of the fundamental rights of Englishmen", *Heller*, 128 S. Ct. at 2798, and which pre-dates the establishment of United States – the right of individual citizens to keep and bear arms.

---

[2] This point has been recognized on numerous occasions. *See, e.g., Heller v. District of Columbia*, 128 S. Ct. at 2797, and *Nordyke v. King*, 563 F.3d 439, 452 (9th Cir.), *reh'g granted*, 575 F.3d 890 (9th Cir. 2009) (the right to bear arms is a fundamental right).

ARGUMENT

I. The Right To Bear Arms Is A Fundamental Right of All Americans Guaranteed By The Fourteenth Amendment And Applies Equally To The States And The Federal Government.

As this Court held in *Heller*, the right to keep and bear arms secured by the Second Amendment is not limited to the context of militias. Citing William Blackstone, the majority in *Heller* found the origin of the right to be variously "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Heller*, 128 S. Ct. at 2798 (citations omitted). Around 200 years after Blackstone, it fell to George Orwell to opine that the rifle hanging on the wall of the flat or cottage of the working classes was "the symbol of democracy." *See* Michael Shelden, *Orwell: The Authorized Biography* 328 (1991). Even the Seventh Circuit recognized in its decision below that the Second Amendment protects the right of citizens to keep and bear arms in their homes for the lawful purpose of self-protection. *National Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009).

Thus, *Heller* and other cases have resolved the question of whether the right to bear arms relates to militias, and have instead established the inviolable right of individuals to keep and bear arms in their private homes. While the opinion in *Heller* was limited to the federal enclave of Washington D.C., the Second Amendment itself clearly is meant to apply more broadly. The Second Amendment proclaims in unambiguous terms: "A well-regulated Militia, being necessary to the security of a free State, **the right of the people to keep and bear Arms, shall not be infringed**" (emphasis added). Courts have found that handguns fall within the definition of arms under the Second Amendment. *See, e.g., Parker v. District of Columbia*, 478 F.3d. 370 (D.C. Cir. 2007), *aff'd in part, sub nom., District of Columbia v. Heller*, 128 S.Ct. 2994 (2008).

Since at least the turn of the 20th century, this Court has not hesitated to ensure that the essential, fundamental liberties set forth in the Bill of Rights are protected from state impairment through "incorporation" of those rights into the Fourteenth Amendment, which provides in relevant part,

> [n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Court summarized the basis for "incorporation" as follows:

> So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.

Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grds.*, *Benton v. Maryland*, 395 U.S. 784 (1969). Furthermore, this Court "has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights[.]" *Benton*, 395 U.S. at 794) (citing *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)).

Thus, the primary guidance on the scope of liberties protected against state encroachment by the "spacious language" of the Fourteenth Amendment is to be found in the first ten amendments to the Constitution, collectively the Bill of Rights. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968). Incorporation depends upon "whether a right is among those fundamental principles of liberty and justice which lie at the base of our civil and political institutions . . . whether it is basic in our system of jurisprudence[.]" *Id.* at 148-49 (citations and internal quotations omitted). As the Ninth Circuit wrote recently, a substantive right is fundamental if it is "necessary to an *Anglo-American* regime of ordered liberty." *Nordyke v. King*, 563 F.3d 439, 450 (9th Cir. 2009) (quoting *Duncan*, 391 U.S. at 149, n. 14).

From the foregoing, it should therefore be apparent that government in all its forms is prohibited from constricting the fundamental rights recognized by the nation's founders as essential for the protection of freedom and secured to citizens of the United States by the Bill of Rights. That being so, there can be no room for doubt that, as recognized by the Ninth Circuit in *Nordyke*, 563 F.3d at 439, the Second Amendment's unequivocal grant of the right to keep and bear arms must fall within the ambit of the liberties, privileges and immunities protected by the Fourteenth Amendment.[3]

The holding in *Heller* should not be misinterpreted as this Court's narrow attempt to protect the rights of D.C. citizens alone. Rather, it is more accurately characterized as a triumph of individual liberty over encroachment by government of any sort. The Second Amendment was appended to the Constitution to provide citizens with the means to protect themselves, and was meant to restrain overbearing legislatures at all levels of government bent upon interfering with the basic right to keep and bear arms.

The Seventh Circuit in this case avoided addressing the conflict between the Second Amendment's guarantees and a local restriction nearly identical to the one struck down in *Heller* by embracing the expedient that the Second Amendment applies only against the federal government, not against the states or their subdivisions. *National Rifle Ass'n of America*, 567 F.3d at 859. *See also Bach v. Pataki,* 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006). This avoidance may at best be characterized as peculiar, given that most other provisions of the Bill of Rights have now been incorporated by the Fourteenth

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[3] Although the states are far from uniform in this belief, with some jurisdictions holding that there is no absolute, individual right to bear arms. *Gardner v. Vespia*, 252 F.3d 500 (1st Cir. 2001); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995).

Amendment. Moreover, the holding in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and later cases such as *United States v. Cruikshank*, 92 U.S. 542 (1876), regarding the scope of the Fourteenth Amendment upon which the Seventh Circuit relied, have been widely discredited. In fact, it would not be an overstatement to say that "everyone agrees that the Court [in *Slaughter-House*] incorrectly interpreted the Privileges or Immunities Clause." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994).

Allowing states and localities to prevent citizens from possessing handguns in their homes also conflicts with the *Nordyke* court's conclusion that the right to arms in the United States was "deeply rooted in this Nation's history and tradition", a history it found to be "compelling." *Nordyke*, 563 F.3d at 454-455. The court there, after an exhaustive analysis of the history of "incorporation" and the Second Amendment, concluded that "language throughout *Heller* suggests that the right is fundamental by characterizing it the same way other opinions described enumerated rights found to be incorporated." *Id.* at 456-57.

If this Court does not recognize the applicability of the Second Amendment to the states, it runs the risk of creating a patently absurd legal bifurcation, according to which although the federal government, under which the federal government, by virtue of *Heller*, could not deprive individuals of their right to keep and bear arms, while individual states would have the power to restrict firearm possession. The fundamental right identified in Heller could become nothing more than a mirage, subject to restriction and outright elimination at the whim of state actors. This Court's "incorporation" of the Bill of Rights is aimed at avoiding such a calamitous and unsustainable situation. It was Thomas Jefferson, a great advocate of states' rights, who wrote, in his Draft Constitution for Virginia of 1776, that "[n]o freeman shall be debarred the use of arms (within his own lands)."[4]

Where, as in the instant case and in *Heller*, the laws passed by legislatures (be they local or federal) infringe upon a right deemed "necessary to the security of a free state," it falls to this Court to strike them down in accordance with the principle set out by Justice Paterson even before Chief Justice Marshall's famous dictum in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803),:

> [I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of

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[4] Draft Constitution for Virginia 1776, *available at* http://avalon.law.yale.edu/18th_century/jeffcons.asp

> all law, and is a rule and commission by which both legislators and judges are to proceed.

Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012, 1015 (1795).

Simply put, the legislative branch of the states or federal government cannot be given free reign over determining the efficacy of a provision of the Bill of Rights. Politicians are not judges; they are democratically accountable representatives of the people, experts in policy and not, on the whole, constitutional law and the legal ramifications of their legislative acts. If, as sometimes happens, legislators make errors and end up passing laws not in accordance with the Constitution, it falls to this Court to correct them. The case at bar presents an ideal opportunity for this Court to affirm the applicability of the Second Amendment to the states and local governments. In so doing, it would also be reiterating that the Constitution is a living instrument which must be read in light of present crime problems and social conditions. Simply because there is no militia today does not render the Second Amendment null and void.

The City of Chicago today has serious crime problems. For example, in 2008, 80.6% of homicides were committed with guns,[5] and of the total number of 412 homicides that year, 92 were perpetrated in residences.[6] As this Court noted in *Heller*, the protection of all forms of communications is now read into the First Amendment, and the Second Amendment accordingly refers to all instruments which may be construed within the definition of "bearable arms", whether they existed at the time the Amendment was introduced or not. *Heller*, 128 S.Ct. at 2781-92.

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[5] The statistics include handguns, rifles and shotguns.

Just as this Court's reading of the meaning of arms in the Constitution has evolved from the meaning it would have been accorded at the time the Second Amendment was adopted, so the purpose of the Amendment must be read in light of today's altered social conditions. The first clause of the Second Amendment references the militia, and thus makes the existence of that militia one of the purposes of the Amendment. However, this reference does not make it the only, or even the most, informing purpose. The second clause is significantly broader.

When the Second Amendment was drafted, the definition of those it covered was narrow, and limited to members of the militia. In *U.S. v. Miller*, 307 U.S. 174, 179 (1939), this Court observed that at that time, the militia "comprised all males physically capable of acting in concert for the common defense."

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[6] Chicago Police Department, 2008 Murder Analysis in Chicago, *available at* https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Homicide%20Reports/2008%20Homicide%20Reports

In other words, the Amendment drew within its ambit only an extremely narrow group of individuals. Were this Court to find that the Second Amendment applied to the states as well as to the federal government, it would of course not be practicable to limit its holding to men only, or only to those capable of acting for the common defense. In other words, the reading this Court gives to the Constitution has evolved, and continues to evolve, so as to prevent the Constitution from becoming little more than a relic with no applicability to the lives of citizens today.

In the same way, it is necessary for the Court to consider the purpose informing the Second Amendment today. Although it is clear that militias as the authors of the Second Amendment knew them do not exist today, the need for self-defense and defense of the home has not disappeared. The figures cited *supra* make apparent the fact that homicides occasioned by firearms amount to more than a small percentage of all crimes committed in Chicago. As one observer has pointed out, crime is even more prevalent in America's inner cities than in its rural areas, because "[t]he concentrated poverty of inner-city neighborhoods erodes the web of social connections that often restrains crime in urban areas." Bruce Western, *Punishment and Inequality in America*, 109 (2007).

Moreover, if the argument against allowing handguns in citizens' homes is motivated by safety concerns, the legislative remedy should be the adoption of stricter state laws on the storage of handguns, not to their outright ban. Safety concerns may also be effectively addressed by laws requiring background checks prior to the purchase of a firearm. In fact, a bipartisan 2009 survey of 612 ~~registered~~ voters by the Illinois Campaign to Prevent Gun Violence revealed that 90% of those asked were in favor of background checks for all gun sales.[7] Most importantly, such laws would not threaten or infringe upon the right guaranteed in the Second Amendment, but would simply place reasonable restrictions upon that right as are in the public interest.

CONCLUSION

For the aforementioned reasons, therefore, this Court should hold that the right to hold and bear arms as enumerated by the Second Amendment to the Constitution of the United States applies to the states and territories of the United States, and not only to the federal government.

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[7] Illinois Campaign to Prevent Gun Violence, Press Release, "New Bipartisan Poll Shows Overwhelming Support for Common Sense Gun Laws", 3/3/2009, available at: http://www.icpgv.org/icpgv_media3.html.

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SECOND AMENDMENT FOUNDATION, INC.;
AND ILLINOIS STATE RIFLE ASSOCIATION,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF *AMICUS CURIAE* SAFARI CLUB INTERNATIONAL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

Safari Club International ("SCI") is a nonprofit corporation incorporated in the State of Arizona, operating under §501(c)(4) of the Internal Revenue Code, with principal offices and places of business in Tucson, Arizona and Washington, D.C. and a membership of approximately 53,000. SCI's missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. SCI carries out its conservation mission through its sister organization, Safari Club International Foundation. SCI has long been involved in litigation and other advocacy efforts to promote hunting and conservation.

Many of the hunting activities in which SCI members regularly engage will be placed at risk if the Second Amendment is not incorporated against the states. SCI members hunt in accordance with federal, state, county and/or municipal statutes, regulations and ordinances. They hunt within the boundaries of cities and counties and on National Wildlife Refuges and other federal lands located within or in the vicinity of urban and suburban areas. They hunt with firearms that are often encompassed within firearms bans and must transport these firearms to private and public hunting areas.

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[1] The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named *amicus curiae* made a monetary contribution to this brief. Counsel of Record for Petitioner and Respondents consented to the filing of all *amicus curiae* briefs with proper notice, which the *amicus curiae* provided.

If local or even state authorities regulate firearms unconstrained by the Second Amendment, many of the hunting activities and opportunities that SCI members enjoy may become illegal, if not impossible. Whether the Second Amendment is incorporated against the states will not only govern the ownership, carriage and use of firearms, but will also heavily influence the ability of sportsmen and women to use those firearms.

In this *amicus* brief, SCI will "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37(1). SCI seeks to provide information that will "be of considerable help to the Court." *Id.* SCI will not be addressing the merits of the claims or legal arguments, especially as the two Petitioners, and possibly other *amici*, will more than adequately cover those areas. Instead, SCI files this amicus brief to describe the impact that the court's ruling will have on the hunting community. In doing so, SCI will try to "provide important assistance to the court . . . [by] 'explain[ing] the impact a potential holding might have on an industry or other group.'" *Neonatology Associates, P.A. v. Commissioner of Internal Revenue Service*, 293 F.3d 128, 132 (3rd Cir. 2002) (Alito, J.), quoting Luther T. Munford, *When Does the Curiae Need An Amicus?,* 1 J.App. Prac. & Process 279 (1999).

SUMMARY OF THE ARGUMENT

The ability to bear arms is essential to the hunter. Whether the weapon of choice is a rifle, shotgun, muzzleloader or handgun, the Second Amendment protects the ability to carry and use that weapon, including for hunting. In states that have no state constitutional right to bear arms provisions, or where such protections are weaker than the Second Amendment provides, the ownership, transportation and use of firearms for hunting are always at risk to potentially arbitrary whims and political agendas of city, county and/or state officials. Incorporation of the Second Amendment against the states is necessary to prevent bans and restrictions that could interfere with valued and beneficial hunting activities.

Americans participate in hunting activities throughout the United States, on public and private lands. Contrary to common perceptions, hunting is not confined to rural areas, but in fact is part of urban, suburban and rural recreation and wildlife management. Recreational hunting has been lauded by courts, presidents, and Congress and has repeatedly been recognized as a tool for wildlife management and conservation.

The case before the Court arose from a city's restrictions on the use of firearms. Similar bans and restrictions in other U.S. cities, townships, counties or even states could interfere with existing and future valuable hunting opportunities. Urban hunting opportunities are particularly vulnerable. Similarly, National Wildlife Refuge hunting in and near urban and suburban areas is at risk despite the fact that both Congress and the Executive branch have designated hunting a priority use of the National Wildlife Refuge System. Traveling with firearms to choice hunting areas could be made impossible by overly general and unnecessary weapons bans. The growing use of urban and suburban hunts for managing wildlife overpopulations could similarly be thwarted by local firearms restrictions.

The impact of the Second Amendment is not limited to ownership and use of firearms. By practical extension, its protections facilitate hunting. As an *amicus curiae* SCI offers this brief to demonstrate the hunting implications of the question this Court will resolve. SCI asks this Court to rule in favor of the Petitioner and in so doing to issue a decision that will ensure consistency in the protections necessary for the continued enjoyment of hunting.

ARGUMENT

A. Without Incorporation of the Second Amendment Through the Fourteenth Amendment, the States Will be Free to Unduly Restrict Firearm Use

The Court should incorporate the Second Amendment through the Fourteenth Amendment so that the Second Amendment applies to the states. Without incorporation, individual state constitutional provisions are all that protect hunters from those who seek to limit or restrict the possession, carriage and use of the firearms necessary for hunting. Six states, including California, Iowa, Maryland, Minnesota, New Jersey and New York, have no state constitutional protections of the right to keep and bear arms. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Texas Rev. L. & Pol. 191, 193-205 (2006). Other states offer only conditional or limited protections. For example, the Massachusetts' Constitution provides that "[t]he people have a right to keep and to bear arms for the common defence." MASS. CONST. pt. I, art. XVII (1780). Massachusetts courts have interpreted that provision to protect only a collective right to bear arms. *Com. v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976) ("the declared right to keep and bear arms is that of the people, the aggregate of citizens.") Illinois' constitutional provision subjects the right to keep and bear arms to restrictions authorized through the state's police power. ILL. CONST. art. 1, §22 (1970) ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."). Without the consistency that incorporation of the Second Amendment against the states will bring, individuals who hunt in states or travel with hunting firearms through states without protections or with limited protections could suffer diminished or lost ability to own, carry and use their firearms for hunting.

B. Regardless of Their Intent, Firearms Bans Affect the Firearms Hunters Use

Laws designed to restrict firearms may not intentionally focus on the firearms hunters use, but can easily sweep them into their reach. Handguns are a frequent target of firearms restrictions. A significant number of hunters hunt with handguns. Safari Club International has an entire chapter of members who hunt with handguns. A survey of active hunters indicated that 69% used rifles, 55% used shotguns, 13% used muzzleloaders, and 8% used handguns for their hunting activities. Responsive Management/National Shooting Sports Foundation, *The Future of Hunting and the Shooting Sports: Research-Based Recruitment and Retention Strategies*, 13 (Mark Duda ed., 2008) *available at*: http://www.responsivemanagement.com/download/reports/Future_Hunting_shooting_Report.pdf (retrieved November 20, 2009). With over 12 million hunters nation-wide, over a million handgun hunters could be affected by overzealous state and local legislators.

Another frequent target of gun control is military-style semi-automatic rifles, some of which are popular hunting firearms. The defunct 1994 federal gun ban targeted these sporting rifles, as do some current state gun laws. *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. 103-322, Title XI, Subtitle A (1994) (codified as amended in scattered sections of 18 U.S.C.) (expired due to sunset provision on September 13, 2004). When these types of gun bans are considered, legislators and gun control advocates fail to understand or acknowledge that many hunting rifles are military-style firearms. Dick Metcalf, *A Reasoned Look at the AR-15 Question*, The Outdoor Wire, March 2, 2007, http://www.theoutdoorwire.com/archived/2007-03-02_tow.html (retrieved November 19, 2009) ("Virtually every type of center fire hunting and sporting rifle in existence started off as a military weapon"). Bolt-action hunting rifles are direct descendants of the 1898 Mauser and 1903 Springfield, which were the preeminent military rifles during World War I. National Shooting Sports Foundation, *The American Rifle*, http://nssf.org/msr/history.cfm (retrieved November 19, 2009); *see also* Dave Anderson, *50 Years of Sporting Rifles*, Guns Magazine, May 2005, http://findarticles.com/p/articles/mi_m0BQY/is_5_51/ai_n13469642/ (retrieved November 19, 2009) ("Even 50 years ago the Model 70 was hardly a new design—its features derive from the 1898 Mauser and 1903 Springfield."). Additionally, semi-automatic hunting rifles were popularized after the use of the M1 Garand by U.S. troops during World War II. *American Rifle*. Currently, one of the best selling semi-automatic sporting rifles is the AR-15, which is modeled after the modern M-16 used by the U.S. military since Vietnam. *American Rifle; Metcalf* p.1. When state or local officials pass gun control laws, popular hunting firearms are inevitably encompassed within those controls and hunters are hurt. The incorporation the Second Amendment against the states would provide an additional check on the adoption of such improvident laws.

C. Hunting Activities, at Risk from the Absence of Second Amendment Protections, are Beneficial as a Tool for Recreation, Wildlife Management and Conservation

As discussed in the following Sections, the failure to incorporate the Second Amendment against the states would allow if not embolden state and local governments to increase regulation of gun ownership, use, and transport. This increased gun control would interfere with and discourage legal and beneficial hunting activities. A failure to incorporate would undermine conduct that is of great value to society and to the environment. Hunting plays a strategic role in wildlife management and conservation in the United States and throughout the world. Courts, presidents, state legislatures and federal agencies have acknowledged these benefits of hunting.

Many states have formally acknowledged hunting's benefits by adopting constitutional provisions that protect the right to hunt. VT. CONST. ch. II, § 67 (1777) ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly."); MINN. CONST. art. 13, § 12 (1998) ("Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good."); LA. CONST. art. 1, § 27 (2004) ("The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people."); ALA. CONST. art. 1, § 36.02 (1996) ("All persons shall have the right to hunt and fish in this state in accordance with law and regulations.").

Numerous state legislatures have codified statements about the social and environmental benefit that hunting brings to their human and wildlife populations and state resources. Several states have adopted laws recognizing hunting as a recreational, wildlife management and conservation tool. Arkansas and Illinois, for example, describe hunting as "an essential component of effective wildlife management, in that it is an important tool for reducing conflicts between people and wildlife and provides incentives for the conservation of wildlife, habitats, and ecosystems on which wildlife depend[.]" ARK. CODE ANN. § 15-41-302(5) (2005); 520 ILL. COMP. STAT. 30/5(5) (2005); *see also* MD. CODE ANN., NAT. RES. § 10-212(a)(5) (2005) (declares that hunters are the foremost supporters of sound wildlife management and conservation practices in the United States, hunters and hunting organizations provide direct assistance to wildlife managers and enforcement officers, and hunting is an effective component of effective wildlife management and provides incentives for the conservation of wildlife, habitats and ecosystems). Colorado law directs that the state shall "[a]llow sport hunting, trapping, and fishing as a wildlife management tool and as the primary method of affecting a necessary wildlife management on lands under the control of the division of parks and outdoor recreation." COLO. REV. STAT. ANN. § 33-10-101(2)(e) (2009). Louisiana describes hunting of migratory waterfowl as a "most valuable asset," LA. REV. STAT. ANN. § 56:151 (2008), and Louisiana's Hunting and Fishing Advisory Education Council, established by state statute, is tasked "to promote the many benefits of hunting and fishing among Louisiana citizens and to educate the citizens of the state on those benefits." *Id* § 56:699.21(A) (2008). Georgia's legislature notes the "important role that hunting and fishing and the taking of wildlife play in the state's economy and in the preservation and management of the state's natural communities." GA. CODE ANN. § 27-1-3 (2009).

State courts have similarly recognized the beneficial role that hunting plays. For example, the Supreme Court of the State of Connecticut acknowledged hunting as a habitat and wildlife management tool:

> regulated hunting [is] the most cost efficient, effective means of controlling the deer population, according to the collective experience of the fifty states. . . . Hunting also helps to control the population of geese, coyotes and a variety of small game.

State v. Ball, 796 A.2d 542, 553 (Conn. 2002). The Maine Supreme Court addressed this issue in a tax case. The Court first observed that "the experience of the Department has been that, unless the deer herd in a given sanctuary or preserve is periodically reduced, the animals tend to increase to a point where the food supply is insufficient, resulting in the starvation of some animals . . . ." *Holbrook Island*

Sanctuary v. Inhabitants of Town of Brooksville, 214 A.2d 660, 664 (Me. 1965). The Court then denied a charitable tax designation for a private "game preserve" where hunting was prohibited because the government biologist deemed such conditions harmful to the wildlife. *Id.* at 666. *See also Wisconsin v. Herwig*, 117 N.W.2d 335, 337 (Wisc. 1962) ("hunting regulations in the interest of conservation may be enacted in the exercise of the police power."); *State Game & Fish Comm'n v. Gill*, 538 S.W.2d 32, 36 (Fogleman, J. dissenting) (Ark. 1976) ("The evidence also shows that hunting is necessary to maintain the proper population balance as a conservation measure.").

Both the federal executive and legislative branches have recognized the significance of hunting. President Clinton designated hunting as a priority public use of the National Wildlife Refuge System. Exec. Order No. 12966, 61 Fed. Reg. 13647 (March 25, 1996). The National Wildlife Refuge System Improvement Act designates hunting as one of six *priority* public uses of the system. 16 U.S.C. § 668dd(a)(3)(C) (1998) ("compatible wildlife-dependent recreational uses are the priority general public uses of the System and shall receive priority consideration in refuge planning and management"); *id.* § 668ee(2) (listing "hunting" first in the definition of "wildlife-dependent recreational uses").

The U.S. Fish and Wildlife Service ("Service"), in charge of the National Wildlife Refuge System, has established, in public documents dealing with the environmental impact of refuge hunting opportunities, that hunting serves to control wildlife populations and to improve habitat. For example, the Service described the potential impact to refuge habitat on a Maine National Wildlife Refuge if the unit terminated deer and goose hunting:

> A lack of hunting on the refuge diminishes the Refuge's ability to manage wildlife populations. Wildlife habitats susceptible to damage, such as native wetlands and marshes, would continue to be overgrazed by increasing numbers of resident Canada geese, resulting in increasingly degraded habitat for black ducks, green-winged teal, and other ducks, as well as sora, Virginia rail, and other waterbirds (Haramis and Kearns 2000). Likewise, an increased local deer population to a density of 15-20 deer per square mile would likely negatively affect forest regeneration, resulting in degradation of habitat for woodcock, chestnut-sided warbler, and other migratory birds that use regenerating forest, ...

Amended Environmental Assessment, Public Hunting on Moosehorn NWR, April 2007, p. 28. http://www.fws.gov/northeast/pdf/moosehorn.pdf (retrieved November 12, 2009). In analyzing the cumulative impact of hunting on refuges throughout the National Wildlife Refuge System, the Service recognized benefits not only to individual refuges, but to wildlife habitat generally, both on and off the refuge system. The analysis also recognized that, because hunting improves habitat and wildlife health, it leads to enhanced recreational opportunities for hunters and non-hunters.

> The control of hunted deer populations, considered collectively with similar wildlife management efforts on numerous refuges throughout the National Wildlife Refuge System, conserves the cumulative health of the habitat of the flyway in which the refuge is located and migratory birds

> that utilize that flyway. The prevention of browse lines and other habitat degradation is beneficial for ground nesting and lower arboreal nesting birds. *Similarly, the benefits that hunting brings to each refuge improves the entire refuge system's available habitat and native wildlife populations and also provides the public generally with more valuable and diverse refuge recreational opportunities of all kinds.*

Environmental Assessment, Activities on Portions of Big Oaks National Wildlife Refuge as Described in the Hunting and Fishing Plan, Final, p. 24 (April 27, 2007) (emphasis added) *available at* http://www.fws.gov/midwest/Refuges/huntEAs/BigOaksEA.pdf (retrieved November 18, 2009).

Federal law has also made hunting an essential component of the financial aspect of wildlife and habitat management and conservation throughout the United States. The Federal Aid in Wildlife Restoration Act directs a portion of the excise tax on sporting arms and ammunition to the states to finance approved projects involving wildlife habitat, introduction of wildlife onto habitat, and wildlife research. 16 U.S.C. § 669 *et seq*. (1937). Under the Federal Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. § 718 *et seq*. (1934), "duck stamps" serve as the license for hunting migratory waterfowl and the means of funding the conservation of those waterfowl, generating over $700 million for wetland conservation and migratory bird habitat. State of the Birds, p. 20 (2009) http://www.stateofthebirds.org/pdf_files/State_of_the_Birds_2009.pdf (retrieved November 12, 2009).

Anything that interferes with such hunting opportunities and activities not only harms an important recreational pursuit, but the management and conservation benefits that flow from hunting.

D. Without Second Amendment Protections, Arbitrary Firearms Controls Could End Valuable and Beneficial Hunting Practices, Including in Urban and Suburban Areas

Inadequate protection of the right to bear arms threatens all types of hunting, but urban and suburban hunting may face the greatest risk. A common misperception is that hunting is only a rural activity. To the contrary, a significant percentage of hunting takes place in suburban areas and often within city limits. In fact, a Respondent in this case, the City of Chicago, allows hunting within its limits. Chi. Mun. Code §8-24-050 (1990). In states that lack their own state constitutional versions of the Second Amendment, or inadequate protections, these urban hunting opportunities are vulnerable to the whims of municipal officials who may fail to understand or appreciate the recreational values and the wildlife management role that hunting plays in the urban setting.[2]

California is one state that lacks any constitutional protections for the ownership, carriage or use of firearms. Hunting that currently takes place within city limits could easily be undermined by arbitrary bans or restrictions on the use or carriage of firearms. For example, the City of San Diego currently permits waterfowl hunting (ducks, geese, coots/gallnules and common snipe) for California state licensed hunters in specifically designated areas of lakes within the city limits. San Diego also allows turkey hunting in identified areas. San Diego City Lakes and Recreation, http://www.sandiego.gov/water/recreation/waterfowl.shtml (retrieved November 19, 2009). San Diego also authorizes the City, through the City Manager, to designate property of the water impounding system for the purpose of hunting. San Diego, Cal., Code § 67.0303 (2000), and to issue permits for hunting in those areas. *Id.* § 67.0305 (2000). The Code further states that the City Council has authority to issue permits or designate areas where firearms can be operated legally within city limits. *Id.* § 53.10 (e) and (f) (1964). Without Second Amendment protections, arbitrary bans or restrictions on the use of firearms could make these valued hunting opportunities impossible, if not illegal.

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[2] Although this brief focuses on the potential for local governments to impose limitations on firearms in the absence of Second Amendment protections, SCI does not mean to suggest that state governments could not or would not impose similar restrictions on a statewide basis. States like California, Minnesota, Iowa, New York, New Jersey and Maryland could utilize their freedom from incorporation to impose broad and unreasonable restrictions on firearms ownership, transportation and use.

Iowa is another state lacking a constitutional right to bear arms. Consequently, Iowa hunters' opportunities to participate in hunts within city boundaries are left to the authority of municipal government officials. For example, the city of West Des Moines, Iowa allows hunting, with firearms, for deer, turkey and migratory waterfowl on certain private property with the permission of the owner, within the city limits. West Des Moines, Ia., Code § 5-2-30A (2009). Hunters in urban areas of Massachusetts, where only limited protections apply, could suffer a similar fate. Many cities in Massachusetts offer hunting opportunities. Revere, for example, allows game hunting with a shotgun within city limits. Revere, Mass., Code § 9.20.010 (2007). All these hunting opportunities could fall or be made impossible by firearms bans or restrictions.

In addition to its recreational and sustenance value, hunting is gaining recognition as a wildlife management tool in urban and suburban areas. State and local fish and game authorities are using urban and suburban managed hunts with increasing frequency to reduce overpopulations of deer (and other wildlife) in and near residential areas. Hunts are designed to reduce the incidence of vehicle/deer collisions, limit property damage caused by deer browsing on residential plantings, lessen the incidence of lyme disease spread by deer ticks, and improve deer herd health where malnutrition and disease are the product of deer exceeding the carrying capacity of available habitat.

Hunters are being called upon to assist state and local officials in culling deer populations on public and private land. In some areas, hunters have participated in deer management as volunteer sharpshooters. In Watchung Reservation in Union County and the South Mountain Reservation in Essex County, New Jersey, volunteer sportsmen participate as agents of wildlife management authorities to reduce the counties' deer populations. Hunters who qualify, based on marksmanship proficiency, cull deer outside of traditional harvest seasons. New Jersey Community Based Deer Management (2009), http://www.njfishandwildlife.com/cbdmp.htm (retrieved November 17, 2009).

Other communities have dealt with deer overpopulations by opening up new hunting areas or seasons, increasing harvest limits and/or lengthening hunting seasons to encourage recreational hunters to increase their take of deer. In densely populated or urban areas, state and local wildlife management authorities have often turned to controlled hunts to manage their deer populations.

> Controlled deer hunts are an alternative management technique in areas where people find traditional sport hunting intrusive, or where specific objectives of the landowner/manager require limited or directed hunter activity. Controlled deer hunts limit hunters to a modified season which is usually more restrictive than traditional hunting in terms of hunter density, methods of take, and size of huntable area than do deer hunting seasons in surrounding areas.

An Evaluation of Deer Management Options, Northeast Deer Technical Committee, May 2009, p. 23, http://www.dec.ny.gov/docs/wildlife_pdf/Deermgtopt08.pdf (retrieved November 17, 2009). The New York State Department of Environmental Conservation endorses controlled hunting for deer management in urban or suburban areas:

> The effectiveness and public acceptance of hunting as a deer management program can be increased through controlled hunts, particularly in areas where traditional hunting is impractical due to housing density, local laws, or restricted land access. Controlled hunts can be tailored to meet a variety of local conditions. Marksmanship requirements and restrictions on who may hunt, hunting methods, hunting times and locations, and the sex, age and number of deer to be taken are often employed.

A Citizen's Guide to Management of White-Tailed Deer in Urban and Suburban New York, New York State Department of Environmental Conservation, 2007, p. 9; http://www.dec.ny.gov/docs/wildlife_pdf/ctguide07.pdf (retrieved November 17, 2009).

Despite the support for hunting offered by state wildlife managers, local firearms bans can make it impossible for members of the hunting community to participate in important wildlife management efforts. Without Second Amendment protections consistently extended throughout the country, those who wish to restrict and control the ownership, carriage and use of firearms can, purposely or not, also sabotage reasonable wildlife management strategies.

E. Bans or Restrictions on Firearms Could Interfere With Federal Hunting Priorities

The risks to hunting on state, local, and private lands extend to federal lands. As discussed in Section C above, by federal statute and Executive Order, hunting has been designated a priority use for the refuges of the National Wildlife Refuge System. There are over 300 hunting programs on National Wildlife Refuges throughout the country.

Several National Wildlife Refuges have lands within the boundaries of one or more cities and provide hunting opportunities within city limits. Some of these refuges are located in states that do not provide constitutional protections for the right to bear arms. Minnesota Valley National Wildlife Refuge, for example, has lands located within Shakopee, Savage and Carver city limits in Minnesota. The refuge provides hunting opportunities in each of the three cities. Hunting with firearms is permitted in the Savage City and Carver City portions of the refuge. Currently, Savage City's municipal code permits the use of firearms for purposes including hunting on National Wildlife Refuge land. Savage

City, MN., Code § 132.03(I)(1990). The Carver City Code also authorizes the use of firearms within city limits with city issued permits. Carver City, MN., Ordinances ch. 11, §1105.03 (2007). Without incorporation of the Second Amendment against the states, the cities that are the home to Minnesota Valley NWR's deer, waterfowl, small game and turkey hunting opportunities, could impose additional restrictions or bans on firearms that could interfere with refuge hunting opportunities presently allowed within city limits. Firearm restrictions and/or bans could make it difficult, if not impossible, for hunters to take advantage of the very hunting opportunities that Congress and the President prioritized.

Loss of hunting on refuges within city limits is a small part of a potentially larger problem—the interference with hunting opportunities on federal lands. National Wildlife Refuges are in every state, and most major U.S. cities are no more than one hour's drive from a National Wildlife Refuge. Welcome to the National Wildlife Refuge System (2009), http://www.fws.gov/refuges/about/welcome.html (retrieved November 18, 2009). Refuges are not the only federal lands where hunting is welcome. Hunting opportunities exist on the vast federal land holdings of the Bureau of Land Management, National Park Service and Forest Service, among other agencies. If cities, townships, counties and states have free reign to interfere with the right to bear arms, hunters who want to take advantage of the wealth of hunting opportunities on federal lands may be unable to obtain a firearm or transport it to their chosen hunting location.

F. Firearms Restrictions Can Inhibit the Transportation of Hunting Equipment

State or locally imposed restraints on the right to keep and bear arms can make it very difficult for the traveling hunter to comply with the law and can result in serious penalties for violations. Varying restrictions between the laws of different jurisdictions make travel with hunting firearms complicated if not impossible. A hunter who lives in one area but seeks to hunt in another might be required to transport his firearm through a variety of jurisdictions. Even the local police can have a difficult time properly enforcing these laws. *Revell v. Port Authority of New York and New Jersey*, 321 Fed.Appx. 113, 115 (3rd Cir. 2009) (Plaintiff en route to Pennsylvania was arrested for transporting a pistol and hollow-point bullets through Newark Airport. Charges against the accused were dismissed.).

A federal law designed to address this problem reveals that Congress has recognized that this concern is real and could become worse. Unfortunately, the law does not alleviate all the problems the traveling hunter might face. To help hunters and gun owners deal with the patchwork of state and local gun laws, Congress enacted the Firearms Owner Protection Act (FOPA) in 1986. This act states:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such

> firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A (1986).

The FOPA was specifically designed to help protect sportsmen traveling between states from inadvertently violating one or more laws within the complicated patchwork of state and local firearms provisions. 131 Cong. Rec. S9116 (daily ed. July 9, 1985) (statement of Senator Hatch). While the FOPA does provide some protections to hunters who travel with firearms, the law does not go far enough to protect the fundamental right to keep and bear arms. The FOPA only allows a hunter to transport his firearm "from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm." *Id.* This law was intended to provide adequate protection for interstate transport of firearms. In practice, the FOPA's protections have not met that expectation. The Department of Justice has interpreted this law to protect a person traveling with a firearm through a state only if that person makes no stops during transit. Letter from the Department of Justice letter to Congressman Young (February 18, 2005) http://www.handgunlaw.us/documents/doj_doc_nyc_air.pdf (retrieved, November 17, 2009) (describing how firearms must be transported without any interruption in the transportation). For many hunters, this protection would be insufficient. A hunter who travels with a firearm through several states on his way to hunt could potentially violate state or local laws by simply stopping to visit relatives or making a side-trip unrelated to his travel. Once the hunter stops for any sort of detour, he or she risks losing the protections of the FOPA. The incorporation of the Second Amendment would provide additional protection to the hunter who wants to make an interstate hunting trip without having to observe unnecessary and arbitrary firearm possession restrictions along the way.

The FOPA also provides no protection for the hunter who wishes to travel intrastate. The Department of Justice, a federal court, and the Massachusetts Attorney General agree that the FOPA applies only to the *interstate* transport of firearms. Department of Justice Letter at 2 (encouraging state and local authorities to continue to enforce their firearms laws); *Coalition of New Jersey Sportsmen v. Florio*, 744 F.Supp. 602, 610 (D.N.J 1990) (court held that the FOPA does not apply to the intrastate transport of firearms); 1986-87 Mass. Op. Atty. Opinion No. 4 p.3, 1986 WL 288992 (1986) ("Thus, the Massachusetts resident leaving the state, returning, or traveling within its borders, must comply with all state regulations."). Without Second Amendment incorporation, hunters traveling from one part of a state to another are not protected from inadvertently violating city or other local restrictions on the possession and carriage of hunting firearms.

CONCLUSION

Amicus Curiae Safari Club International requests that this Court reverse the ruling of the Seventh Circuit and declare that the Second Amendment must be incorporated against the states. Only with such a ruling can hunters be better assured that they will not face unnecessary and inappropriate restrictions on their ability to own, carry and use their hunting firearms. Only with such a ruling can hunters rest easier that they will not face detrimental obstacles to their participation in beneficial hunting activities on state, federal and private land.

Respectfully submitted,

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OTIS MCDONALD, *ET AL.*,
PETITIONERS,

v.

CITY OF CHICAGO, *ET AL.*
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR STATE FIREARM ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTERESTS OF THE *AMICI*[1]

The *amici* are state firearm associations from over forty of the fifty states.[2] The *amici* represent the interests of millions of citizens, members, and firearm owners across the United States from all walks of life and with political views that cover the spectrum. What unites the State Associations in this brief is their common interest in ensuring that the right of the people to keep and bear arms is properly recognized as a fundamental right incorporated as against the States.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part. In addition to the amici curie, the National Rifle Association Civil Defense Fund made a monetary contribution to the preparation of this brief.

[2] The state firearm associations represented include: Alabama Rifle and Pistol Ass'n, Alaska Outdoor Council, Arizona State Rifle & Pistol Ass'n, California Rifle & Pistol Ass'n, Colorado State Shooting Ass'n, Delaware State Sportsmen's Ass'n, Florida Sport Shooting Ass'n, Georgia Sport Shooting Ass'n, Idaho State Rifle & Pistol Ass'n, Indiana State Rifle & Pistol Ass'n, Iowa State Rifle & Pistol Ass'n, Kansas State Rifle Ass'n, League of Kentucky Sportsmen, Louisiana Shooting Ass'n, Pine Tree State Rifle & Pistol Ass'n (Maine), Maryland State Rifle & Pistol Ass'n, Gun Owners Action League (Massachusetts), Michigan Rifle & Pistol Ass'n, Minnesota Rifle & Revolver Ass'n, Mississippi State Firearm Owners' Ass'n, Missouri Sport Shooting Ass'n, Montana Rifle & Pistol Ass'n, Nebraska Shooting Sports Ass'n, Nevada State Rifle & Pistol Ass'n, Gun Owners of New Hampshire, Inc., Ass'n of New Jersey Rifle & Pistol Clubs, Inc., New Mexico Shooting Sports Ass'n, New York State Rifle & Pistol Ass'n, North Carolina Rifle & Pistol Ass'n, Ohio Rifle & Pistol Ass'n, Oregon State Shooting Ass'n, Pennsylvania. Rifle & Pistol Ass'n, Rhode Island State Rifle & Revolver Ass'n, Gun Owners of South Carolina, South Dakota Shooting Sports Ass'n, Tennessee Shooting Sports Ass'n, Texas State Rifle Association, Utah State Rifle & Pistol Ass'n, Vermont Federation of Sportsman's Clubs, Inc., Virginia Shooting Sports Ass'n, Washington State Rifle and Pistol Ass'n, and Wisconsin Firearm Owners, Ranges, Clubs and Educators, Inc. (collectively, "State Associations").

This Court's decision in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008), confirmed that the Second Amendment reflects an individual right to keep and bear arms for the purpose of self-defense. The State Associations now ask the Court to confirm that the Second Amendment rights—like those of the First and Fourth Amendments—apply to the states as well as to the federal government.

This issue has concrete implications for the State Associations. Like all Americans, the State Associations' members live in a mobile society. Those members frequently participate in competitions, hunting, or other sporting events in other states. Similarly, the members' jobs will often cause them to move to other states, perhaps several times during their lives. Whether or not the members may exercise the fundamental rights recognized in the Second Amendment should not be dependent on their particular latitude and longitude within these United States of America.

SUMMARY OF THE ARGUMENT

This Court has never squarely addressed whether the Second Amendment is incorporated as against the States under the incorporation standards of modern jurisprudence. Opponents of incorporation will doubtlessly argue for the perpetuation of the anti-incorporation views from cases such as

Cruikshank and *Presser*. Those cases were written during a time of open animus toward groups such as African-Americans and labor unions, and they bear the stigma of goal-oriented decisions. This Court has long since disavowed both the biases reflected in those decisions and their view of incorporation standards.

When judged by the Court's modern standards, the question of incorporation of the Second Amendment becomes self-evident. The Second Amendment right to keep and bear arms for purposes of self-defense is both deeply rooted in this nation's history and traditions, and implicit in the Anglo-American concept of ordered liberty. Indeed, the Court admitted as much in both *Cruikshank* and *Presser*. Thus, the Second Amendment is properly incorporated as against the States.

ARGUMENT

I. *DRED SCOTT*, *CRUIKSHANK*, AND THEIR PROGENY REFLECT A SAD LEGACY, AND THIS COURT SHOULD NOT PERPETUATE THEIR OBSOLETE ANTI-INCORPORATION VIEWS.

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among them are Life, Liberty, and the pursuit of Happiness; that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Despite the magnitude of this pronouncement, the United States historically has been inconsistent in how it has applied the precept of fundamental rights. This inconsistency often manifested itself in situations where the person who might have invoked these rights was not of a favored class, such as slaves, former slaves or labor union members.

In 1857, the United States Supreme Court issued its infamous opinion in *Dred Scott*. *Scott v. Sandford*, 60 U.S. 393 (1857). Dred Scott was a slave who sued for his freedom in federal court, asserting diversity of citizenship as a basis for invoking the jurisdiction of the federal court. Chief Justice Taney, writing for the Court, held that the federal courts did not have jurisdiction over Dred Scott's claim because African-Americans that were descendents of slaves were not citizens of the United States. In support of this holding, he cited a "parade of horribles" that would occur if the Court were to hold otherwise:

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in

> public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*

60 U.S. at 417 (emphasis added).

Sixteen years later, on Easter Sunday 1873, William J. Cruikshank and 140 other white Democrats attacked a group of African-American Republicans who were defending the Grant Parish courthouse in Louisiana. After the battle, Cruikshank took charge of the African-American prisoners, marched them away from the courthouse two-by-two, and had these unarmed men executed. Cruikshank himself made it a point to line up two of the prisoners in an attempt to kill them both with a single shot. CHARLES LANE, THE DAY FREEDOM DIED (2008) at 106.

Cruikshank was subsequently tried and convicted of violating these U.S. citizens' civil rights, including their right to assemble and petition the government for a redress of grievances under the First Amendment and their right to keep and bear arms under the Second Amendment.[3]

Eventually, the case made its way to the United States Supreme Court, where the Court reversed all of the convictions. *United States v. Cruikshank*, 92 U.S. 542 (1875). To support its holding, the Court found that neither the First Amendment nor the Second Amendment was incorporated as against the states precisely *because* these rights were fundamental rights and not created by the Constitution:

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[3] One of the witnesses against Cruikshank was Levi Nelson, who had successfully played dead after Cruikshank's above-mentioned attempt to kill two of the African-Americans with a single shot. THE DAY FREEDOM DIED at 166-68.

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.
>
> ...
>
> The second and tenth counts are equally defective. The right specified there is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

92 U.S. at 551-553.

Mere months after Cruikshank executed those African-American citizens, the United States entered a prolonged depression, beginning with the Great Panic of 1873. This led to a fear of the rising influence of labor unions. In Illinois, it also led to the formation of the privately-funded and restricted-membership Illinois National Guard.

The largest single "subscriber" or financial backer of this paramilitary force was George M. Pullman. HOLDRIDGE O. COLLINS, HISTORY OF THE ILLINOIS NATIONAL GUARD (1884) at 14. Mr. Pullman, of course, is perhaps best known for inventing and promoting the Pullman railroad car and his role in taking control of Union Pacific Railroad Company in 1871. As regards the criteria for membership, one of the first resolutions of this regiment proclaimed that "no company of men shall be admitted to this Regimental organization, unless the company or body of men shall be recruited by recruiting officers regularly appointed by the Battalion Commander." HISTORY OF THE ILLINOIS NATIONAL GUARD at 9-10.

As later euphemistically described by one of the founding members of the Illinois National Guard: "The necessity for such a force was more apparent in the large cities and populous communities, where the civil authorities needed a powerful aid to check lawlessness and disorder." HISTORY OF THE ILLINOIS NATIONAL GUARD at 3.

There can be little doubt as to partiality of the Illinois National Guard in favor of the railroads and against the unions:

> There was a very general feeling that the Railroads had acted with oppression toward their employees, and the public almost universally sympathized with the laborers and mechanics. It was evident that unless the troubles were checked at this point, the Country would be thrown into revolution. The time had come for the Militia to show whether it were capable of the stern duty and exacting discipline of the soldier.
>
> . . .
>
> The usefulness of a well trained and reliable Militia was practically demonstrated to the Citizens of this State by the preservation of millions of dollars in Railroad, Mining and

> Manufacturing interests and the prompt suppression of disorder in July 1877.

Id at 64, 96.

In response to the threat represented by this privately-funded force, Herman Presser and other citizens joined the "Lehr und Wehr Verein."[4] This Illinois corporation was formed for the express purpose of "improving the mental and bodily condition of its members so as to qualify them for the duties of citizens of a republic. Its members shall, therefore, obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises."[5]

When Presser and other members of this organization subsequently drilled with rifles, Presser was arrested for, and convicted of, violating the Illinois Military Code, which prohibited associating, drilling, or parading with arms by any group not licensed by the State of Illinois. His case reached the United States Supreme Court as *Presser v. State of Illinois*, 116 U.S. 252 (1886).

Citing *Cruikshank*, the Court again held neither the First Amendment nor the Second Amendment protected Mr. Presser from prosecution by the state of Illinois. 116 U.S. at 264-68. As before, the Court stated that the Second Amendment did not act as a prohibition against the states *because* the right to keep and bear arms is a fundamental right that was not dependent on the Constitution for its creation:

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[4] "Lehr und Wehr Verein" roughly translates to "Education and Defense Association."

[5] See *Presser v. State of Illinois*, 116 U.S. 252, 256 (1886).

> It was so held by this court in the case of *U.S. v. Cruikshank*, 92 U.S. 542, 553, in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instruments for its existence."

116. U.S. at 265.

These cases manifest an animus toward minorities and others that would not be tolerated by a jurist today. Yet they represent the lynchpin of the argument articulated by the opponents of incorporation.[6] The Court's refusal in these opinions to acknowledge incorporation of the Second Amendment rights is no more proper than its refusal to acknowledge incorporation of the First Amendment rights.

Nonetheless, each of these cases admits that the right to keep and bear arms is a fundamental right of citizenship under a free government. To that end, and as discussed below, these holdings confirm that the Second Amendment right to keep and bear arms is properly incorporated as against the States.

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[6] As the Court noted in *Heller*, *United States v. Miller*, 307 U.S. 174 (1939) did not even purport to be a thorough examination of the Second Amendment (which is not surprising given that the respondent made no appearance in the case, neither filing a brief nor appearing at argument). Neither did that opinion address the issue of incorporation whatsoever. As such, it is simply inapposite to the issue presently before the Court.

II. RIGHTS THAT ARE DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITIONS, OR THAT ARE IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY, ARE INCORPORATED AS AGAINST THE STATES UNDER THE FOURTEENTH AMENDMENT.

As this Court has previously acknowledged, its earlier incorporation jurisprudence was not a model of consistency. *See Duncan v. Louisiana,* 391 U.S. 145 (1968). The Court's modern decisions have, however, consistently decided questions of incorporation based on a determination of whether the right at issue is a *fundamental* right.

The standard for determining whether a right is fundamental has been variously articulated as whether the right is "deeply rooted in this nation's history and tradition," *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno v. Flores,* 507 U.S. 292, 303 (1993). Yet other cases have emphasized that such rights are "implicit in the concept of ordered liberty," *Mapp v. Ohio,* 367 U.S. 643, 650 (1961) or "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana,* 391 U.S. at 150.

Regardless of which exact wording is used, it is clear that the right to keep and bear arms satisfies the modern standard for incorporation and should be recognized as applying against the states.

III. THE SECOND AMENDMENT RIGHTS ARE DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITIONS, ARE IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY, AND ARE PROPERLY INCORPORATED AS AGAINST THE STATES UNDER THE FOURTEENTH AMENDMENT.

As referenced above, earlier cases from this Court held that the Second Amendment's rights were not incorporated as against the states *because* the right to keep and bear arms was a fundamental right that exists independently of the Constitution:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.
>
> ...
>
> The second and tenth counts are equally defective. The right specified there is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

United States v. Cruikshank, 92 U.S. 542 at 551-553.

> It was so held by this court in the case of *U.S. v. Cruikshank*, 92 U.S. 542, 553, in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear

> arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence."

Presser v. State of Illinois, 116 U.S. 252 at 265.

Those early decisions also acknowledged the scope of the fundamental rights recognized in the First and Second Amendments. As Justice Taney acknowledged in *Dred Scott*, if the Court had recognized descendents of slaves as citizens, those descendents would have had both "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs" and the right to "keep and carry arms wherever they went." *Scott v. Sandford*, 60 U.S. 393 at 417.

Although not often admitted by opponents of incorporation of the Second Amendment, the right to self-defense—including the right to the use of arms and deadly force for self-defense—is indeed a right deeply rooted in this nation's history and traditions, and it is implicit in the Anglo-American concept of ordered liberty.

In 1765—eleven years before the founding fathers signed the Declaration of Independence—William Blackstone published his Commentaries on the Laws of England. In those Commentaries, Mr. Blackstone addressed the absolute right to personal security and the implications of that right.

> Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed in self defense, or in order to preserve them. For whatever

> is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.
>
> . . .
>
> [In order] to vindicate these rights, when actually violated or attacked, the subjects of England are entitled . . . to the right of having and using arms for self-preservation and defense.

1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 126, 140 (1765).

> Self-defense therefore as it is justly called the primary law of nature, for it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself . . . .

3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 3-4 (1765).

This same right to bear arms for self-defense was also recognized from the earliest days of the United States. Within months of the signing of the Declaration of Independence, Pennsylvania adopted a state constitution. PENNSYLVANIA CONST. (September 28, 1776). In a foreshadowing of the Bill or Rights, Pennsylvania's Constitution included an explicit "Declaration of Rights of the Inhabitants of the Commonwealth or State of Pennsylvania." Among the fundamental rights set forth in that Declaration was a provision stating: "the people have a right to bear arms for the defense of themselves and the state." PENNSYLVANIA CONST. art. XIII.

A year and four days after the founding fathers signed the Declaration of Independence, Vermont also adopted a state constitution that included an express "Declaration of the Rights of the Inhabitants of the State of Vermont." VERMONT CONST (July 8, 1777). As with Pennsylvania's Constitution, Vermont's Declaration proclaimed that "the people have a right to bear arms for the defense of themselves and the state." VERMONT CONST. ch. 1, § XV (1777). When Vermont subsequently adopted a revised constitution in 1786, it continued to recognize that "the people have a right to bear arms for the defense of themselves and the state." VERMONT CONST. ch. 1, § XVIII (1786). Thus, both the early state constitutions that included an express Declaration of Rights acknowledged the right to keep and bear arms for self defense.

When Alexander Hamilton was advocating for the adoption of the United States Constitution, he once again reminded the People of the State of New York of the importance of the right to self-defense, stating that if "the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government." THE FEDERALIST No. 28 (Alexander Hamilton).

This Court has also acknowledged the right to self-defense, including the right to use a deadly weapon in self-defense. In the case of *Beard v. United States,* 158 U.S. 550 (1895), the Court reversed the murder conviction of Mr. Beard after he had defended himself against three brothers who came to take his cow. Writing for the majority, Justice Harlan was unequivocal in recognizing the right to self-defense:

> The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.

158 U.S. at 564.

Beard is far from the only time this Court has acknowledged the right to use arms in self-defense. *See e.g., Rowe v. United States*, 164 U.S. 546, 558 (1896) ("The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life, or to protect himself from great bodily harm."); *Gourko v. United States*, 153 U.S. 183, 191 (1894) (recognizing the right of a person to deliberately arm himself, "provided he rightfully so armed himself for purposes simply of self-defense"); *Thomson v. United States*, 155 U.S. 271, 283 (1894) ("The error here is the assumption that the act of the defendant in arming himself showed a purpose to kill formed before the actual affray. This was the same error we found in the instructions regarding the right of self-defense, and brings the case within the case of *Gourko v. U.S.*, previously cited, and the language of which we need not repeat.").

Most recently, the Court reaffirmed the fundamental nature of a person's right to self-defense, and that the Second Amendment embodied the fundamental nature of the individual's right to keep and bear arms for, *inter alia*, the purpose of protecting this right to self-defense. See *District of Columbia v. Heller*, 128 S. Ct. at 2817, 2821-22. Thus, the instant case implicates at least two fundamental rights that are deeply rooted in this nation's history and traditions and implicit in the Anglo-American concept of ordered liberty.

This case also implicates the fundamental right to travel among the several States.

> For all the great purposes for which the Federal Government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Crandall v. State of Nevada, 73 U.S. 35, 48-49 (1867).

> The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

United States v. Guest, 383 U.S. 745, 757 (1966).

The City of Chicago is a key hub affecting this right to travel from one State to another. It is the third largest city in the United States. Numerous interstate freeways run through Chicago, including I-55, I-57, I-80, I-88, I-90, and I-94. Like many large cities, Chicago actively solicits companies to relocate their businesses there. Boeing Aircraft is one of the better-known companies that have relocated to Chicago.

At the same time, the City of Chicago unapologetically bans the possession of handguns by all but a select group of its residents. This serves to deprive both the residents of Chicago and citizens of other states who may travel to, or through, Chicago of their right to bear arms for self-defense.

Consider the situation of a member of one of the State Associations who owns and keeps a handgun for self-defense. If her company were to relocate to the City of Chicago, she would be forced to make the Hobson's choice of forfeiting her fundamental right to keep and bear arms for self-defense, or giving up a good paying job in today's trying economic conditions. In other words, the ordinances enacted by the City of Chicago effectively require her to forfeit one fundamental right—the right to keep and bear arms—to exercise another, her fundamental right of travel.

Consider also the situation of a State Association member who lives in a state north or west of Chicago, such as Montana, and wishes to compete in the National Matches at Camp Perry, Ohio. The National Matches are an annual firearms competition expressly authorized by federal statute. The National Matches consist of "rifle and pistol matches for a national trophy, medals, and other prizes [and] shall be held as prescribed by the Secretary of the Army." 36 U.S.C. § 40725 (2009). Along with the rest of the Civilian Marksmanship Program, the National Matches are supervised and controlled by a federally chartered corporation - the Corporation for the Promotion of Rifle Practice and Firearms Safety. 36 U.S.C. §§ 40701, 40721 (2009).[7]

The drive for our competitor from Billings, Montana to Camp Perry, Ohio is over 1,500 miles and requires more than 23 hours of driving time. The most direct route is along I-90 and takes the competitor directly through Chicago. According to the City of Chicago, however, our competitor may not take that most direct route unless she is willing to sacrifice her fundamental right to self-defense and her right to bear arms for self-defense while en route.

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[7] The Civilian Marksmanship Program goes back to late 19th century efforts by U.S. military and political leaders to strengthen our country's national defense capabilities by improving the rifle marksmanship skills of members of the Armed Forces. The Civilian Marksmanship Program traces its direct lineage to 1903 when Congress and President Theodore Roosevelt established the National Board for the Promotion of Rifle Practice and the National Matches. The National Matches were first held in 1903, moved to Camp Perry, Ohio, in 1907, and continue to take place every summer at Camp Perry. The National Matches currently have well over 6,000 annual participants. *See generally*, http://odcmp.com/about_us.htm.

In order for our competitor to avoid prosecution, any firearm she has with her must be "broken down in a nonfunctioning state." Municipal Code of Chicago, Ill. § 8-20-010(10). As the Court noted in *Heller*: "This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." 128 S. Ct. at 2818. Once again, the ordinances enacted by the City of Chicago effectively require her to forfeit one fundamental right—the right to keep and bear arms—to exercise another, her fundamental right of travel.[8]

Now consider the case of Otis McDonald—the petitioner in this matter. Otis McDonald is a 76-year old resident of the City of Chicago with a personal history that would make any citizen proud. He moved to Chicago when he was 16 years old. As an African American, few job opportunities were available to Mr. McDonald. While working at a series of menial jobs, he repeatedly applied for apprentice maintenance engineering positions. Mr. McDonald was finally hired for such a position at the University of Chicago on the condition that he go to school.

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[8] The choice of a female member for these illustrations is intentional. Admittedly, *some* citizens may be able to defend themselves against *some* attacks without arms. However, it would be no more proper to effectively limit the fundamental right to self-defense to young males with above-average strength and skills than it would be to effectively limit the right to vote to those who could timely complete a grueling obstacle course.

In order to pay for college, Mr. McDonald volunteered for the U.S. Army and was stationed in Germany. True to his word, he eventually obtained his associates degree in Applied Science. Mr. McDonald also played a pioneering role in integrating his labor union, working his way up through the ranks until he became the head of the union local.

Now retired, Mr. McDonald is a community activist, working with the Chicago Alternative Policing Strategies program to address crime and community problems in his south side neighborhood. This has led to Mr. McDonald being repeatedly threatened by drug dealers and other criminals. Nonetheless, the City of Chicago will not allow Mr. McDonald to keep a handgun in the city for his own defense. This trampling of Mr. McDonald's fundamental right to keep and bear arms for his self-defense led directly to the instant suit.[9]

Otis McDonald is a citizen of the United States of America and a member of both classes of citizens unfairly targeted in *Cruikshank* and *Presser*. Mr. McDonald is no less worthy of the fundamental right to keep and bear arms for self-defense than any other citizen. This Court should not permit the City of

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[9] *See generally*, David Savage, *Supreme Court to Hear Challenge to Chicago Gun Law*, Chicago Breaking News, Sept. 30, 2009 (available at http://www.chicagobreakingnews.com/mt-search.cgi?search=otis+mcdonald&IncludeBlogs=2&limit=20); Maureen Martin, *Handgun Ban Plaintiff Urges Gun Rights in Crime Ridden Neighborhoods*, The Heartland Institute, Nov. 9, 2009 (available at http://www.heartland.org/article/26330/Handgun_Ban_Plaintiff_Urges_Gun_Rights_in_CrimeRidden_Neighborhoods.html).

Chicago to deprive this great American of such a fundamental right.

Finally, in its brief in opposition to the petition for a writ of certiorari, the City of Chicago argued to justify its trampling of the fundamental right to keep and bear arms as a "novel social experiment." It is beyond peradventure that fundamental rights are not appropriate subjects for such experiments.[10] For confirmation of this principle, one need look no further than the "social experiment" that William J. Cruikshank and his cohorts attempted to impose on the newly-emancipated African-Americans that sad Easter morning in 1873.

The right to keep and bear arms, like the right to self-defense itself, is a right that is deeply rooted in this nation's history and traditions, and it is implicit in the Anglo-American concept of ordered liberty. As such, the right to keep and bear arms is properly incorporated as against the States by the Fourteenth Amendment's Due Process Clauses.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court hold that the Second Amendment's right to keep and bear arms is incorporated as against the States, and reverse the decision of the court below.

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[10] *See, e.g., Chandler v. Florida*, 449 U.S. 560, 574 (1981) (holding that the Court could consider permitting Florida to allow photographic or broadcast coverage of a criminal trial only because the Court's precedent "did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process").

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Supreme Court of the United States

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Petitioners,
v.
CITY OF CHICAGO, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF *AMICI CURIAE* STATE LEGISLATORS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses?

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STATEMENT OF INTEREST OF *AMICI CURIAE* STATE LEGISLATORS

Amici Curiae are 891 individual State Government officials from all 50 States.[1] As State officials, we seek the assistance of this Court in securing the fundamental rights of our constituents and resolving ongoing uncertainty over the validity of State legislation regulating firearms.

Since this Court affirmed the fundamental right of the individual to keep and bear arms in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the States have been plagued by uncertainty surrounding the validity of their various ordinances and regulations on individual possession and use of firearms. In many instances, this uncertainty has impeded our ability to legislate.

In fact, we and many of our colleagues are reluctant to review, draft, or enact laws that impact this fundamental right, without interpretative guidance from this Court. Although we have no doubt that this fundamental individual right, embodied in the Second Amendment of the United States Constitution,[2] is incorporated as against the States by the Fourteenth Amendment of the United States Constitution,[3] this Court should use this case to confirm incorporation now.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. The *Amici* have given the parties at least ten days notice of their intention to file this brief.

A list of the *Amici Curiae* State Legislators is provided in the Appendix of this brief. *Amici* submit this brief in their individual capacities, not on behalf of any State Government itself, but their views are informed by their experiences as State officials, and their interest in Federal and State Government institutions.

The reasons set forth in *Heller* and Fourteenth Amendment jurisprudence show that incorporation of the Second Amendment is both necessary and logical for preserving the exercise of this individual fundamental right against State action that impermissibly encroaches on it. By incorporating the Second Amendment, this Court will assist State Legislators, who need to determine the appropriate boundaries for the exercise of the States' Police Powers to regulate firearms. For these reasons and those below, we respectfully submit this brief in support of the Petitioners' brief and the briefs of the many *amici curiae* that advocate incorporation in this case. The sooner the Court confirms incorporation, the sooner State Legislators can get on with determining the permissible scope of legislation regulating individual possession and use of firearms.

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[2] "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

[3] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;...." U.S. CONST. amend. XIV, §1.

SUMMARY OF ARGUMENT

It will do no harm to our system of federalism for this Court to find the Second Amendment incorporated as against the States by the Fourteenth Amendment under either or both of the Due Process Clause or the Privileges or Immunities Clause. The balance between Federal and State Government was carefully crafted to preserve individual liberties against tyranny, not serve as an excuse for erosion of the people's fundamental rights. The United States Court of Appeals for the Seventh Circuit should be reversed and this Court should declare unconstitutional the City of Chicago's and Village of Oak Park's bans on handguns. The other challenged ordinances should be remanded for scrutiny in light of this Court's incorporation ruling. This will provide a springboard for clarifying the States' permissible regulatory role.

More than two centuries passed before *Heller* presented this Court with the opportunity to illuminate the fundamental nature of the individual right to keep and bear arms embodied in the Second Amendment. For most of our Nation's history, that question had not presented itself because the States rather than the Federal Government are most active in the regulation of individual possession and use of firearms (*Heller*, 128 S. Ct. at 2816); and for most of that time the Bill of Rights, including the Second Amendment, was not thought to apply to the States. *Id.*

Now that the Court has found in the Second Amendment a fundamental individual right, the unresolved question of incorporation casts a shadow on the validity of existing State regulations of firearms. Until the incorporation question is put to rest, the lower courts are reluctant to explore the permissible boundaries of State regulation as demonstrated in this case. Just as the number of State and local ordinances regulating individual firearm ownership and use has continued to increase, so too has the necessity for constitutional interpretation increased in light of *Heller*. The sooner that work is begun, the sooner clarity will return to the permissible scope of State regulation in this area.

Incorporation of this fundamental right thus begs affirmation by this Court now. Both the United States Courts of Appeals for the Second[4] and Seventh[5] Circuits in addressing the issue of incorporation found that they were bound by *Presser v. Illinois*, which ruled that the Second Amendment applies only to limitations the Federal Government seeks to impose on the right to keep and bear arms. 116 U.S. 252, 265 (1886). Even though the courts below noted that the persuasive authority of that early precedent had diminished and that *Heller* might be read to question the continuing validity of such early rulings on incorporation,[6] they chose to defer to this Court for guidance.[7]

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[4] *Maloney v. Rice*, 554 F.3d 56 (2d Cir. 2009), *petition for cert. filed*, (No. 08-1592).

[5] *National Rifle Ass'n of America, Inc., et al. v. City of Chicago, Illinois, and Village of Oak Park, Illinois*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, (No. 08-1521), and *petition for cert. filed*, (No. 08-1497) (hereinafter *NRA v. Chicago*).

[6] The Second Circuit found:

Neither the United States Courts of Appeals for the Second nor the Seventh Circuit spoke to the merits of incorporation in either *Maloney v. Rice*, 554 F.3d 56 (2d Cir. 2009), or *National Rifle Association of America, Inc., et al. v. City of Chicago, Illinois, and Village of Oak Park, Illinois*, 567 F.3d 856 (7th Cir. 2009). Instead, these courts faithfully followed their views of this Court's Nineteenth Century precedent and ignored subsequent rulings of the Court that are more hospitable to incorporation. In contrast, a panel of the United States Court of Appeals for the Ninth Circuit in *Nordyke v. King* found that not all avenues to incorporation had been considered or rejected in those early precedents. 563 F.3d 439 (9th Cir. 2009).

> to the extent that *Heller* might be read to question the continuing validity of [incorporation], we "must follow *Presser*" because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'"

Maloney, 554 F.3d at 59, (quoting *Bach v. Pataki*, 408 F.3d 75, 86 (2d Circ. 2005)). The Seventh Circuit agreed with the Second Circuit that "*Cruikshank, Presser,* and *Miller* still control even though their reasoning is obsolete." *NRA v. Chicago*, 567 F.3d at 857

[7] *Compare Nordyke v. King*, holding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the States and local governments because, among many reasons, "the right to keep and bear arms is 'deeply rooted in this Nation's history and tradition.'" 563 F.3d 439, 457 (9th Cir. 2009), *rehearing en banc ordered*, 575 F.3d 890 (9th Cir. 2009) (No. 07-15763) (declaring panel opinion was not to be cited as precedent by or to any court of the Ninth Circuit).

The *Nordyke* panel, applying the Court's modern Fourteenth Amendment jurisprudence, correctly found incorporation, holding that *Heller* and the history of the Second Amendment demonstrate the fundamental character of the individual right to keep and bear arms. *Nordyke*, 563 F.3d at 451-57. Because this fundamental right embodied in the Second Amendment is "deeply rooted in this Nation's history and tradition," the panel found incorporation is warranted under this Court's approach to selective incorporation within the Due Process Clause. *Id.* at 475. The *Nordyke* panel, the only federal court to address the issue on the merits, got it right: selective incorporation is the simplest and easiest way to accomplish that which the Framers of both the Second and Fourteenth Amendments intended. *Nordyke* provides the crucial guideposts for this Court to follow in finding incorporation.

Incorporation by way of the Privileges or Immunities Clause provides an independent basis to reach the same result. The Court's historic precedent under this clause should not be construed in a manner to compromise the fundamental rights of United States citizens. There is room in these early precedents, particularly in light of the Court's modern decisions, to find incorporation under the Privileges or Immunities Clause as well.

This Court may choose either method of incorporation, or both, but either way incorporation should be the result. *Heller* illuminated the Second Amendment and it is time for the Fourteenth Amendment jurisprudence to catch up so that State Legislators and the courts can begin interpreting the permissible regulatory role of the States in the individual exercise of this fundamental right.

ARGUMENT

I. INCORPORATION OF THE SECOND AMENDMENT AGAINST THE STATES BY THE FOURTEENTH AMENDMENT DOES NO HARM TO OUR FEDERAL SYSTEM.

Regulation of firearms is generally divided between the Federal Government's exercise of its Commerce Power and the States' exercise of their Police Powers. This Court held in *United States v. Lopez* that the Federal Government could not regulate the possession of a handgun on school property because there was an inadequate nexus to commercial activity and the legislation intruded impermissibly on the State's Police Power. 514 U.S. 549, 561-62, 567 (1995). Both the Federal Government and the States have important and distinct roles to play here.

Federalism, the "unique contribution of our Framers to political science and political theory," was designed to enhance, not diminish individual freedom. *Lopez,* 514 U.S. at 575-76 (Kennedy, J., concurring). Federalism should not be raised as a reason to constrain the exercise of our fundamental rights, but must be preserved to better secure these rights against tyranny from either the Federal Government or the States. Federalism relies for its preservation on separate political accountability of the Federal Government on the one hand, and the States on the other, each acting in their respective spheres. *Id.* at 576-77.

This Court is being called to find the fundamental right to keep and bear arms incorporated against the States by the Fourteenth Amendment. Our federal system has withstood such incorporation many times in the past and will suffer no harm from incorporation of the Second Amendment. Principles of federalism do not trump fundamental rights. To the contrary, our federal system must flex to accommodate these fundamental rights and exists precisely to ensure the preservation of those rights.

Federalism strikes a dynamic balance between certain fundamental rights that are entitled to protection by the Constitution and the States' exercise of their Police Powers. Protecting individual fundamental rights does not displace State authority to experiment within the permissible bounds of their Police Powers nor intrude upon an area of traditional State concern. *See Lopez*, 576 U.S. at 580. This Court has recognized that such State experimentation is both valuable and an inherent part of our system of federalism, but it is not without limitation. *Id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).[8]

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[8] We give credence to Justice Brandeis's wise remark that "[d]enial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 311 (J. Brandeis dissenting). We do note, however, that the risk of dispensing with an enumerated individual fundamental right carries with it substantial risk to the rest of the country. Even Justice Brandeis would agree that there are limitations

Incorporation of the right to keep and bear arms does not disrupt the balance between either the Federal Government and the State, or between the State and the individual. Indeed, incorporation of many other fundamental individual rights has not upset that balance in the past. We as State Legislators have learned to tread carefully when enacting legislation that impacts other fundamental rights, such as free speech and assembly. Incorporation of the right to keep and bear arms is no different. The States will continue to have considerable leeway in exercising their Police Powers once the Second Amendment is incorporated.

State Legislators are uniquely qualified to strike the balance between protecting fundamental rights and exercising State Police Powers. We respectfully request this Court to affirm the fundamental nature of the Second Amendment, so that we may get on with our work. We welcome the opportunity to review and conform our State laws in a manner that respects and does not abridge individual basic liberties, including our right to keep and bear arms.

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to State experimentation. *See generally Gambino v. United States*, 275 U.S. 310 (1927) (Brandeis, J.) (holding that evidence wrongly seized by State police violated the Fourth, Fifth and Sixth Amendments of the Federal Constitution).

II. THE FUNDAMENTAL RIGHT OF AN INDIVIDUAL TO KEEP AND BEAR ARMS SET FORTH IN THE SECOND AMENDMENT IS INCORPORATED AGAINST THE STATES BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Examination of modern substantive due process jurisprudence reveals that fundamental rights are accorded heightened protection against State as well as federal action. The extent to which the Fourteenth Amendment restricts State action that infringes the exercise of enumerated rights in the first eight Amendments has been considered in numerous cases and this Court has not hesitated to find incorporation of a fundamental right. *Nordyke*, 563 F.3d at 450 n.9. Incorporation should be found here as well.

Heller emphatically supports a finding that this right is "deeply rooted in this Nation's history and tradition," (*Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)), and thus warrants incorporation. This recognition alone should dictate substantive due process incorporation, but the panel opinion in *Nordyke* also provides further support. Because the substantive incorporation analysis already has been performed, this Court should endorse that analysis and let State Legislators move forward with their work. There is no just reason that the right to keep and bear arms, recognized as a fundamental individual right by *Heller*, should be afforded any less protection against State action than federal.

A. The Panel in *Nordyke*, the Only Federal Court to Conduct the Required Analysis, Got It Right: Selective Incorporation of Fundamental Rights Through the Due Process Clause of the Fourteenth Amendment Dictates Incorporation of the Second Amendment.

The Fourteenth Amendment of the United States Constitution prohibits "any State [from] depriv[ing] any person of life, liberty, or property, without the due process of law...." U.S. CONST. amend. XIV, § 1. Due process is considered on a case by case basis and "[t]his court has never attempted to define with precision the words 'due process of law'.... It is sufficient to say that there are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard." *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898). Many fundamental rights, including those enumerated in the Bill of Rights, have been incorporated against the States by way of the Fourteenth Amendment. *Nordyke*, 563 F.3d at 447 n.9. There can be no doubt that the right to keep and bear arms of the Second Amendment, found in *Heller* to be a fundamental individual right, embodies one of the immutable principles inherent in the very idea of free government and warrants incorporation.

1. The Due Process Clause incorporates "fundamental" individual rights.

Substantive due process secures those immutable principles, or "fundamental" rights, through the process of selective incorporation. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). By incorporation, "'it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of [those rights] would be a denial of due process of law.'" *Malloy v. Hogan*, 378 U.S. 1, 4 (1964) (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

In reviewing its substantive due process jurisprudence, the Court in *Malloy* observed that "[t]his Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Id.* The time has come for the Court to revisit its early decisions regarding the Second Amendment and apply selective incorporation principles.

The threshold inquiry for finding selective incorporation is whether a right is fundamental. Fundamental rights, afforded substantive due process protections, are those rights "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 504 (1977)). This Court in *Duncan v. Louisiana* explained that the "question is whether the right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'." 391 U.S. 145, 148 (1968) (internal quotes removed). *Duncan* further specified that incorporation turns on "whether given this kind of system a particular procedure is fundamental – whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.*, n. 14. *See also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) ("implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"). Both *Heller* and *Nordyke* point the way to selective incorporation of the Second Amendment under these principles.

2. History supports the right to keep and bear arms as a "fundamental" individual right.

Determining whether a liberty interest is fundamental and entitled to substantive due process incorporation requires consideration of the right's historical backdrop. *Nordyke* explains that over time this Court has developed a concrete historical framework for making this determination. 563 F.3d at 449. The panel in *Nordyke* also was persuaded by the analytical approach set forth in *Duncan*. In *Duncan*, the Court evaluated the right's present use, and the place of the right in pre-Founding English law and in the Founding era itself. *Id.* 449-50 (internal quotations removed). Similarly, in *Glucksberg*, this Court explained that "[o]ur Nation's history, legal traditions, and practices ... provide the crucial guideposts for responsible decisionmaking [in the area of substantive due process]." 521 U.S. at 721. The *Nordyke* panel's analysis provides the crucial guideposts for determining whether the right to keep and bear arms is fundamental.

Relying on the factual findings of *Heller*, reinforced by its own analysis, the *Nordyke* panel easily determined that the right to keep and bear arms is fundamental. In performing its analysis, *Nordyke* tracked the historical parallels between the evidence relied upon in *Duncan* to incorporate the right to a jury in criminal cases and the right to keep and bear arms. *Nordyke*, 563 F.3d at 450-54. As part of this consideration, *Nordyke* held that the "brief survey of our history reveals a right indeed 'deeply rooted in this Nation's history and tradition.'" *Id.* at 454. No contrary finding is supported by history and the Court need not reconsider its findings in *Heller* in this case.

The observations this Court made about the nature of the Second Amendment right made clear the right to keep and bear arms is as implicit in the concept of ordered liberty, discussed in *Palko*, as it is deeply rooted in this Nation's history and tradition. Again, we look to *Nordyke*, which succinctly informed this point:

> Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a

> recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited.

Nordyke, 563 F.3d at 457.

The right to keep and bear arms as described in *Heller* and *Nordyke* is a right such that "neither liberty nor justice would exist if they were sacrificed." *Palko*, 302 U.S. at 326. No right can truly be said to be more fundamental than the right of self-defense.

While modern times and urban living may have changed societal mores, the right to keep and bear arms is no less fundamental today because it continues to provide the means necessary to exercise the natural right of self-defense. The concepts of fundamental rights and ordered liberty include the right of the people to defend themselves. As evidenced by Samuel Adams and Benjamin Franklin, "[a]mong the natural rights of the colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can." Samuel Adams, *The Right of the Colonists, The Report of the Committee of Correspondence to the Boston Town Meeting*, (Nov. 20, 1772) (Old South Leaflets, No. 173 (Bost: Directors of Old South Work 1906) 7: 417-428)) (Benjamin Franklin preface). This natural right, recognized and expressly preserved in our Bill of Rights, does not cease to exist inside State or municipal boundaries.

B. Selective Incorporation Through the Due Process Clause Is the Simplest and Easiest Way to Accomplish That Which the Framers of Both the Second and Fourteenth Amendments Intended.

Selective incorporation is not barred by this Court's Nineteenth Century precedent. *United States v. Cruikshank, et al.*, should not be construed in a manner that limits the application of the Second Amendment to the States. 92 U.S. 542 (1875). Doing so would result in a great disservice to the intentions of the Framers of the Fourteenth Amendment. Moreover, *Cruikshank's* analysis was informed by the jurisprudence of its time, without the aid of modern substantive due process guidance.

1. *Cruikshank* and its progeny did not consider selective incorporation.

The well-settled jurisprudence of this Court holds that the Second Amendment, standing alone, is not applicable as against the States. The Nineteenth Century precedent of *United States v. Cruikshank, et al.*, 92 U.S. 542 (1876), *Presser v. Illinois,* 116 U.S. 252 (1885), and *Miller v. Texas,* 153 U.S. 535 (1894), uniformly concluded: "the provision in the Second Amendment to the Constitution, that 'the right of the people to keep and bear arms shall not be infringed,' is a limitation only on the power of Congress and the national government, and not of the States."

Presser, 116 U.S. at 252; *see also Cruikshank*, 92 U.S. at 591-92; and *Miller*, 153 U.S. at 538. The Court need not reconsider its prior rulings that the Second Amendment does not have direct application upon the States. Selective incorporation of the Second Amendment through the Fourteenth Amendment, by way of the Court's substantive due process rulings, however, is an entirely different matter.

This Court in *Heller* suggested that *Cruikshank* should not stand in the way of incorporation. *Heller*, 128 S. Ct. at 2813 n. 23 ("With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, and *Miller v. Texas*, reaffirmed that the Second Amendment applies only to the Federal Government." (citations omitted)). This Court also made clear that at a minimum *Cruikshank's* holding is limited and not so broad as found by the court below in this case. *Id.* at 2812-13. ("*United States v. Cruikshank*, in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government.").

Unlike most incorporation cases, there was no claim in *Cruikshank* that the victims were deprived of their rights by State action. "Contemporary commentators saw the case very differently: They almost uniformly understood *Cruikshank* solely as a state-action decision." Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L. J. 643, 718 (1999). Most commentators suggested that *Cruikshank* held that the Fourteenth Amendment offered no protection from an invasion of individual rights not involving State action. *Id.*

In any event, *Cruikshank* did not reject selective incorporation of the Second Amendment because the doctrinal basis for selective incorporation under substantive due process was not developed until a later date. Application of the doctrine of selective incorporation is not foreclosed by *Cruikshank* or its progeny. Incorporation of the Second Amendment should be reviewed under modern substantive due process jurisprudence. When that analysis is conducted, incorporation is the necessary and logical result, as shown in *Nordyke*.

2. The Framers of the Fourteenth Amendment intended to make the Second Amendment applicable to the States.

Early on, this Court in *Barron v. Mayor Balt.*, ruled that the Bill of Rights did not apply to State action. 32 U.S. (7 Pet.) 243, 249 (1833), The Framers of the Fourteenth Amendment intended to overturn *Barron* and specifically concerned themselves with reaching State action that deprived citizens of their right to keep and bear arms.

The *Nordyke* panel observed a notable shift in focus of the Framers of the Bill of Rights in 1789 and the Framers of the Fourteenth Amendment in 1868:

> the target of the right to keep and bear arms shifted in the period leading up to the Civil War. While the generation of 1789 envisioned the right as a component of local resistance to centralized tyranny, whether British or federal, the generation of 1868 envisioned the right as safeguard to protect individuals from oppressive or indifferent local governments.

563 F.3d at 456 (relying upon Akhil Reed Amar, *The Bill of Rights*, 257-66 (1998)).

Less concerned with tyranny of a newly created Federal Government, the Framers of the Fourteenth Amendment sought to end post-Civil War State oppression of individual fundamental rights, including the right to keep and bear arms. *Nordyke* outlines this crucial history to the Fourteenth Amendment in reaching its conclusion on incorporation:

> During the debates surrounding the Freedmen's Bureau Act, the Civil Rights Act, and the Fourteenth Amendment, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" someone's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller,* 128 S.Ct. at 2811. Representative Bingham, a principal author of the Fourteenth Amendment, argued that it was necessary to overrule *Barron* and apply the Bill of Rights to the states. In his view, *Barron* was wrongly decided because the Bill of Rights "secur[ed] to all the citizens in every State all the privileges and immunities of citizens, and to

> all the people all the sacred rights of persons- those rights dear to freemen and formidable only to tyrants." *Id.* at 1090.... The reports and testimony contain similar evidence, confirming that the Framers of the Fourteenth Amendment considered the right to keep and bear arms a crucial safeguard....

Nordyke, 563 F.3d at 455-56.

The legislative history of the Fourteenth Amendment supports incorporation of the individual's right to keep and bear arms, and this Court should endorse *Nordyke's* interpretation.

C. While Rehearing *en Banc* May Have Been Granted in *Nordyke* for Whatever Reason, the Panel's Reasoning Remains Sound and Should Guide the Court's Analysis Here.

The United States Court of Appeals for the Ninth Circuit ordered that *Nordyke* be reheard *en banc* and that the "three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009). Whatever the reason for this action (and it may be no more than that the panel parted ways with prior Ninth Circuit precedent relying on *Cruikshank* and its progeny and instead relied on *Heller*), *Nordyke's* analysis is compelling and its conclusions persuasive. The opinion is relevant, has substantial persuasive value, and provides a bounty of information on this issue. *Nordyke* should not be ignored.

Nordyke provides crucial guideposts for this Court's analysis, because the foundation of its conclusion that the right to keep and bear arms is a fundamental right is based mainly upon the *Heller* findings, supplemented by the panel's separate research and analysis. Independent analysis on this issue would support the same conclusion as demonstrated by the briefs of Petitioners and the many *amici* supporting Petitioners.

III. THE FUNDAMENTAL RIGHT OF AN INDIVIDUAL TO KEEP AND BEAR ARMS SET FORTH IN THE SECOND AMENDMENT IS INCORPORATED AGAINST THE STATES BY THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment of the United States Constitution also provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." U.S. CONST. amend. XIV, § 1. The Privileges or Immunities Clause provides an independent basis upon which to find the Second Amendment incorporated against the States by the Fourteenth Amendment, consistent with Fourteenth Amendment doctrines.

Prior decisions giving far too broad a reach to the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), have eviscerated a substantive clause of the Constitution. This Court need not disturb its precedent, however, because *Slaughter-House* does not preclude a finding protecting fundamental individual rights against State action. *Slaughter-House* simply requires clarification, revealing that the Second Amendment may be incorporated by way of the Privileges or Immunities Clause.

A. Incorporation of the Fundamental Right to Keep and Bear Arms by Way of the Privileges or Immunities Clause Can Coexist with *Slaughter-House.*

The *Slaughter-House* precedent should not be construed to curtail fundamental rights and privileges, simply because those fundamental rights are enumerated in the Bill of Rights. Instead, the *Slaughter-House* opinion should lead this Court to a much different view. "[N]othing in [Justice] Miller's [*Slaughter-House*] opinion [negates] a role for the Privileges and Immunities Clause in the incorporation of the Bill of Rights freedoms against the states, and, a more plausible reading of Miller's opinion specifically preserves such a role for the Clause." *See* Newsome, *supra*, at 650.

1. The *Slaughter-House* holding applies to economic interests, not fundamental rights enumerated in the Bill of Rights.

Slaughter-House did not face the issue of incorporation of an enumerated right from the first eight Amendments. Rather, the Court addressed whether common law interests of butchers to "free trade" found protection in the Fourteenth

Amendment.[9] *Slaughter-House*, 83 U.S. at 57. *Slaughter-House* rejected the butchers' argument that the Privileges or Immunities Clause secured the common right[10] "to require that the course of trade should be free from unreasonable obstruction." *See* Newsome, *supra*, at 659. The holding does not prohibit a reading that the Privileges or Immunities Clause incorporates the Second Amendment.

Slaughter-House made clear that neither the Framers of the Fourteenth Amendment, nor the legislatures of the States that ratified the Privileges or Immunities Clause, "intended to bring within the power of Congress the entire domain of civil rights." 83 U.S. at 77. Civil rights, as described by contemporary works and commentators, broadly referred to economic rights, including those rights argued in support of the butchers. *See* Newsome, *supra*, 670-73.

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[9] At oral argument, the butchers' counsel, John Campbell (a retired U.S. Supreme Court Justice), conceded "that there was no specific textual basis in the Constitution for the right he claimed on behalf of his clients." *See* Newsome, *supra*, at 658-59.

[10] Newsome suggests that Justice Cambell's use of the term "common right" was intended to mean "a term applied to rights, privileges, and immunities appertaining to and enjoyed by all citizens equally and in common, *and which have their foundation in the common law*." Newsome, *supra*, at 659-60 (emphasis in original). The argument presented and at issue before the Court was "that the Fourteenth Amendment had federalized–indeed, constitutionalized–the panoply of economic common-law freedoms, including the right to pursue an occupation." *Id.* at 660. The Court's understandable reluctance to embrace such a breathtaking expansion of the Fourteenth Amendment should not bar that Amendment's incorporation through the Privileges or Immunities Clause of the fundamental individual liberties of the Second Amendment.

> So when [Justice] Miller wrote that state-based privileges and immunities "embrace[d] nearly every *civil right* for the establishment and protection of which organized government is instituted," and scoffed at the idea that the Framers of the Fourteenth Amendment had intended "to transfer the security and protection of all the *civil rights* which we have mentioned, from the States to the Federal government," he was not, as is commonly assumed, in any way casting doubt on the notion that the Privileges or Immunities Clause had incorporated Bill of Rights freedoms against the states. He was merely emphasizing that the Fourteenth Amendment had *not* federalized the common-law rules that governed the making of contracts, the disposition of property, and the regulation of employment.

Id. at 673 (emphasis in original).

Slaughter-House did not reject application to the States of fundamental individual rights, protected by federal citizenship. *Slaughter-House* lends support for incorporation of a narrow realm of "'uniquely federal' rights" enumerated in the Federal Bill of Rights. Newsome, *supra*, 666.

2. Rights enumerated within the Bill of Rights were left open by *Slaughter-House* for incorporation by way of the Privileges or Immunities Clause.

This Court left open the possibility that some fundamental rights would be made applicable to the States through incorporation. Because *Slaughter-House* did not present an issue of privileges or immunities impacting federal citizenship, this Court found itself "excused from defining the privileges and immunities of citizens of the United States which no State can abridge, *until* some case involving those privileges may make it necessary to do so." 83 U.S. at 77 (emphasis added). This Court held that it was "useless to pursue this branch of inquiry, since we are of the opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States...." *Id.*

Although this Court did not provide a definition of privileges and immunities, it did provide some critical guidance.[11] In *Slaughter-House* it is apparent that the only privileges the Fourteenth Amendment might protect against State encroachment are those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws." 83 U.S. at 78-79. The better view of *Slaughter-House* is that the Court viewed the Privileges or Immunities Clause as incorporating fundamental rights found in the Bill of Rights, regardless of whether such rights were recognized before that document came into being.

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[11] Justice Jackson, concurring in *Edwards v. California*, explained that the difficulty in its practical application to specific cases "does not excuse [the Court] from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case." 314 U.S. 160, 182-83 (1941).

B. The Right to Keep and Bear Arms Is a Privilege of National Citizenship That No State Shall Abridge.

This Court's later reading of the Privileges or Immunities Clause in *Twining* supports Second Amendment incorporation. *Twining v. New Jersey*, 211 U.S. 78 (1908), *overturned on other grounds Malloy v. Hogan*, 378 U.S. 1 (1964). In *Twining* this Court explained that "[p]rivileges and immunities of citizens of the United States ... are only such as arise out of the nature and essential character of the National Government, *or* are specifically granted or secured to all citizens or persons by the Constitution of the United States." *Id.* at 97, (citing *Slaughter-House, supra*, at 79; *In re Kemmler*, 136 U.S. 436, 448 (1890); *Duncan v. Missouri*, 152 U.S. 377, 382 (1894))(emphasis added).

In addition, *Presser v. Illinois* does not preclude finding the right to keep and bear arms is a privilege of national citizenship.[12] 116 U.S. 252. The privilege at issue was the right to "associate with others as a military company, and to drill and parade with arms in the towns and cities of the State." *Id.* at 266. In *Presser*, no privilege existed because the plaintiff was unable "to point to the provision of the Constitutional statutes of the United States by which it is conferred." *Id.*

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[12] In dicta, *Twining* incorrectly explained that "the right to bear arms guaranteed by the Second Amendment (*Presser v. Illinois*, 116 U.S. 252), [has] been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgement by the States...." 211 U.S. at 98. In *Heller* this Court rejected similar dicta where the point was not at issue and was not argued. 128 S.Ct. 2783, n. 25.

The right to keep and bear arms is a privilege conferred by federal citizenship. Indeed, any United States citizen, including Petitioners here, may point to the Second Amendment as evidence of that privilege. That the individual right to keep and bear arms is both a fundamental right preexisting the Constitution and one directly conferred by way of federal citizenship should serve to emphasize the importance of that right, not constrict the protection afforded its exercise.

Moreover, this Court in *Heller* established that there is a federal individual right to keep and bear arms. 128 S.Ct. at 2821-22. This ruling is applicable to the States through the Privileges or Immunities Clause because, as evidenced in *Heller*, this right arises out of the nature and essential character of our National government. Neither the States nor the City of Chicago and Village of Oak Park may abridge that right.

C. The Framers of the Fourteenth Amendment Intended to Make the Second Amendment Applicable to the States by Way of the Privileges or Immunities Clause.

The Framers of the Fourteenth Amendment intended the Privileges or Immunities Clause to incorporate the Second Amendment against the States. Senator Howard's statement supports this: "The right to keep and bear arms was frequently mentioned by the Framers of the Fourteenth Amendment during its adoption as one of the privileges or immunities of citizenship." Cong.

Globe, 39th Cong., 1st Sess. 2765 (1866). This right was precisely the right that the Reconstruction Congress intended to protect and the history supports that. *Heller*, 128 S.Ct. 2810-12. This Court should give force to the Framers' intention and make clear that the right to keep and bear arms is encompassed within the privileges and immunities of a United States citizen.

IV. THE DECISION BELOW SHOULD BE OVERTURNED BECAUSE THE CHALLENGED HANDGUN BANS VIOLATE THE SECOND AMENDMENT AS HELD BY THIS COURT IN *HELLER* AND AS APPLIED AGAINST THE STATES IN THE FOURTEENTH AMENDMENT.

The City of Chicago prohibits possession of a firearm unless it is registered. Mun. Code of Chicago, § 8-20-040 (a). The City of Chicago Ordinance also prohibits registration of handguns: "No registration certificate shall be issued for any of the following types of firearms... (c) Handguns...." Section 8-20-050 (c). The Village of Oak Park prohibits possession of any "firearm", which it defines as a handgun. Mun. Code of Oak Park, §§ 27-2-1, 27-1-1 ("It shall be unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm ...."; "For the purpose of this Article firearms are: pistols, revolvers, guns and small arms of a size and character that may be concealed on or about the person, commonly known as handguns."). While there are certain exceptions to these handgun bans,[13] the vast majority of citizens do not fall within those exceptions. Each municipality's ordinances operate in a manner that impose a total ban on handgun ownership in the home, as well as elsewhere in the municipality.

In *Heller*, this Court rejected the District of Columbia's handgun ban and explained:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for [the lawful purpose of self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under *any* of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection on one's home and family," would fail constitutional muster.

128 S.Ct. 2817-18 (emphasis added). When an entire class of arms commonly used for self-defense is prohibited, the Second Amendment is implicated. When possession of that class of firearms is

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[13] In the City of Chicago non-governmental exceptions are: "(1) Those validly registered to a current owner in the City of Chicago prior to the effective date of this chapter [(1982)] ... (3) Those owned by security personnel, (4) Those owned by private [licensed] detective agencies ...." Mun. Code of Chicago, § 8-20-050 (c). In the Village of Oak Park, non-governmental exceptions apply to: "... (J) Antique firearms; (K) Licensed firearm collectors; (L) Members or established theater organizations located in Oak Park and performing a regular performance schedule to the public ...." Mun. Code of Oak Park, § 27-2-1.

prohibited in the home, the Second Amendment is impermissibly infringed.

The City of Chicago's and Village of Oak Park's ordinances unlawfully burden the right to defend one's self and home in contravention of the Second Amendment. These ordinances infringe the fundamental right and privilege to keep and bear arms in the home. The City of Chicago's and Village of Oak Park's handgun bans cannot survive constitutional scrutiny any more than the District of Columbia's ban could. For these reasons, the decision below should be reversed.

The remainder of the issues raised by the City of Chicago's and the Village of Oak Park's ordinances should be remanded for the lower courts to consider whether the other challenged restrictions on the right to keep and bear arms pass muster under the Second Amendment as applied against the States by the Fourteenth Amendment in accordance with this Court's decision. Remand of these issues for further consideration by the courts below will begin the process of clarifying the States' permissible role in regulating the possession and use of firearms.

CONCLUSION

For the reasons stated above, this Court should reverse the judgments below, and hold that the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-1521

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Supreme Court of the United States

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OTIS P. MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF OF THIRTY-FOUR CALIFORNIA DISTRICT ATTORNEYS; EIGHT NEVADA DISTRICT ATTORNEYS; GRAHAM COUNTY, ARIZONA, FORMER SHERIFF RICHARD MACK; MENDOCINO COUNTY, CALIFORNIA, SHERIFF THOMAS D. ALLMAN; TEHAMA COUNTY, CALIFORNIA, SHERIFF CLAY D. PARKER; CALIFORNIA RIFLE & PISTOL ASSOCIATION FOUNDATION; LONG BEACH POLICE OFFICERS ASSOCIATION; SAN FRANCISCO VETERANS POLICE OFFICERS ASSOCIATION; ARIZONA CITIZENS DEFENSE LEAGUE; TEXAS CONCEALED HANDGUN ASSOCIATION; VIRGINIA CITIZENS DEFENSE LEAGUE; BLOOMFIELD PRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are district attorneys, police organizations, and other persons and groups concerned with protecting the public safety benefits of citizens possessing firearms for self-defense.

Thirty-Four California and Eight Nevada District Attorneys

The thirty-four California and eight Nevada County elected District Attorneys in this brief represent populous counties such as Orange, Fresno, and San Bernardino, as well as mid-sized and rural counties.

The interests of additional *amici* are described in Appendix B.

◆

SUMMARY OF ARGUMENT

The *Heller* majority's final words were: "[I]t is not the role of this Court to pronounce the Second

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amendment extinct."[2] Having saved the Second Amendment from that fate, it is equally true that it is not the role of this Court to deem Second Amendment rights less worthy of incorporation than other rights of the people enumerated in the Bill of Rights. Accurately considered the "true palladium of liberty,"[3] the people's right to keep and bear arms should be incorporated into the Due Process Clause of the Fourteenth Amendment, and rightfully take its place alongside all the other fundamental rights that the right to arms secures.[4]

The people's right to arms is inextricably tied to the equally fundamental right to defend oneself – to fight to save one's own life. The former is often indispensable to effectuate the latter. *Heller* noted that founding-era legal scholars considered these rights inseparable. In fact, an original justice of this Court, Justice Wilson, described the right to use deadly force to repel a homicidal attacker as "the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution."[5]

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[2] *District of Columbia v. Heller*, 128 S.Ct. 2783, 2822 (2008).

[3] *Id.* at 128 S.Ct. at 2805 (quoting from St. George Tucker's version of Blackstone's Commentaries: "This may be considered as the true palladium of liberty. . . . The right to self-defence is the first law of nature. . . .").

[4] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, pp. 620-621 (4th ed. 1873) ("The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic . . . "), cited in *Heller*, 128 S.Ct. at 2840.

While the question of incorporation was not squarely before this Court in *Heller*, this Court nonetheless effectively made the case for incorporation there. Finding an individual right to arms in the first place requires the same inquiry needed to test for incorporation of that right. *Heller* informs, if not resolves, the issue of incorporation by reaffirming that armed self-defense is an "inherent," "natural," "fundamental," "right." *See Heller*, 128 S.Ct. at 2793, 2797-2799, 2801, 2809, 2817. And further, the "inherent right of self-defense has been central to the Second Amendment right" to keep and bear arms. *Heller*, at 2817.

It is difficult to read *Heller* without acknowledging, whether by hearty agreement or begrudging concession, that the right to keep and bear arms must be incorporated, under *any* test. The Court's landmark decision in *Heller* concluded that the Second Amendment's right to arms is "deeply rooted in this Nation's history and tradition," is "fundamental to the American scheme of justice," and is "necessary to an Anglo-American regime of ordered liberty." *See Heller*, at 2793, 2797-2799, 2801, 2809, 2817. Those *are* the tests for incorporation. *See Moore v. East*

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[5] 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., Philadelphia: Lorenzo Press, 1804); *see Heller*, 128 S.Ct. at 2793, 2817.

Cleveland, 431 U.S. 494, 503 (1977) (plurality op.); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).

Section I examines why the cases relied upon in *National Rifle Association of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009) (hereafter, "*NRA v. Chicago*") do not preclude incorporation. Section II examines the applicable tests for incorporation and suggests why the Second Amendment is properly incorporated. We cover both topics summarily knowing that they will be covered thoroughly by the parties and other *amici*.

Section III is the focus of this brief. There, we examine this Court's self-defense jurisprudence. Our examination takes place in the context of Judge Easterbrook's thought-provoking observations in *NRA v. Chicago*. But the main focus is on this Court's own self-defense cases – cases widely cited by state and federal courts – to illustrate that *armed* self-defense rights are far more than a "common-law gloss on criminal statutes." Rather, armed self-defense is a fundamental right founded on traditional principles well-established in our judicial system, our laws, our society, and our culture.

Section IV takes a closer look at the nature of firearms, the connection between arms and the right to self-defense, and how the Founders believed the two inseparable.

Section V touches on *NRA v. Chicago's* references to federalism, and shows why federalism poses no obstacle to incorporation.

◆

ARGUMENT

California, the home state of most of the District Attorneys represented herein, is one of the few states without a constitutional provision expressly guaranteeing a right to keep and bear arms.[6] Yet California's Supreme Court found that even a *felon* nonetheless had a *right* to use his friend's handgun to shoot an attacker in self-defense, and could not be prosecuted for possessing the firearm for that purpose. The court found that the prohibition against felons possessing handguns "was not intended to affect *a felon's right* to use a concealable firearm in self-defense[.]" *People v. King*, 22 Cal. 3d 12, 24, 582 P.2d 1000, 1007 (1978) (emphasis added). This Court came to a similar conclusion in *Starr v. United States*, 153 U.S. 614, 623 (1894), finding an alleged horse thief had the right to defend himself against an overzealous posse.

These holdings are not an anomaly. They reflect a judicial recognition of the American tradition of gun ownership and use, and an acknowledgment of the fundamental right to armed self-defense.[7] This tradition and right are also recognized in state constitutions, statutes, and in this Court's own jurisprudence. *People v. King* and countless other cases confirm that the right to keep and bear arms *is* the

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[6] States that guarantee the right to arms and/or self-defense and their respective provisions are listed in Appendix A, attached hereto.

[7] "Arms" or "armed self-defense" herein refer to firearms.

"true palladium of liberty," and the right to armed self-defense is fundamental to the American scheme of justice.

That being the case, the Seventh Circuit's postulations in *NRA v. Chicago*, 567 F.3d at 857 and the cases consolidated thereunder are incongruous. First, the appellate court defers to this Court on the matter of incorporation, suggesting the fate of the Second Amendment "under the Court's selective (and subjective) approach to incorporation is hard to predict." *Id.* at 858-859. Then, the court observes that the right of "[s]elf defense is a common-law gloss on criminal statutes." *Id.* at 859. From that premise, the Seventh Circuit Court hypothesized that this Court might find self-defense rights subject to state abrogation, or "arms" limited, for example, to long guns only or even to "pepper spray." *Id.* at 860.

The Court's observations in *NRA v. Chicago* appear based on a common but mistaken belief that there is little legal authority supporting a right to self-defense, beyond criminal statutes. In sections III and IV, we dispel this myth by reviewing the substantial body of law that supports a right to armed defense, including numerous cases by this Court dating back to the 1800's. First, however, we review the incorporation doctrine, and how it applies here.

I. INCORPORATION OF THE SECOND AMENDMENT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS A MATTER OF FIRST IMPRESSION

The Seventh Circuit concluded it was barred by Supreme Court precedent from considering selective incorporation of the Second Amendment.[8] Supreme Court decisions from 1876, 1886, and 1894 *did* hold that the Second Amendment did not apply directly to the States. *See United States v. Cruikshank,* 92 U.S. 542 (1876); *Presser v. Illinois,* 116 U.S. 252 (1886); *Miller v. Texas,* 153 U.S. 535 (1894). But none of those cases addressed whether the Second Amendment applies against the states *through the Due Process Clause* – for they could not. Those cases were decided before the advent of the selective incorporation doctrine, and before this Court even hinted that fundamental provisions of the Bill of Rights are incorporated through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 241 (1897).[9] So they addressed only

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[8] *See NRA v. Chicago*, 567 F.3d at 857, *citing Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009).

[9] *Heller*, 128 S.Ct. at 2812-2813 & n.23, explains that *Cruikshank*, "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government." (citing *Cruikshank* 92 U.S. at 553). But *Heller* also noted the "limited discussion of the Second Amendment in *Cruikshank*," *Heller*, 128 S.Ct. at 2813, simply did not address the possibility of incorporation of the right to keep and bear

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whether the Second Amendment applies *directly* against the states – a very different question than the one presented here.[10] As a matter of fact, law,[11] and logic the Supreme Court has never directly ruled on this issue.

The most natural reading of the *Cruikshank, Presser, Miller* triumvirate – indeed, the only reading that comports with the actual text, posture, and structure of those opinions – is that they reaffirmed the now unremarkable constitutional principle that the Bill of Rights, *standing alone,* restrains only the

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arms in the Fourteenth Amendment's Due Process Clause. Indeed, in discussing the Second Amendment's application, the *Cruikshank* Court noted that the "[S]econd [A]mendment declares that it shall not be infringed; but this, *as has been seen,* means no more than it shall not be infringed by Congress." *Cruikshank,* 92 U.S. at 553 (emphasis added). The "as has been seen" language refers to the Court's preceding discussion of the First Amendment: "The First Amendment to the Constitution . . . like other amendments *proposed and adopted at the same time, was not intended to limit the powers of the State governments* in respect to their own citizens, but to operate upon the National government alone." *Id.* at 552 (emphasis added). At this point the *Cruikshank* opinion cites *Barron v. Mayor of Baltimore,* 32 U.S. 243 (1833). So *Cruikshank's* Second Amendment discussion simply reaffirmed the basic principle of *Barron* that the Bill of Rights originally, of its own terms, applied *directly* only to the federal government.

[10] *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257 (1983).

[11] *Heller*, 128 S.Ct. at 2813, n.23 (2008) (courts must apply current Fourteenth Amendment jurisprudence).

federal government.[12] This Court is thus free to follow its own suggestion in *Heller's* famous footnote 23, and "engage in the sort of *Fourteenth Amendment* inquiry required by our later cases."[13] *Heller*, 128 S.Ct. at 2813 n.23.

II. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS FUNDAMENTAL AND THUS INCORPORATED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Numerous cases confirm what Justice Scalia has said: "virtually all" individual rights found in the Bill of Rights have been incorporated against the States via the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment); *see also Planned Parenthood v.*

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[12] *See, e.g.,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 484 (2d ed., Aspen Publishers, 2002) ("Technically, the Bill of Rights still applies directly only to the federal government; *Barron v. Mayor & City Council of Baltimore* never has been expressly overruled. Therefore, whenever a case involves a state or local violation of a Bill of Rights provision, to be precise it involves that provision as applied to the states through the due process clause of the Fourteenth Amendment").

[13] Of course, the Court also may take this opportunity to consider whether the Second Amendment is incorporated via the Privileges or Immunities provisions of the Fourteenth Amendment, but in that event must address the contrary precedent of the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873). We leave that issue to the parties and other *amici* to press.

Casey, 505 U.S. 833, 847 (1992) ("We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States").[14] Thus, if the rights protected by the Second Amendment are "fundamental," then the Second Amendment likewise restricts state infringement of those rights through the Fourteenth Amendment.

"Fundamental" rights have been defined as those "necessary to an Anglo-American regime of ordered liberty," *Duncan,* 391 U.S. at 150 n.14, or "deeply rooted in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 721. To determine whether the right to keep and bear arms is "fundamental," this Court must engage in a culturally specific inquiry, canvassing the attitudes and historical practices of the founding-era and post-Civil War period because those times produced the constitutional provisions at issue.

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[14] The Due Process Clause of the Fourteenth Amendment prohibits states from infringing rights that are "fundamental." *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). Any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas,* 380 U.S. 400, 403 (1965) (referencing *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963)); *see, e.g., Wallace v. Jaffree,* 472 U.S. 38, 49 (1985) ("[W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power").

In *Heller*, this Court already effectively conducted this incorporation analysis, albeit for a different but related purpose. In determining whether the right to arms was a right of the people or the state, *Heller* canvassed the attitudes and historical practices of the Founding era and post-Civil War period – and more. *Heller* explored the history and foundations of the ancient right of self-defense and the right to arms for that purpose. After its exhaustive analysis, this Court concluded that self-defense is an "inherent," "natural," "fundamental," "right." *See Heller*, at 2793 (natural right of defense), 2797-2798 (pre-existing right), 2798 (fundamental right), 2799 (natural right), 2801 (central right), 2809 (natural right), and 2817 (inherent right).

The Court came to a similar conclusion concerning the Second Amendment's origins and links to self-defense. It found the "inherent right of self-defense has been central to the Second Amendment right[ ]" to keep and bear arms, *id.* at 2817, and further, that while self-defense "had little to do with the right's *codification*; it was the *central* component of the right itself." *Id.* at 2801 (emphasis in original).

Given *Heller's* findings, the incorporation determination reduces to a simple syllogism: (1) all fundamental rights of the people enumerated in the Bill of Rights are incorporated by, and apply to, the states through the Fourteenth Amendment; (2) *Heller* found the Second Amendment embodied a fundamental right of the people to keep and bear arms; and therefore (3) the Second Amendment is incorporated by, and applies to, the states through the Fourteenth Amendment.[15]

Accordingly, we will not repeat *Heller's* "fundamental rights" analysis, here. To the extent we revisit the analysis in *Heller*, we do so in the context of our review of this Court's own cases on armed, self-defense, and of *NRA v. Chicago,* which questions the inevitability of incorporation.

III. THE SUPREME COURT HAS RECOGNIZED A FUNDAMENTAL RIGHT TO ARMED SELF-DEFENSE, DATING BACK TO THE NINETEENTH CENTURY

NRA v. Chicago considered itself bound by *Cruikshank*, *Presser*, and *Miller*, deferring to this Court on whether Second Amendment rights should be incorporated. *NRA v. Chicago*, 567 F.3d at 857. Consequently, the *NRA v. Chicago* court did not engage in the inquiry suggested in *Heller's* footnote 23. Judge Easterbrook, writing for the panel, did however offer provocative observations on incorporation, the right of self-defense, and its corollary right to arms. Those observations conflict with *Heller* and other decisions of this Court, and thus warrant discussion.

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[15] While *NRA v. Chicago and Maloney v. Cuomo* held against incorporation – or at least declined to consider the issue, deferring instead to this Court – and did not engage in the incorporation analysis referred to in *Heller's* footnote 23, the Ninth Circuit case holding in favor of incorporation did. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *reh'g en banc granted*, 575 F.3d 890 (July 29, 2009). While the initial opinion is not binding, pending rehearing, it nonetheless provides an objective incorporation analysis in harmony with this Court's decision in *Heller*.

A. Self-Defense Is More Than A "Common-Law Gloss On Criminal Statutes," It Is A Universally Recognized Fundamental Right

NRA v. Chicago suggests the right to self-defense is a "common-law gloss on criminal statutes," and may be a "right" so lacking in foundation that state legislatures would be free to abrogate it entirely. *NRA v. Chicago*, 567 F.3d at 859. Without a right to self-defense, however, the right to keep and bear arms is stripped of one of its fundamental tenets – indeed, its core motivating principle, as the court reveals in posing its self-described "farfetched" hypothetical:

> Suppose a state were to decide that people cornered in their homes must surrender rather than fight back – in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the second amendment protects only the interests of law-abiding citizens.

Id. "Farfetched" perhaps too gently describes that hypothetical. If, as *NRA v. Chicago* suggests, some states are moving toward criminalizing – and have authority to criminalize – self-defense, then the *Heller* decision came down none too soon.[16]

The court's hypothetical rests on the false premise that the "right" to self-defense is divorced from self-preservation, from survival, from natural law, i.e., that it is solely a creature of the legislature. The court indicates that, rather than being a fundamental right, self-defense is little more than an affirmative defense, a statutory entitlement to avoid criminal prosecution for bodily injury inflicted upon an aggressor by the intended victim – *if* the victim survives. And further, that despite a "common-law gloss" applied by courts, self-defense remains a mere legislative creation legislatures can revoke at will. *Id.* at 859-860.

Heller, however, put to rest the belittling notion that the bedrock right to self-defense, i.e., the right to fight for one's own life, is mere legal varnish. And it did so repeatedly. *Heller*, 128 S.Ct. at 2793, 2797-2799, 2801, 2809, 2817 (finding self-defense an "inherent," "natural," "fundamental" and pre-existing "right").

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[16] In fact, the trend is in the opposite direction, with more states abandoning duty to retreat legislation in favor of "castle-doctrine" legislation to protect victims from criminal prosecution for defending hearth and home. *See* Denise Drake, *The Castle Doctrine: Expanding a Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573, 575-576 n.12 (2008) (stating that at least 15 states have adopted the model castle doctrine).

B. The Right To Self-Defense Is Well-Established In State And Federal Law

A central argument in *Heller* is that the right to keep and bear arms is inextricably tied to a fundamental, *individual* right to self-defense, a right well-established in state and federal law – especially when defending hearth and home, a principle known as the "castle doctrine." As Judge Cardozo explained in *People v. Tomlins*, 213 N.Y. 240 (Ct. App. 1914):

> It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than two hundred years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486): In case a man is assailed in his own house, he "need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight." Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England. It was so held by the United States Supreme Court in *Beard v. United States* (158 U.S. 550).

Tomlins, 213 N.Y. at 243; *see also People v. Jones*, 3 N.Y.3d 491, 495-496 (Ct. App. 2004) (at least since *Tomlins*, the castle doctrine has been part of New York's statutory and decisional law, which in turn grew out of the common law).[17]

In addition to *Beard*, Judge Cardozo cites two more self-defense opinions by this Court (discussed below), and references leading treatises, scholars, and several other state opinions for the same proposition.[18] Moreover, the *Beard* decision cited by Judge

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[17] The castle doctrine has long been recognized in the context of the Fourth Amendment, *see, e.g.*, SEMAYNE'S CASE, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603), *cited with approval in Payton v. New York*, 445 U.S. 573, 592 n.44 (1980).

[18] "In that case [*Beard*] there was a full review of the authorities, and the rule was held to extend not merely to one's house but also to the surrounding grounds. That case has been followed by the same court in later decisions. (*Alberty v. U.S., 162 U.S. 499*; *Rowe v. U.S., 164 U.S. 546, 557.*) The same rule is enforced in Michigan (*Pond v. People, 8 Mich. 150*; *People v. Keuhn, 93 Mich. 619*); in New Jersey (*State v. Zellers, 7 N.J.L. 220*); in Vermont (*State v. Patterson, 45 Vt. 308*); in Wisconsin (*State v. Martin, 30 Wis. 216*); in Alabama (*Green v. State, 96 Ala. 24*) [sic]; in Georgia (*Haynes v. State, 17 Ga. 465*); in Florida (*Wilson v. State, 30 Fla. 234*); in Ohio (*State v. Peacock, 40 Ohio St. 333*); in North Carolina (*State v. Taylor, 82 N.C. 554*); and in other jurisdictions. It is also stated as undoubted law in all the leading treatises. (1 Wharton Crim. Law, sec. 633; 1 Bishop Crim. Law, secs. 858, 859; 3 Russell on Crimes, 207, 213; 2 East Pleas of the Crown, 372; Foster's Crown Cases, c. 3, p. 273.) The rule is the same whether the attack proceeds from some other occupant or from an intruder. It was so adjudged in *Jones v. State (76 Ala. 8, 14)*. 'Why,' it was there inquired, 'should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is

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Cardozo is only one of many cases where this Court and others have recognized the right to defend oneself and others, and the right to use lethal force in doing so.[19]

C. This Court Has Recognized The Fundamental Right To *Armed* Self-Defense On Multiple Occasions, Often Reversing Criminal Convictions Where Lower Courts Failed To Honor That Right

Conventional wisdom suggests a paucity of Supreme Court case law concerning firearms and self-defense, and thus little pre-*Heller* support for a fundamental right to *armed* self-defense. This can be seen in the lack of attention paid to this Court's own self-defense cases by those analyzing the roots of the

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lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?' We think that the conclusion there reached is sustained by principle, and we have not been referred to any decision to the contrary. The duty to retreat, as defined in the charge of the trial judge, is one applicable to cases of sudden affray or *chance medley*, to use the language of the early books. (Blackstone Comm. bk. IV, ch. XIV; East Pleas of the Crown, *supra*; Russell on Crimes, *supra*; *People v. Fiori, 123 App. Div. 174, 188.*) We think that if the situation justified the defendant as a reasonable man in believing that he was about to be murderously attacked, he had the right to stand his ground." *Tomlins*, 213 N.Y. at 243-244.

[19] Later, then-Justice Cardozo commented further on incorporation of fundamental rights, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone. *See Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937).

Second Amendment right to arms.[20] As noted above, the court in *NRA v. Chicago* reflects this "wisdom" by deeming the right to self-defense a "common-law gloss," easily removed. *NRA v. Chicago*, 567 F.3d at 859. But to the extent the court in *NRA v. Chicago* suggested the right to armed self-defense is not solidly grounded in American culture and legal tradition, the court was mistaken.

On the contrary, a substantial body of self-defense – and armed self-defense – case law exists dating back to the late 1800's.[21] These cases show that courts routinely treat self-defense as a natural right, and armed self-defense as an extension of that right under proper circumstances. To make the point, we examine a few of this Court's more prominent cases on the subject, along with examples of other cases that engage in their own, independent review of the right to armed self-defense and its historic roots.

Gourko v. United States marks the beginning of a string of cases out of the Western District of

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[20] Many analysts also seem unaware that almost all state constitutions include some variation of the right to armed self-defense, from the founding era, forward, *see* Appendix A.

[21] *See* DAVID B. KOPEL, STEPHEN P. HALBROOK, AND ALAN KORWIN, SUPREME COURT GUN CASES 15 (Candice M. DeBarr ed., Bloomfield Press) (2004) (breaking down 14 armed, self-defense cases by fundamental elements, and examining 92 firearms cases, generally); *see also* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (Gun Control Symposium 1999).

Arkansas, where this Court reversed convictions because of improper jury instructions on self-defense provided by Judge Isaac Parker (widely known as the "hanging judge"). *Gourko v. United States,* 153 U.S. 183 (1894). *Gourko* involved a dispute between coal miners. Victim Peter Carbo, who "possessed extraordinary physical strength and was regarded as a dangerous character," accused the smaller John Gourko of taking money for certain lots of coal dug by Carbo. Carbo threatened to shoot Gourko "down like a dog." *Id.* at 183. In response to Carbo's threats, Gourko armed himself. In a later confrontation, Gourko shot and killed the unarmed Carbo. Gourko was convicted of murder. *Ibid.*

Gourko appealed, claiming Judge Parker erred by instructing the jury that, because Gourko had armed himself, the verdict could *not* be manslaughter; it had to be either murder or justifiable homicide based on self-defense. Justice Harlan, writing for the Court, found the instructions constituted prejudicial error, noting that arming oneself for necessary self-defense in response to a threat did not preclude a verdict of manslaughter based on a subsequent encounter, provided the case for manslaughter was otherwise made. *Id.* at 191-192.

Thus, assuming the facts did *not* support a finding that Gourko shot Carbo in self-defense, it was up to the jury, not the judge, to decide the nature of the homicide. In other words, "manslaughter" did not become "murder" solely because Gourko armed himself well before he killed Carbo. Under the circumstances, arming himself might have been a reasonable precaution, given Carbo's threats of violence, and thus did not necessarily show an intent to kill. Gourko had a *right to armed self-defense*. *Ibid.*; *accord Thompson v. United States*, 155 U.S. 271, 283 (1894); *Wallace v. United States*, 162 U.S. 466, 474 (1896).

On the heels of *Gourko*, Chief Justice Fuller ruled that defendant Henry Starr, a teenager wanted for stealing horses, was entitled to defend himself when fired upon by a peace officer who failed to identify himself. *Starr v. United States*, 153 U.S. 614 (1894). The officer had tracked down Starr to serve a warrant, but decided upon seeing him to shoot first and serve later. Starr shot back. The Court found that even an accused horse thief in hiding could defend himself, reasoning that each person "is entitled to protect his life." *Id.* at 623; *cf. People v. King*, *supra*, 22 Cal. 3d at 24 (felon had a *right* to use otherwise prohibited firearm in self-defense).

In *Beard v. United States*, the Court again reviewed Judge Parker's jury instructions on several principles of self-defense. *Beard v. United States,* 158 U.S. 550 (1895). *Beard* arose out of a family dispute between Mr. Beard and his nephews, the three Jones brothers, over ownership of a cow. Edward Jones, who had been living with the Beards following his mother's death, claimed the cow belonged to his mother and thus was rightfully his; further, he determined to leave the farm and take the cow with him. In an initial confrontation with the Jones brothers, one of whom was armed with a shotgun, Mr. Beard disputed Edward's claim, and told him to file a legal action to settle the matter. Beard ordered the brothers off the property and told them not to come back, which of course they did. In the meantime, Will Jones publicly avowed his intention to get the cow or kill Beard. Beard heard of these threats right before the fatal encounter. *Id.* at 551-553.

When Edward and his older brothers returned to the farm, this time armed with pistols, they quarreled with Mrs. Beard, who refused to let them take the cow. It was while the boys were arguing with Mrs. Beard in a field some 50 yards from the farmhouse that Mr. Beard arrived on the scene, returning from town. He was carrying his shotgun, as was his custom. Mr. Beard ordered the boys to leave. They refused. Will Jones moved aggressively toward Beard and, while exclaiming "Damn you, I will show you," moved his hand as if to draw his pistol. When Jones got within a few feet of Beard, Beard hit him on the head with his shotgun, causing serious injury. Jones died soon thereafter. *Id.* at 552-553.

Beard was tried and convicted of manslaughter. On appeal, Beard argued that Judge Parker's lengthy jury instructions on self-defense misstated the law and prejudiced his case. The Court agreed, finding that the trial court incorrectly limited the "castle doctrine" (no duty to retreat) to one's actual dwelling. That interpretation precluded a finding of justifiable homicide if Beard could have retreated, because Beard struck the fatal blow while in his field, not his house. Justice Harlan stated: "we cannot agree that the accused was under any greater obligation, when on his own premises, near his dwelling-house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling-house." *Id.* at 559-560; *see also Tomlins*, *supra*, 213 N.Y. at 243 (Cardozo, J). The Court further found that someone in Beard's position "is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger[,] and if he kills him in so doing it is called justifiable self-defence[.]" *Id.* at 562.[22]

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[22] The common law right to self-defense has sometimes been misunderstood as always entailing a duty to retreat if possible before using deadly force. That is false, based on a common law distinction we no longer make – between killings among quarreling good people and the killing of criminals. In early common law times 15 year old boys trotted around with swords and most adults, male and female, carried a knife – not for protection but as a tool, and especially as the common tool for eating. Deadly quarrels among teenagers were commonplace, so the common law developed a rule that if you killed another *good citizen* you were at fault even if he had started the quarrel and he had escalated it to deadly force. If you had retreated as far as you could before killing him, you got a pardon. You still had not acted from right and all your worldly possessions were forfeit. This was called a killing *se defendendo*. *See* Don Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 147 n.24 (1986). But *se defendendo* was only the rule if you had harmed society by killing another good person. When necessarily killing robbers and other felons you were serving the law by preventing the commission of a felony and you were commended for serving the community as well as yourself. Retreat was not required when you killed a criminal rather than a good person. Neither is it in most American jurisdictions today. In the 2000's

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The Court in *Beard* found other errors in Judge Parker's instructions on self-defense, and took the opportunity to explore the origins of self-defense doctrine. In doing so, the Court turned to other courts and legal scholars, including the Supreme Courts of Ohio (*Erwin v. State*, 29 Ohio St. 186 (1876)) and Indiana (*Runyan v. State*, 57 Ind. 80 (1877)), East's Pleas of the Crown, Foster's Crown Cases, Bishop's New Criminal Law, Wharton on Criminal Law, etc. *Beard*, 158 U.S. at 560-563.

The point here is not to list the fundamental elements or examine the subtle nuances of the right to self-defense, but to illustrate that this Court has explored, *on multiple occasions*, the origins of that right and its link to the right to keep and bear arms. *Beard*, *Gourko*, *Starr* and at least ten other Supreme Court cases do that to varying degrees.[23] And the

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at least 15 states adopted the Marion Hammer law which abrogates any duty to retreat rule; *see* Drake, *supra* note 16.

[23] *See, e.g.*, *Brown v. United States*, 256 U.S. 335, 343 (1921) (no duty to retreat from anywhere the defendant had a right to be; also known for Justice Holmes' quote: "Detached reflection cannot be demanded in the presence of an uplifted knife."); *Allen v. United States*, 164 U.S. 492 (1896) (self-defense case heard three times by the Court, with the final case being known for the "Allen charge" given to deadlocked juries), 157 U.S. 675, 679-680 (1895) (decision to carry arms did not negate claim of self-defense), and 150 U.S. 551, 561-562 (1893) (defendant not held to standard of judge or jury when assessing threat in heat of the moment); *Rowe v. United States*, 164 U.S. 546, 558 (1896) (defendant had no duty to retreat or to "so carefully aim[ ] his pistol as to paralyze the arm of his assailant without more seriously wounding him."); *Acers v. United States*, 164 U.S. 388, 391

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right to self-defense and right to arms are discussed further in cases citing this Court's decisions.

For example, *Beard* has been cited in over 100 cases on armed self-defense, with many jurists in those cases, e.g., Judge Cardozo in *Tomlins*, *supra*, exploring at length the origins and nature of the those rights. Of course, the citations go in both directions as seen above in *Beard's* references to cases in Ohio and Indiana. The result is a substantial body of law providing this Court with ample support for finding the Second Amendment's right to arms and underlying right to self-defense, together, are part of this country's history and traditions. The Second Amendment guarantees the means necessary to exercise the most fundamental right of all – the right to survive. It is an expression of the natural law of self preservation. *See Heller*, 128 S.Ct. at 2797-2799 (right to arms is fundamental).

In sum, these cases show that not only self-defense, but armed self-defense, is a fundamental right deeply rooted in our history and traditions.

(1896) (stone can be a "deadly weapon"); *Alberty v. United States*, 162 U.S. 499, 508 (1896) (victim is not bound to retreat when on own property, and may use such force as necessary to repel the assault.); *Wallace, supra*, 162 U.S. 466, 474-475 (carrying arms in response to earlier threat does not necessarily show an intent to kill in later confrontation); *Allison v. United States*, 160 U.S. 203, 211 (1895) (son who shot abusive father entitled to have jury consider self-defense); *Thompson*, *supra*, 155 U.S. 271, 283 (right to armed self-defense, as in *Gourko*, in response to threat did not negate self-defense claim).

Because the right to armed self-defense is central to the Second Amendment, *Heller*, 128 S.Ct. at 2817, these cases also support incorporation of the Second Amendment. *See Moore v. East Cleveland*, 431 U.S. 494, 502-503 (1977) (plurality op., discussing various tests for protecting fundamental rights via incorporation); *see also Washington v. Glucksberg*, 521 U.S. 702, 727 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

IV. FIREARMS ARE ESSENTIAL TO THE RIGHT TO SELF-DEFENSE

One of Judge Easterbrook's more unconventional suggestions was that a right to "arms" be limited by state and local governments to, for instance, "pepper spray." *NRA v. Chicago*, 567 F.3d at 859-860. But that comment fails to appreciate the unique role firearms play in self-defense, a role most people understand, intuitively, but one often left unexplained.

A. Firearms Are Unique Among Weapons

Although the *unlawful* violent misuse of firearms is sensationalized by the media,[24] one primary lawful use of firearms is for protection and safety. This crucial and greater role is exercised daily across the country, with little fanfare.[25] Properly used, firearms (particularly handguns) are weapons that defend. They are unique in allowing the weak to defend against aggression and victimization by the strong. Criminals always have the decided advantage of choosing the time, place, and victim. The presence of an intended-victim's firearm provides a semblance of balance to that life-threatening equation.[26]

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[24] *See* JOHN R. LOTT, JR., THE BIAS AGAINST GUNS – WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG (Regnery Publishing, 2003).

The defensive nature of firearms is part of the reason why we as a society have chosen to arm the police and ourselves. Criminological studies find that in confrontations between criminals and armed citizens, the armed citizens usually win.[27] For example, 80 percent or more of attackers flee when victims just *display* a gun in self-defense.[28] And, Professor

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[25] Gary Kleck and Don B. Kates, Armed: New Perspectives On Gun Control (Prometheus Books, NY 2001) (summarizing the frequency of defensive gun use based on 13 early surveys and the National Self-Defense Survey).

[26] This was illustrated vividly by the recent murders at Fort Hood, where dozens of unarmed soldiers could not defend against a single armed attacker. The attacks went unabated until an armed officer arrived at the scene. *See* Greg Jaffe and Dan Eggen, *Heroic Civilian Police Officer "Walked up and Engaged" Shooter*, The Washington Post, November 6, 2009 *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/06/AR2009110601931.html (last visited November 17, 2009).

[27] Don Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts (Timothy Lytton ed., University of Michigan Press) (2005).

[28] *Id.* at 68.

Southwick's study finds that in those criminal attacks, "The use of a gun by the victim significantly reduces her chance of being injured. . . ."[29] Another study finds that "firearms are used over half a million times a year [in America] against home invasion burglars; *usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired.*"[30]

The foregoing quote is emphasized because it represents the consistent outcome of confrontations between criminals and gun-armed citizens. Armed citizens have two immense advantages, which may explain why criminals usually flee without firing a shot. First, gunshots attract police, a result as adverse to criminals as it is welcome to victims. Second, roughly 85 percent of people wounded by gunshot survive if given medical care.[31] Victims unequivocally welcome such medical help. But criminals would rather avoid it. For criminals, going to a hospital is typically just a first step toward going to prison.

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[29] Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362 (2000); *see also* Jongyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861 (2004).

[30] David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 166 (2008) (citing Robert M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997) (reporting results of study conducted by the CDC) (emphasis added).

[31] Don B. Kates, *The Value of Civilian Handgun Possession as Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991).

Thus, generally speaking, firearms alter the balance of power between criminals and victims, and in some respects give victims the advantage. That is, firearms are *comparatively* less useful to criminals than victims. Conversely, the absence of firearms leaves victims defenseless without appreciably inconveniencing criminals, who can victimize unarmed citizens and commit most crimes even *without* a firearm because, as noted above, criminals have the luxury of choosing the time, place, and victim.

B. As A Matter Of Common Sense, The Right To Self-Defense Implies The Right To Arms

The court in *NRA v. Chicago* tried unsuccessfully to distinguish the right to arms from the right to self-defense. *NRA v. Chicago*, 567 F.3d at 859-860 (suggesting "pepper spray" might suffice). The right to self-defense without access to the tools essential for self-defense is no right at all. The *Heller* decision left no doubt on this point. To reiterate, the "inherent right of self-defense has been central to the Second Amendment right" to keep and bear arms, *Heller*, 128 S.Ct. at 2817. And, while self-defense had little to do with the *codification* of the right to arms, "it was the *central* component of the right itself." *Id.* at 2801 (emphasis in original).

With respect to spray cans and similar products, studies show these half-measures are simply ineffective against anyone sufficiently inebriated, under narcotic influence – or just very angry.[32] In other words, as a practical matter, sprays are ineffective to defend against exactly the people from whom victims need defense. A "right" to self-defense without a correlative right to *firearms* is no right at all. That is why modern philosophers overwhelmingly conclude that a right of self-defense entails a right to possess a gun.[33] The Founders were of a similar mind.

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[32] As to the ineffectiveness of chemical sprays due to range, power, and deterrent capacity, *see, e.g.*, James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141 (1989); *see also* MASSAD AYOOB, THE TRUTH ABOUT SELF-PROTECTION 314-322 (Bantam, 1983) (indicating pepper spray is only useful as dog repellent). Even stronger irritants such as Mace should "*not* be used in life-threatening encounters! It would be extremely foolish to use Mace on a suspect immediately capable of employing a deadly weapon. That is simply not what it was designed for." *Id.* at 316 (italics in original).

[33] Michael Huemer, *Is There A Right to Own A Gun?*, 29 SOC. THEORY & PRAC. 297 (2003); *see also* Todd C. Hughes and Lester H. Hunt, *The Liberal Basis of the Right to Bear Arms*, 14 PUB. AFF. Q. 1 (2000); Lance Stell, *Self-Defense and Handgun Rights*, 2 J. L., ECON. & POL'Y 265 (2006); Samuel C. Wheeler, *Self-Defense Rights and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431 (1997); and *Arms as Insurance*, 13 PUB. AFF. Q. 111 (April, 1999).

C. The Founders Understood That The Right To Self-Defense Included The Right To Arms

The Founders inherited the view that self-defense is the first right – and embraces the right to arms – from the philosophers they knew, especially Locke[34] and Hobbes.[35]

The Founders did not entertain any theoretical distinction between the right of self-defense and the right to possess arms for self-defense. An original justice of this Court, law professor James Wilson, was a member of the Continental Congress and the principal draftsman of the Pennsylvania Constitution. Wilson explained the right to use deadly force to repel a homicidal attacker:

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[34] Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA L. REV. 103, 118 n.35 (1987) (referencing Locke that by the laws of nature everyone is both: a) "*bound to preserve himself*" and b) entitled to have and use "what tends to the preservation of the Life, the Liberty, Health, Limb or Goods. . . .") (italics in original).

[35] THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL ch. XIV, p. 86 (A.R. Waller ed., Cambridge University Press 1904 (1651) stressed the inclusion of the right to arms within the right to self-defense as follows:

> "The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, his own life. . . .
>
> A law of nature, *lex naturalis*, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his own life, or *taketh away the means of preserving the same*, and to omit that by which he thinketh that it may be best preserved" (emphasis added).

> [I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. This law, however, is expressly recognized in the Constitution of Pennsylvania: "*The right of the citizens to bear arms in defence of themselves shall not be questioned.*"[36]

Modern philosophy and the Founders agree: any academic distinction between the right of self-defense and the right to possess arms for self-defense is a distinction without a difference.

V. FEDERALISM DOES NOT BAR INCORPORATION OF A FUNDAMENTAL RIGHT

NRA v. Chicago suggests that principles of federalism might militate against ruling in favor of Second Amendment incorporation. *NRA v. Chicago*, 567 F.3d at 860. This argument fails in the first instance because there are no – and hence the court failed to produce any – late 18th Century authorities indicating states have the power to abolish pre-existing human rights – much less the premier "human right" of self-defense, which necessarily includes the right to be armed to exercise that right effectively.

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[36] *See* Wilson, *supra* note 5, at 84 (emphasis added); *see also* STEPHEN HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 262 (2008) (quoting Roger Sherman's avowal that he "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made").

Second, such considerations should have been directed to the Supreme Court over a century ago when that Court began subjecting state powers to the Bill of Rights. Unless this Court wishes to revisit the validity of the incorporation doctrine, *in full*, then an appeal to federalism cannot legitimize any argument against incorporation of a substantive "right of the people" enshrined in the Bill of Rights.

Moreover, the federalism argument presents a curious contradiction. On the one hand, it rests upon a belief that the Founders intended that citizens have the "right to keep and bear arms" to resist tyranny, put down rebellions, and repel invasions. On the other hand, it argues that these same citizens could be prohibited by states from possessing those same arms to prevent murder, rape and home invasion (regardless of the express individual rights protected by the Bill of Rights).

Finally, the federalism argument conflicts with what the actual, founding-era Federalists believed. To natural-law philosophers (whom the Founders revered), self-defense was "the primary law of nature," the primary reason for man entering society. Believing self-preservation to be the very reason for society's creation and existence, they held this right – which they understood to encompass the right to arms – "cannot be repealed or superseded, or suspended by any human institution,"[37] – including the states.

As shown in the substantial body of law above, although the right to armed-self-defense is reflected in nearly all state constitutional provisions, states were not the source of that right. Nor can states abolish it. As Justice Black declared, concurring in *Duncan*, "I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights." *Duncan* 391 U.S. at 170.

◆

CONCLUSION

The individual right of self-defense, and the right to keep and bear arms necessary for self-defense, are integral parts of this nation's laws and tradition. The Founders understood the fundamental nature of these inseparable rights, and the need to protect them to secure all other rights in a free society. Legal scholars and philosophers, too, understood the right of self-defense as the first law of nature, and the right to arms as its corollary. This Court has recognized both rights on multiple occasions, as have state courts and legislatures.

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[37] *See* Wilson, *supra* note 5, at 84.

While often unstated, the link between self-defense and the right to arms is the unique function firearms serve in human society. Firearms in the hands of law-abiding citizens uniquely allow the weak to defend against victimization by the strong. Nations that ban firearms have not managed to control crime, nor even disarm criminals. Only the law-abiding disarm themselves in reaction to such laws. The effect has often been to promote violence, not dissuade it.

This result fulfills the prediction of "the father of criminology," Cesare Beccaria. His comments are doubly worthy of attention: First, because they are the flowery 18th Century precursor of the modern slogan: "When guns are outlawed, only outlaws will have guns." Second, because Thomas Jefferson translated this passage from the Italian and wrote it into his collection of great quotations:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be

> violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty – so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[38]

Beccaria, known and esteemed by our Founders, speaks directly of the need to protect fundamental rights from the vagaries of state and local officials, who would unwittingly aid assailants. This Court saved the Second Amendment from extinction in *Heller*. Now it should breathe some life into it. The fundamental rights embodied in the Second Amendment deserve the same protection afforded other fundamental rights.

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[38] Don Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 91 (1992) (referencing CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 87-88 (Henry Paolucci, tr., Bobbs-Merrill, 1963)).

The decision of the Seventh Circuit should be reversed.

Date: November 20, 2009

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APPENDIX A
LIST OF STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

Alabama: That every citizen has a right to bear arms in defense of himself and the state. Art. I, § 26 (enacted 1819, art. I, § 23, with "defence" in place of "defense," spelling changed 1901).

Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State. Art. I, § 19 (first sentence enacted 1959, second sentence added 1994).

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Art. II, § 26 (enacted 1912).

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. Art. II, § 5 (enacted 1868, art. I, § 5).

1836: That the free white men of this State shall have a right to keep and to bear arms for their common defence. Art. II, § 21.

California: No express right to keep and bear arms provision. However, a right to self defense is provided: All people . . . have inalienable rights. Among these are enjoying and defending life and liberty. . . . Art. I, § 1.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Art. II, § 13 (enacted 1876, art. II, § 13).

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Art. I, § 15 (enacted 1818, art. I, § 17). The original 1818 text came from the Mississippi Constitution of 1817.

Delaware: A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use. Art. I, § 20 (enacted 1987).

Florida: (a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun. Art. I, § 8 (sections (b)-(d) added in 1990).

1838: That the free white men of this State shall have a right to keep and to bear arms for their common defence. Art. I, § 21.

1865: Clause omitted.

1868: The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State. Art. I, § 22.

1885: The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne. Art. I, § 20.

1968: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

Georgia: The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. Art. I, § 1, ¶ VIII (enacted 1877, art. I, § XXII).

1865: A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. Art. I, § 4.

1868: A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne. Art. I, § 14.

Hawaii: A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. Art. I, § 17 (enacted 1950).

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. Art. I, § 11 (enacted 1978).

1889: The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law. Art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. Art. I, § 22 (enacted 1970).

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Art. I, § 32 (enacted 1851, art. I, § 32).

1816: That the people have a right to bear arms for the defense of themselves and the State, and that the military shall be kept in strict subordination to the civil power. Art. I, § 20.

Iowa: No express right to keep and bear arms provision. However, a right to self defense is provided: All men and women . . . have . . . inalienable rights . . . of enjoying and defending life. . . . Art. I, § 1.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. Bill of Rights, § 4 (enacted 1859, art. I, § 4).

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties. . . .

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. §1 (enacted 1891).

1792: That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned. Art. XII, § 23.

1799: That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned. Art. X, § 23.

1850: That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms. Art. XIII, § 25.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. Art. I, § 11 (enacted 1974).

1879: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed. Art. 3.

Maine: Every citizen has a right to keep and bear arms and this right shall never be questioned. Art. I, § 16 (enacted 1987, after a collective-rights interpretation of the original provision).

1819: Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned. Art. I, § 16.

Maryland: No provision.

Massachusetts: The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. Pt. 1, art. 17 (enacted 1780).

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Art. I, § 6 (enacted 1835).

Minnesota: No provision.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Art. III, § 12 (enacted 1890, art. 3, § 12).

1817: Every citizen has a right to bear arms, in defence of himself and the State. Art. I, § 23.

1832: Every citizen has a right to bear arms in defence of himself and of the State. Art. I, § 23.

1868: All persons shall have a right to keep and bear arms for their defence. Art. I, § 15.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Art. I, § 23 (enacted 1945).

1820: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned. Art. XIII, § 3.

1865: Same as above, but with "the lawful authority of the State" instead of "the State." Art. I, § 8.

1875: That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons. Art. II, § 17.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Art. II, § 12 (enacted 1889).

Nebraska: All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed. Art. I, § 1 (right to keep and bear arms enacted 1988).

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. Art. I, § 11(1) (enacted 1982).

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state. Pt. 1, art. 2-a (enacted 1982).

New Jersey: No express right to keep and bear arms provision. However, a right to self defense is provided: All persons . . . have certain natural and unalienable rights, among which are those of . . . defending life. . . . Art. 1, § 1.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. Art. II, § 6 (first sentence enacted in 1971, second sentence added 1986).

1912: The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.

New York: No provision.

North Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. Art. 1, § 30 (enacted 1971).

1776: That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power. Bill of Rights, § XVII.

1868: A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Art. I, § 24.

1875: Same as 1868, but added "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed. Art. I, § 1 (right to keep and bear arms enacted 1984).

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. Art. I, § 4 (enacted 1851).

1802: That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power. Art. VIII, § 20.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. Art. II, § 26 (enacted 1907).

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.] Art. I, § 27 (enacted 1857, art. I, § 28).

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Art. 1, § 21 (enacted 1790, art. IX, § 21).

1776: That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination, to, and governed by, the civil power. Declaration of Rights, cl. XIII.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. Art. I, § 22 (enacted 1842).

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. Art. 1, § 20 (enacted 1895).

1868: The people have a right to keep and bear arms for the common defence. Art. I, § 28.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. Art. VI, § 24 (enacted 1889).

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. Art. I, § 26 (enacted 1870).

1796: That the freemen of this State have a right to keep and bear arms for their common defence. Art. XI, § 26.

1834: That the freemen of this State have a right to keep and bear arms for their common defence. Art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. Art. I, § 23 (enacted 1876).

1836: Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power. Declaration of Rights, cl. 14.

1845: Every citizen shall have the right to keep and bear arms in lawful defence of himself or the State. Art. I, § 13.

1868: Every person shall have the right to keep and bear arms in the lawful defence of himself or the State, under such regulations as the legislature may prescribe. Art. I, § 13.

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. Art. I, § 6 (enacted 1984).

1896: The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.

Vermont: That the people have a right to bear arms for the defence of themselves and the State – and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. Ch. I, art. 16 (enacted 1777, ch. I, art. 15).

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Art. I, § 13 (enacted 1776 without explicit right to keep and bear arms; "therefore, the right to keep and bear arms shall not be infringed" added in 1971).

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. Art. I, § 24 (enacted 1889).

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use. Art. III, § 22 (enacted 1986).

Wisconsin: The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose. Art. I, § 25 (enacted 1998).

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Art. I, § 24 (enacted 1889).

APPENDIX B

Statement of Interests of Additional Amici

CALIFORNIA DISTRICT ATTORNEYS

Alpine County, California, District Attorney Will Richmond Will Richmond previously served as District Attorney for Thiare County, and as Deputy Chief Assistant U.S. Attorney for Eastern District of California. He was appointed Alpine County District Attorney in 2002, and then elected to the position.

Amador County, California, District Attorney Todd Reibe First elected in 1999, Todd Reibe was re-elected in 2002 and 2006.

Butte County, California, District Attorney Michael Ramsey Michael Ramsey has served as a prosecutor for 29 years, and as Butte County District Attorney for over 20 years. During his administration the department has instituted 17 special prosecution units and investigative programs.

Colusa County, California, District Attorney John Poyner John Poyner was first elected District Attorney in 1986, and has been re-elected ever since. He is California District Attorneys Association President-Elect for 2007-2008.

Del Norte County, California, District Attorney Michael D. Reise Michael D. Reise was elected to his first term in 2002, and re-elected in 2006.

El Dorado County, California, District Attorney Vern Pierson As a career prosecutor, Vern Pierson has served as a vertical prosecutor for domestic violence and sexual assault. He helped create the *Field Guide* used by thousands of California police officers, and he is the author of the annually-updated *California Evidence Pocketbook.* He teaches trial advocacy and the laws of evidence to California prosecutors. Since 1999, he has served on the committee that provides the annual legal revisions for Peace Officers Standards and Training (P.O.S.T.).

Fresno County, California, District Attorney Elizabeth A. Egan Elizabeth Egan was elected in 2002. She heads one of the largest prosecutorial agencies in California.

Glenn County, California, District Attorney Robert Holzapfel Robert Holzapfel was first elected District Attorney of Glenn County in 1990 and was re-elected 1994, 1998, 2002, and 2006.

Kern County, California, District Attorney Edward Jagels Edward Jagels was first elected District Attorney of Kern County in 1983, at the age of 33. He is a past President of the California District Attorneys Association. He has served on the Governor's Law Enforcement Steering Committee, the Attorney General's Policy Council on Violence Prevention, and was co-author and campaign chair of the Crime Victims Justice Reform Act (Prop. 115).

Kings County, California, District Attorney Ron Calhoun Ron Calhoun was first elected in 1999, and is currently serving his third term.

Imperial County, California, District Attorney Gilbert Otero Gilbert Otero was first elected in 1992, and is currently serving his fourth term. He is a past President of the California District Attorneys Association.

Madera County, California, District Attorney Michael R. Keitz Michael R. Keitz was appointed District Attorney in October 2008. Prosecutor for 17 years. Past recognition by the Elks Lodge as Prosecutor of the Year. A former Reserve Deputy Sheriff of 19 years of experience.

Mariposa County, California, District Attorney Robert H. Brown Former Naval Commander Robert H. Brown began his career as a lawyer after retiring from the U.S. Navy. He has been a prosecutor since 1985, and was elected District Attorney in 2002 and re-elected in 2006.

Mendocino County, California, District Attorney Meredith Lintott. Meredith Lintott began her career as a prosecutor in 1987, receiving the "Prosecutor of the Year" award in 1988. Lintott was elected District Attorney in 2007 and that same year received Victim's Right's Recognition from Crime Victim's United.

Merced County, California, District Attorney Larry Morse Larry Morse joined the District Attorney's office in 1993, and was elected District Attorney in 2006. He was named Prosecutor of the Year by A Women's Place of Merced County and by the Central Valley Arson Investigators Association.

Modoc County, California, District Attorney Gary Woolverton After more than 30 years in private practice, specializing in workman's compensation, Gary Woolverton was elected District Attorney in 2006.

Mono County, California, District Attorney George Booth George Booth has worked as a criminal defense attorney, and Deputy District Attorney and Assistant District Attorney for Mono County. He has been in the District Attorney's Office for 18 years.

Orange County, California, District Attorney Tony Rackauckas Before being elected District Attorney, Tony Rackauckas had served as Presiding Judge of the Appellate Department of the Superior Court, and before that as a judge of the Superior Court and the Municipal Court. He was elected District Attorney in 1998, and re-elected in 2002 and 2006. During his time in office, gang membership has decreased by 8,500 members, a reduction of 45 percent. There are 55 fewer gangs.

Placer County, California, District Attorney Brad Fenocchio Brad Fenocchio joined Placer County District Attorney's office in 1985, and was first elected District Attorney in 1994. He received the Rural and Medium County Outstanding Prosecutor of the Year Award for the State of California in 2003; the National Association of Counties 2003 Achievement Award presented to the Placer County

District Attorney's Office for its innovative Community Agency Multi disciplinary Elder Team; and the Attorney General's Distinguished Service Award for Elder Abuse Prosecution presented by California Attorney General's Office in 2003.

San Benito County, California, District Attorney Candice Hooper Candice Hooper was first elected in 2006. She has been a prosecutor for 22 years.

San Bernardino, California, District Attorney Michael Ramos Michael Ramos was elected 2002 and re-elected in 2006. In 2004 he was appointed to California Victim Compensation and Government Claims Board, and was elected to the California District Attorneys Association Board of Directors. He was given the Latino of the Year Award in 1999, by the Redlands Northside Impact Committee.

San Diego County, California, District Attorney Bonnie M. Dumanis Bonnie Dumanis was elected in 2003 and is the first woman to serve as District Attorney for the County of San Diego. She served as a prosecutor for twelve years under former District Attorney Ed Miller. In 1994 she was elected to serve in the Municipal Courts and in 1998 she was elected to the San Diego Superior Court.

San Joaquin County, California, District Attorney James Willett James Willett was appointed District Attorney of San Joaquin County in April 2005. He has served the District Attorneys Office for the last 26 years, 10 of which were as Assistant District Attorney.

Santa Barbara County, California, District Attorney Christie Stanley Christie Stanley joined the Santa Barbara County District Attorney's office in 1980. In 1984 she was recognized as "Deputy District Attorney of the Year." She was elected in 2006.

Shasta County, California, District Attorney Gerald C. Benito Gerald C. Benito was first elected District Attorney in 2003.

Sierra County, California, District Attorney Larry Allen Larry Allen was elected District Attorney/Public Administrator of Sierra County on March 5, 2002 and took office as the County's 37th District Attorney on January 6, 2003.

Siskiyou County, California, District Attorney J. Kirk Andrus J. Kirk Andrus was appointed District Attorney in 2005, and was elected in 2006. He is the youngest District Attorney in California.

Solano County, California, District Attorney David W. Paulson Before joining the District Attorney's Office in 1977, David W. Paulson had served as a military trial judge and as an appellate military judge on the Navy's highest court, the Navy-Marine Corps Court of Criminal Appeals. He was appointed District Attorney by the Board of Supervisors in 1993, elected in 1994, and re-elected in 1998, 2002, and 2006. He is a past President (2004-2005) of the California District Attorneys Association (CDAA), and served as CDAA Director in 1995-1997. He is also a past President (2005-2006) of the Board of Directors of the Institute for the Advancement of Criminal Justice (IACJ), and currently serves as the Editor-in-Chief of *The Journal of the Institute for the Advancement of Criminal Justice.* Mr. Paulson was recently appointed Chair of the Board of Advisors for the new LL.M. in Prosecutorial Science program at Chapman University School of Law.

Sutter County, California, District Attorney Carl V. Adams Carl V. Adams is the senior elected District Attorney in California. He was first elected in 1982, and has been re-elected six times. He serves on the Board of the California District Attorneys Association.

Tehama County, California, District Attorney Gregg Cohen Gregg Cohen was first elected in 1998, re-elected in 2002 and again in 2006. He is a member of the Rotary and former member of the California District Attorneys Association (CDAA). He also has served on several committees with CDAA.

Trinity County, California, District Attorney Michael Harper Michael Harper was elected in 2006. Prior to taking office he was Deputy District Attorney in Trinity County from 2001-2007, and has worked as a prosecutor for 15 years.

Tulare County, California, District Attorney Phil Cline Phil Cline began his career as a prosecutor in 1978 with the Tulare County District

Attorney's Office. Before being appointed District Attorney in 1992, he had specialized for seven years in homicide cases. He was first elected in 1994. He created Tulare County's Rural Crime Program, the first of its kind in the nation. He is a past President of the Tulare County Police Chiefs Association.

Ventura County, California, District Attorney Gregory Totten Gregory Totten was first elected in 2002, and was re-elected in 2006. He has been named the Ventura County Kiwanis "Law Enforcement Officer of the Year." He serves on the Board of Directors of the California District Attorneys Association.

Yolo County, California, District Attorney Jeff W. Reisig Jeff Reisig was first elected District Attorney in 2006. He was three times named Yolo County Prosecutor of the Year.

NEVADA DISTRICT ATTORNEYS

Churchill County, Nevada, District Attorney Arthur E. Mallory Arthur E. Mallory was elected as District Attorney of Churchill County in November 1998. He also is a member of the State of Nevada Commission on Judicial Selection since 2003. He also serves on the State Commission on Rural Courts and the Advisory Committee on Criminal Justice in Rural Areas.

Esmeralda County, Nevada, District Attorney Todd Leventhal Todd Leventhal was elected in 2006 to serve his first term. He works as both a criminal defense attorney and District Attorney.

Humboldt County, Nevada, District Attorney Russell D. Smith Russell Smith was admitted to the Nevada State Bar on May 4, 2004.

Lander County, Nevada, District Attorney Hy Forgeron Hy Forgeron was admitted to the Nevada State Bar on October 1, 1973.

Lyon County, Nevada, District Attorney Robert Auer Robert Auer has served as the elected Lyon County District Attorney for the past three years. He has practiced public law for the past 25 years. During that time he has worked for the Nevada Supreme Court, Deputy District Attorney for Carson City and Lyon County, Deputy Attorney General for Nevada.

Mineral County, Nevada, District Attorney Cheri Emm-Smith Cheri Emm-Smith was appointed to the position in May 2002 and elected to two terms (2002 and 2006).

Pershing County, Nevada, District Attorney Jim Shirley Jim Shirley was first elected in 2002, and was re-elected in 2006. He is a member of the National District Attorneys Association.

Washoe County, Nevada, District Attorney Richard Gammick Richard Gammick was first elected in 1994 and was re-elected in 1998 and 2002. He was a Reno Police Officer, a Major in the United States Army, with a combat tour in Vietnam. He served in the Nevada Army National Guard, and was a legal advisor for the Reno Police Department as a Deputy Reno City Attorney.

LAW ENFORCEMENT

Graham County, Arizona, Former Sheriff Richard Mack Richard Mack was the first sheriff in the nation to file a lawsuit against the Clinton administration, seeking to stop federal intrusion on states' rights associated with the Brady bill. That case was ultimately settled in the United States Supreme Court as *Printz v. United States*, 521 U.S. 898 (1997), a victory for states and a long-sought limitation on federal power over the states. A graduate of the FBI National Academy (1992), Mack holds a B.A. in Latin American Studies and Sociology from Brigham Young University, and is the author of five books. He has been integrally involved in the struggle to preserve the right to keep and bear arms, and the right of the individual to lawful self-defense for much of his professional career. Sheriff Mack sees the threat posed by Chicago's near total ban on private gun ownership as unacceptable infringement on the public's fundamental rights corrosive to our constitutional republic.

Mendocino County, California, Sheriff Thomas D. Allman Thomas Allman has been a law enforcement officer since 1981. He has served in a variety of assignments, including undercover narcotics work targeting methamphetamine. He was elected Sheriff in 2006.

Tehama County, California, Sheriff Clay D. Parker Clay Parker has been a law enforcement officer since 1981. He was elected Sheriff in 1999.

ASSOCIATIONS

California Rifle & Pistol Association Foundation The CRPA Foundation was established in 2004 as a 501(c)3 non-profit corporation. CRPA Foundation promotes and encourages firearms and hunting safety and education; educates individuals with respect to firearms, firearms history, firearms technology, hunting, safety and marksmanship; and supports litigation advancing Second Amendment rights.

Long Beach Police Officers Association The Long Beach Police Officers Association (LBPOA) was incorporated on June 24, 1940. It is made up of men and women who serve for the Long Beach Police Department from the police officer, corporal, sergeant and lieutenant ranks. The association ensures the protection and preservation of peace officer rights.

San Francisco Veterans Police Officers Association The San Francisco Veteran Police Officers Association (SFVPOA) represents retired San Francisco officers and is active in protecting their interests, particularly their interest in being able to defend themselves from the criminals they have arrested throughout their careers. SFVPOA is also active in protecting its members' interests in post-retirement employment.

The Arizona Citizens Defense League (AzCDL) The Arizona Citizens Defense League was founded in 2005 by a group of people seeking a sustained, coordinated, statewide effort to protect and expand the rights of law-abiding gun owners. The AzCDL represents 2,500 Arizonans and is growing rapidly. The group's founders, two of whom are now registered lobbyists, have been instrumental in drafting and enacting numerous pro-rights improvements in Arizona's gun laws. AzCDL believes the proper emphasis of gun laws should be on criminal misuse, and that law-abiding citizens' rights to own and carry firearms should be vigorously protected and unencumbered by unnecessary laws or regulations. AzCDL views the Chicago-style gun bans addressed in *NRA v. Chicago* as a threat to personal liberty, beyond any legitimately delegated power, and infringing directly upon the Second Amendment rights of Americans.

The Texas Concealed Handgun Association (TCHA) The Texas Concealed Handgun Association began as the Texas Concealed Handgun Instructor Association in 1997, one year after the Texas concealed handgun law (CHL) went into effect. The association's membership initially consisted of instructors trained by the Texas Department of Public Safety and licensed to train and certify Texas residents to legally carry sidearms under the law. In 2003, the association expanded its membership to include license holders and anyone interested in carrying a concealed handgun for self-defense and currently has more than 1,500 members. Among

TCHA's objectives are: 1) promotion, continuation, and improvement of the Texas concealed handgun law, 2) promoting responsible firearm safety, ownership, and use in our communities, 3) promotion of high standards of instruction and training, 4) to provide mission-relevant information to its members, the community, legislators and the media, and 5) to support the right of responsible, law-abiding citizens to own, keep, and lawfully carry firearms for personal protection.

The Virginia Citizens Defense League (VCDL) The Virginia Citizens Defense League is a non-profit C4 corporation whose group's mission is to advocate for laws that protect the rights of its members and all Virginians to own and carry firearms for self-defense and all lawful purposes. Incorporated in 1997, it currently has over 5,000 members and 13,000 subscribers to its email alert system. Before it was incorporated as VCDL, the Northern Virginia Citizens League was a major force in getting "shall issue" concealed-handgun permits enacted in 1995. VCDL has been successful in requiring localities, which were violating Virginia's gun laws to the detriment of their citizens, to come into compliance. VCDL believes that *NRA v. Chicago*, decided in favor of the people's right to keep and bear arms, would enhance and protect the rights of Virginians and all Americans to keep and bear arms for the time-honored tradition and practice of self-defense.

PUBLISHERS

Bloomfield Press Bloomfield Press is the largest publisher and distributer of gun-law books in the nation, founded in 1988 to publish and describe the gun laws for the state of Arizona, in plain English. It grew in classic entrepreneurial fashion and its flagship book, *The Arizona Gun Owner's Guide*, went into its 24th edition in October, 2009. The firm maintains a national directory to every statute available online in the country in an effort to inform and protect the right of the citizenry, and publishes a blog with over 30,000 subscribers. Company owner and publisher Alan Korwin is a nationally recognized expert on gun law, with eight of his own eleven books addressing that subject, including the unabridged, *Supreme Court Gun Cases* (co-written with David B. Kopel and Stephen P. Halbrook, Ph.D.), and the unabridged federal guide, *Gun Laws of America* (with Michael P. Anthony).

AMICUS
CURIAE
BRIEF

B268

49

No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THIRTY-FOUR PROFESSIONAL HISTORIANS AND LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THIRTY-FOUR PROFESSIONAL HISTORIANS AND LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Professional historians and legal historians respectfully submit this brief as *amici curiae* in support of Respondents.[1]

INTEREST OF *AMICI CURIAE*

Amici are professional historians and legal historians who have taught courses and published scholarship on the Second Amendment, Reconstruction Amendments, federalism, and legal and constitutional history. We file this brief in support of Respondents. *Amici* do not directly address the doctrinal question of whether the Fourteenth Amendment incorporated a right to bear arms against the states. Rather, based on our study as historians, we explain that, in the period surrounding ratification of the Fourteenth Amendment, states had broad authority to enact non-discriminatory gun-safety regulations and regulate arms in like manner as the ordinances challenged in this case.

Amici's names are set forth in the "List of *Amici Curiae*" following the Conclusion.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

The historical record shows that states and municipalities have long enjoyed authority to enact reasonable non-discriminatory gun safety regulations, including bans on the possession of particularly dangerous classes of weapons. Although this type of regulation—enacted through the exercise of traditional police powers—preceded adoption of the Fourteenth Amendment, it continued unabated and even increased in the aftermath of that new constitutional provision. Neither state constitution drafters, nor state legislatures, nor state courts, nor legal treatise writers understood the Fourteenth Amendment to limit state authority to enact such reasonable non-discriminatory regulations.

During the Reconstruction period, many states adopted constitutional right-to-bear-arms provisions that explicitly contemplated and authorized gun safety regulations. For example, the Texas Constitution of 1868 was one of several to make "the right to keep and bear arms" expressly subject to "such regulations as the legislature may prescribe." These express provisions would have made little sense if those states believed that the Fourteenth Amendment barred such forms of regulation in any event.

State legislatures also heavily regulated firearms during the Reconstruction period. As firearms became smaller and more dangerous in the nineteenth century, many states either regulated or forbade the carrying or use of portable weapons, including pistols. To take just two of the many examples we describe in this brief, Tennessee outlawed any carrying of "any … belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol," and Wyoming barred anyone from "bear[ing] upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village." (Excerpts from these laws are reprinted in the Appendix.)

Courts repeatedly upheld these types of restrictions against constitutional attack. For example, the Tennessee Supreme Court observed that the right to bear arms could "be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good," and the Arkansas Supreme Court upheld that state's regulations as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms. Influential treatises and articles reaffirmed the permissibility of reasonable safety regulations.

The historical examples from the Reconstruction era identified by petitioners and their *amici* do indicate one important change created by the Fourteenth Amendment. In its aftermath, states could no longer enact gun laws that discriminated against classes of *people* (and, in particular, against African-Americans). But petitioners and their *amici* do not cite—and we as professional historians have not found—examples from the Reconstruction era in which states were prohibited from enacting reasonable non-discriminatory safety regulations, including regulations banning classes of dangerous weapons.

It would therefore be contrary to early practice under the Fourteenth Amendment to block states and cities from enacting reasonable gun regulations, including bans on specific types of dangerous weapons, such as the laws at issue in this case. As state constitution drafters, courts, legislatures, and commentators alike have agreed, our constitutional framework gives states and local governments the authority they need to balance the public safety interests impacted by the possession and use of dangerous weapons such as handguns. The regulations at issue in this case are consistent with our nation's historical regulation of dangerous weapons.

ARGUMENT

IT WAS WIDELY UNDERSTOOD DURING THE RECONSTRUCTION PERIOD THAT STATES WERE AUTHORIZED TO EXERCISE THEIR TRADITIONAL POLICE POWERS TO REGULATE FIREARMS, INCLUDING BY BANNING PARTICULARLY DANGEROUS WEAPONS.

A. States Possessed Plenary Authority During The Antebellum Period To Regulate Arms In Order To Protect The Public Safety.

States and municipalities have always had primary responsibility to enact regulations protecting public safety in our constitutional system. Exercising these "police powers," states and municipalities extensively regulated firearms during the antebellum period, including by banning types of particularly dangerous weapons. Courts almost universally upheld regulations that stopped short of disarming the citizenry altogether.

1. *States Had Broad Authority To Exercise Police Power To Promote Public Safety.*

Since the Founding, states and municipalities have possessed broad power to enact safety regulations protecting the public. In the early nineteenth century, this came to be known as the "police power"—"the inherent and plenary power of a State ... to prescribe regulations to preserve and promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society." Lewis Hochheimer, *The Police Power*, 44 Cent. L.J. 158, 158 (1897).

The range and reach of police powers are extensive.[2] As this Court recently recognized, "the structure and limitations of federalism ... allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc v. Lohr*, 518 U.S. 470, 575 (1996)). Indeed, nineteenth-century jurists often proclaimed the difficulty of establishing *any* fixed constitutional limitation on state police powers to enact regulations when necessary for the protection of public health, morals, welfare, or especially, safety—even when these regulations shaped or restricted the rights, interests, liberties, and property of its citizens.

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[2] *See, e.g.*, Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw: The Evolution of American Law, 1830-1860* (2d ed. 1967); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 Cal. L. Rev. 217 (1984).

Rather than viewing constitutional rights as final trump cards over local self-governing authority, the early American conception of police power instead held that rights were generally subject to the kinds of regulations and restrictions that protected the ordered liberty of all in a well-regulated society. As Massachusetts Chief Justice Lemuel Shaw described the police power, "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

As a consequence, ordinary police regulations were rarely challenged on constitutional grounds in antebellum American courts. When such regulations were challenged, courts regularly upheld the exercise of police power. *See, e.g.*, *Thorpe v. Rutland & Burlington R.R.*, 27 Vt. 140, 149-50 (1854) (surveying an array of early American police power cases and describing its breadth). In later assessing the scope of police powers, Justice William O. Douglas concluded: "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

2. *States and Municipalities Regularly Invoked Their Police Power To Regulate Or Ban Arms In The Name Of Public Safety.*

The "promotion of safety of persons and property is unquestionably at the core of the State's police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). In order to promote the safety of persons and property, "colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used guns." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162 (2007).

States exercised their police powers to regulate arms in many ways. In one early form of regulation, several states regulated the storage of gunpowder in order to protect against fires, in some instances effectively banning the possession of loaded weapons in the home.[3] As Chief Justice Marshall observed,

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[3] *See, e.g.*, Act of June 26, 1792, ch. X, 1792 Mass. Acts 208; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of Dec. 6, 1783, ch. 1059, 11 Pa. Stat. 209; *see District of Columbia v. Heller*, 128 S. Ct. 2783, 2819 (2008) (stating that the Massachusetts law would have been construed to permit self-defense and, "[i]n any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city"); *id.* at 2849 (Breyer, J., dissenting) (describing various laws regulating gunpowder). Antebellum courts repeatedly upheld such regulations. *See, e.g., Foote v. Fire Dep't of New York*, 5 Hill 99, 101 (N.Y. Sup. Ct. 1843) ("The statute is a mere police regulation—an act to prevent a nuisance to the city."); *Williams v. City Council of Augusta*, 4 Ga. 509, 512 (1848).

"The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). He explained that "The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power ...." *Id.* at 444.

Shortly thereafter, other states, including Ohio, Tennessee, and Virginia, enacted laws regulating the discharge of guns, particularly in potentially crowded public places like the town square.[4] Since the Founding, then, states and local governments have regulated arms when necessary to protect citizens from such then-existing threats to public safety as fires and accidental shootings.

In the early part of the nineteenth century, the states were confronted with an additional problem concerning firearms. In the years since the colonial era, weapons had grown smaller and cheaper, and the practice of traveling with concealed weapons, such as handguns and knives, had become both common and dangerous. *See* Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 138-41 (2006). Perceiving a threat to their citizens' safety, many state legislatures responded to this new danger by enacting laws prohibiting the carrying of concealed weapons. Kentucky passed the first of these in 1813, prohibiting the wearing of a "pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon," with a narrow exception for "when traveling on a journey." An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases (1813), *reprinted in* Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic* 143-44 (1999). Louisiana passed a similar ban the same year. Other states soon followed suit.[5]

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[4] *See, e.g.*, Act of Feb. 17, 1831 § 6, reprinted in 3 Statutes of Ohio and the Northwestern Territory 1740 (Salmon P. Chase ed., 1835); Act of Dec. 3, 1825, ch. CCXCII, § 3, 1825 Tenn. Priv. Acts 306; Act of Nov. 16, 1821, ch. LXLIII, §§ 1-2, 1821 Tenn. Pub. Acts 78-79; Act of Jan. 30, 1847, ch. 79, 1846-47 Va. Acts 67; Act of Feb. 4, 1806, ch. XCIV, 1805-06 Va. Acts 51.

Several states went further in response to this new threat, deciding not only to outlaw the carrying of concealed weapons, but to proscribe entire classes of concealable weapons, which by their nature posed threats to public safety. In 1837, for example, Alabama imposed a tax on the sale or giving of Bowie Knives or Arkansas Tooth-picks. *See* An Act To Suppress the Use of Bowie Knives (1837), *reprinted in* Cramer, *supra*, at 146. The following year, Tennessee altogether banned the wearing, sale, or giving of the same weapons. *See* Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200, *reprinted in* Cramer, *supra*, at 148-49; *see also* Cornell, *supra*, at 142 (describing the Alabama and Tennessee statutes as "more robust" than earlier statutes by "effectively moving from regulation to prohibition of certain classes of weapons").[6]

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[5] See statutes from Alabama, Virginia, Arkansas, and Indiana, *reprinted in* Cramer, *supra*, at 145-52, and from Ohio, Act of Mar. 18, 1859, 1859 Ohio Laws 56.

[6] Edged weapons were standard equipment for the militia, *see, e.g.*, Mass. Session Laws (Nov. 29, 1775), at 17, and so would be protected against federal regulation by the Second

In the years that followed, state courts repeatedly upheld these statutes against constitutional attack, even when the pertinent state constitution explicitly protected the right to bear arms. *See, e.g.*, *Day v. State*, 37 Tenn. 496, 499 (1857); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) (right to keep weapons is unqualified, but right to bear arms for purposes other than the common defense can be regulated); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850) (upholding a ban on concealed weapons that was "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons"); *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (upholding a concealed-weapons law because it only banned a "*particular mode* of bearing arms which is found dangerous to the peace of society"); *State v. Reid*, 1 Ala. 612, 616-17 (1840) (holding that it was permissible for the state to regulate weapons "merely to promote personal security" by prohibiting the wearing of weapons "in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others"). Courts thus recognized that states and localities had authority to exercise their police powers to regulate weapons deemed particularly dangerous.

Against this backdrop, the major outlier is *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which the Kentucky Supreme Court declared Kentucky's concealed-weapons ban in conflict with its Constitu-

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Amendment, *see Heller*, 128 S. Ct. at 2816. Until the era of the Colt, edged weapons were more lethal and reliable than handguns.

tion. As commentators in the era of the Fourteenth Amendment recognized, *Bliss* is properly understood as the exception, not the rule, in judicial decisions involving challenges to gun-safety regulations. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). And, indeed, it was so anomalous that the legislature responded by amending the state constitution to allow a concealed-weapons ban. *See* Ky. Const. of 1850, art. XIII, § 25.

By contrast, the vast majority of state and local laws regulating or outlawing dangerous arms were upheld as paradigmatic examples of the exercise of police power. "The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed." *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 589-91 (1847) (McLean, J., dissenting).[7] This power, Justice McLean explained, is "essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin, or approached by poison." Thus, for example, in light of the "explosive nature of gunpowder, a city may exclude it" as an "act[] of self-preservation." For "[i]ndividuals in the enjoyment of their own rights must be careful not to injure the rights of others." *Id.*

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[7] Justice McLean's conception of dangerous weapons as a "nuisance" invokes the common law notion that judicial regulation of certain types of property to protect the public safety was appropriate even without affirmative legislative action. This understanding was the forerunner of the modern statutory police power. *See* Ernst Freund, *Standards of American Legislation* 66 (1917) ("[T]he law of nuisance is the common law of the police power, striking at all gross violations of health, safety, order, and morals."); Novak, *supra*, at 60-66 (describing gunpowder as an example of something governed by the common law of nuisance).

It was therefore generally recognized in the period before adoption of the Fourteenth Amendment that state legislatures could react to threats to the public safety through reasonable regulation of the right to bear arms, including outlawing certain classes of particularly dangerous weapons.

B. The Fourteenth Amendment Did Not Reduce States' Robust Authority To Enact Non-Discriminatory Regulations Of Arms Or Outlaw Specific Classes Of Weapons.

The passage of the Fourteenth Amendment did not reduce states' broad authority to regulate possession of arms. On the contrary, state constitutions, regulations, and judicial decisions of the period following adoption of the Fourteenth Amendment demonstrate that states continued to enjoy broad authority to balance the right to bear arms against requirements of public safety. In striking that balance, states were authorized to regulate (and even ban) dangerous weapons, including handguns.

Consistent with an across-the-board expansion in the number and scope of state police-power regulations in the post-Civil War era,[8] state restrictions on dangerous weapons expanded after adoption of the Fourteenth Amendment. This history provides grounding to the Seventh Circuit's observation that "it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868." Pet. App. 8a. To the extent that the Fourteenth Amendment protects any individual right to bear arms, that right was widely understood—both before and after the Reconstruction Amendments—to permit states the authority to enact significant non-discriminatory safety regulations of dangerous weapons, including handguns.

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[8] There is a scholarly consensus extending from the Reconstruction-era itself to today concerning the general explosion in police-power health and safety regulations in the period *follow-*

1. *Many Post-Fourteenth-Amendment State Constitutions Authorized Legislatures To Enact Reasonable Safety Regulations Of Weapons.*

The Reconstruction era brought a burst of constitution-writing at the state level, and a majority of the state constitutions adopted at the time of or after passage of the Fourteenth Amendment protected some right to bear arms. But, as detailed below, the majority of the new constitutions that included right-to-bear-arms provisions—fifteen of twenty-four—*also* expressly limited those rights by authoriz-

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ing the adoption of the Fourteenth Amendment. *See, e.g.*, William J. Novak, "Legal Origins of the Modern American State" *in* Austin Sarat et al., *Looking Back at Law's Century* 249-83 (2002); B.J. Ramage, *Social Progress and the Police Power of a State*, 36 Am. L. Rev. 684 (1902); Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (1904). As described in this section, the increased regulation of firearms during the period accords with that trend.

ing legislative regulation.[9] It is quite unlikely that these states believed they were violating the federal Constitution in allowing for such regulation. To the extent that the states believed they were bound by the Second Amendment, they did not understand that Amendment to *prevent* precisely the kind of reasonable safety regulation permitted by their own constitutions.

Three new state constitutions subjected the right to general legislative limitation. In 1868, Texas's Republican-dominated constitutional convention drafted a provision subjecting "the right to keep and bear arms" to "such regulations as the legislature may prescribe." Tex. Const. of 1869, art. I, § 13. Over the next several decades, Idaho and Utah enacted similar provisions, with Idaho providing that "the Legislature shall regulate the exercise of this right by law" and Utah providing that "nothing herein shall prevent the legislature from defining the lawful use of arms." Idaho Const. of 1889, art. I, § 11; Utah Const. of 1896, art. I, § 6.

Other state constitutional provisions—such as one Texas enacted in 1876—specifically granted the legislature the somewhat narrower "power, by law, to regulate the wearing of arms, with a view to prevent crime." Tex. Const. of 1876, art. I, § 23. Tennessee enacted a provision substantially identical to Texas's. *See* Tenn. Const. of 1870, art. I, § 26. Georgia and Florida granted even broader power to their legislatures, allowing for regulation of the manner of bearing arms without tying the power to the prevention of crime.[10] *See* Fla. Const. of 1885, art. I, § 20; Ga. Const. of 1868, art. I, § 14; Ga. Const. of 1877, art. I, § 22. Seven other states expressly authorized regulation of firearms by noting that their protections should not be construed to deny legislatures the power to regulate concealed weapons.[11]

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[9] Several new state constitutions declined to protect arms rights. *See* Cal. Const. of 1879; Ill. Const. of 1870; Neb. Const. of 1875; N.Y. Const. of 1894; N.D. Const. of 1889; Va. Const. of 1870; W. Va. Const. of 1872.

2. *Legislative Regulation Of Firearms Was Ubiquitous, Sometimes Banning Possession Of Entire Classes Of Dangerous Weapons, Including Handguns.*

State legislatures routinely enacted broad restrictions on the possession of weapons in the years following adoption of the Fourteenth Amendment. These regulations were more pervasive than those enacted during the antebellum period. Even when new state constitutions contained a right to bear arms not expressly subject to legislative regulation,[12] legislatures still regulated firearms.[13] Several even imposed outright bans on handguns.

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[10] Florida's grant of legislative authority was effectively as sweeping as that of Idaho, Utah, and the Texas Constitution of 1869. The right protected is only the "right to *bear* arms," Fla. Const. of 1885, art. I, § 20 (emphasis added); it provides no right to *keep* arms. The power to "prescribe the manner in which they may be borne," *id.*, was thus the power to regulate the constitutional right in its entirety.

[11] *See* Colo. Const. of 1876, art. II, § 13; Ky. Const. of 1891, § 1.7; La. Const. of 1879, art. III; Miss. Const. of 1890, art. III, § 12; Mo. Const. of 1875, art. II, § 17; Mont. Const. of 1889, art. III, § 13; N.C. Const. of 1875, art. I, § 30.

[12] *See* Ala. Const. of 1868, art. I, § 28; Ark. Const. of 1868, art. I, § 5; Del. Const. of 1897, art. I, § 20; Or. Const. of 1857, art. I, § 27; Pa. Const. of 1874, art. I, § 21; S.C. Const. of 1868,

The most common regulations of the period were concealed-weapons laws. At least fifteen states prohibited the carrying of concealed pistols and deadly weapons, some explicitly covering all firearms or all weapons.[14] Although three of these statutes created exceptions for travelers, persons on their own premises, or those with a legitimate fear of attack,[15] the majority contained no such exceptions.

But concealed-weapons laws were not the only legislative prerogative exercised at the time. At least four states went further, banning the possession of all non-military handguns. Tennessee criminalized carrying, "publicly or privately, any ... belt or

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art. I § 28; S.D. Const. of 1889, art. VI, § 24; Wash. Const. of 1889, art. I, § 24; Wyo. Const. of 1889, art. I, § 24.

[13] *See* Ark. Act of Apr. 1, 1881; Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1–4, p. 33; 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 455 (1877); Wash. Code § 929 (1881); 1876 Wyo. Comp. Laws ch. 52, § 1.

[14] *See* Ark. Act of Apr. 1, 1881; 1881 Colo. Rev. Stat. p. 229 § 149; Fla. Act of Feb. 12, 1885, ch. 3620, § 1; Ill. Act of Apr. 16, 1881; 1880 Ky. Gen. Stat. ch. 29, § 1; 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127; N.D. Pen. Code § 457 (1895); Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1–4. p. 33; 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 457 (1877); Tex. Act of Apr. 12, 1871; 1869–1870 Va. Acts 510; Wash. Code § 929 (1881); W. Va. Code ch. 148, § 7 (1870).

[15] *See* 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127; 1880 S.C. Acts 448, § 1.

pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand." 1879 Tenn. Pub. Acts ch. 186. The only persons exempted from the statute were military personnel and those performing specified law enforcement functions. *Id.* Perhaps most pertinent here, the Tennessee Supreme Court construed the act to apply even "upon one's own farm or premises, or in fact in *any place*." *Dycus v. State*, 74 Tenn. 584, 585 (1880) (emphasis added); *see also Barton v. State*, 66 Tenn. 105, 105-06 (1874).

Tennessee was not alone in such regulation. Wyoming likewise forbade anyone from "bear[ing] upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village." 1876 Wyo. Comp. Laws ch. 52, § 1. Arkansas and Texas enacted similar bans. *See* Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871. States also outlawed the sale of non-military pistols,[16] or prohibited specific weapons elected officials determined were public dangers.[17]

Municipalities likewise enacted their own regulations. Dodge City, Kansas, for example, banned the carrying of pistols and other dangerous weapons in response to violence accompanying western cattle drives. *See* Dodge City, Kan., Ordinance No. 16, § XI

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[16] *See* Ark. Act of Apr. 1, 1881; 1879 Tenn. Pub. Acts ch. 96.

[17] *See* Fla. Act of Aug. 8, 1868; Ill. Act of Apr. 16, 1881; 1850 Mass. Gen. Laws, ch. 194, § 2; N.D. Pen. Code § 457 (1895); S.D. Terr. Pen. Code § 455 (1877).

(Sept. 22, 1876); Robert R. Dykstra, *The Cattle Towns* 121-22 (1968).

For these reasons, it was widely understood in the years following adoption of the Fourteenth Amendment that states and municipalities could balance any right to bear arms against the state's duty to protect the public; and that balancing included the authority to ban the use of handguns.

3. Courts Routinely Upheld Restrictions On Carrying Handguns Such As Pistols Or Revolvers.

In the wake of the Fourteenth Amendment, state courts also recognized state legislative authority to regulate dangerous weapons, such as handguns. The Tennessee Supreme Court's *Andrews v. State* decision is illustrative. The plaintiffs there challenged a statute forbidding any person to "publicly or privately carry any ... pocket pistol ... or revolver," Tenn. Act. of June 11, 1870, asserting "that it is in violation of, and repugnant to" the Second Amendment of the U.S. Constitution and Tennessee's constitution. 50 Tenn. 165, 171 (1871). The court interpreted the statute to "amount[] to a prohibition to keep and use such weapon for *any and all purposes.*" *Id.* at 187 (emphasis added). Although the court held that the federal Constitution did not limit the state legislature, *id.* at 175, it interpreted the state right-to-bear-arms provision *in pari materia* with the Second Amendment, *id.* at 177. Nevertheless, this right did not extend to "every thing that may be useful for offense and defense." *Id.* at 179. Weapons such as the pocket pistol and revolver could be prohibited *altogether*. *Id.* Even the use of weapons such as "the rifle ... , the shot gun, the musket, and repeater," could "be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good." *Id.* at 179-80; *see also State v. Wilburn*, 66 Tenn. 57, 59-60 (1872).

Similarly, the Arkansas Supreme Court upheld that state's prohibition on carrying pistols. *See Fife v. State*, 31 Ark. 455 (1876). Tracking the reasoning of *Andrews*, the Arkansas Supreme Court upheld that State's prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms. *Id.* at 461. So, too, the Texas Supreme Court upheld a conviction for carrying an unloaded pistol for the purpose of getting it repaired, and concluded that such carrying is not "in any way protected either under the State or Federal Constitution." *English v. State*, 35 Tex. 473, 473, 478 (1871).

Courts in Georgia, West Virginia, and Oklahoma followed suit. *See Hill v. State*, 53 Ga. 472, 474 (1874); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908). In the Georgia case, the author of the Court's opinion noted that he was "at a loss to follow the line of thought that extends the guarantee"—in the state Constitution of the "right of the people to keep and bear arms"—"to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day." 53 Ga. at 474.

At the time surrounding the enactment of the Fourteenth Amendment, then, the constitutional right to bear arms—whether state or federal—was not believed to bar states from exercising their police powers to enforce appropriate safety regulations, including broad bans of categories of weapons such as pistols and revolvers.

4. Leading Treatises Recognized States' Authority To Regulate Arms To Protect The Public Safety.

The major legal treatises of the day cement the conclusion that states were widely understood to have authority to regulate weapons. Some commentators observed that the "right in the people to keep and bear arms, although secured by ... the constitution, is held in subjection to the public safety and welfare." Joel Tiffany, *A Treatise on Government and Constitutional Law* 394 (1867).

As Judge John Dillon explained, even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cont. L.J. 259, 287 (1874). And so the law must "strike some sort of balance between these apparently conflicting rights." *Id.*

In *Heller*, this Court cited John Norton Pomeroy's treatise as representative of "post-Civil War 19th-century sources" commenting on the right to bear arms. 128 S. Ct. at 2812. As this Court noted, Pomeroy observed that while "[t]he object of" the Second Amendment "is to secure a well-armed militia," "a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons," and so the government "is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152 (1868). The very next sentence in Pomeroy's treatise is: "But all such provisions, all such guarantees, must be construed with reference to their intent and design. This constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner." *Id.* at 152-53.

In his authoritative survey of police power, published in 1904, Ernst Freund reviewed nineteenth-century weapons regulations to conclude that the constitutional guarantees of the Second Amendment and similar state constitutional provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons, and the *possession or use of certain deadly weapons.*" Freund, *The Police Power, supra,* at 90-91 (emphasis added). He deemed this a classic illustration of the more general principle whereby "constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security." *Id.* at 91.

In the wake of the Fourteenth Amendment's adoption, respected legal authorities would thus have seen the ordinances challenged in this case—which, much like the laws of Tennessee and other states at the time, prohibit the keeping of handguns while allowing other types of firearms—as striking a reasonable balance between an individual's right and the public's expectation that the state will protect them from the dangers inherent in small and dangerous weapons.

C. The Fourteenth Amendment Prohibited Discriminatory Laws That Targeted Certain Classes Of *People.*

Petitioners and their *amici* cite little if any evidence from the historical record suggesting that the enactment and ratification of the Fourteenth Amendment prevented states, through the exercise of their police powers, from enacting reasonable safety regulations, including banning *classes of weapons* that states and municipalities deemed dangerous. Instead, they point to a variety of historical sources demonstrating that the Fourteenth Amendment was meant and understood to preclude state laws and actions targeted at certain *classes of people*, in particular African-Americans.

For example, the NRA (at 10-11) and Constitutional Law Professors (at 25-26) both describe concern in Congress about the Black Codes. As they note, laws in Mississippi, South Carolina, and elsewhere explicitly discriminated against the rights of freedmen and other African-Americans, including by preventing those individuals from possessing the types of arms others were permitted to own. Petitioners and the NRA also cite an order from General Sickles, issued in January 1866, to suspend the South Carolina Black Codes. *See* Pet. Br. 11; NRA Br. 14. Both quote the order selectively, however, cutting off the provision in mid-sentence. Read in full, it provides: "The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons, nor to authorize any person to enter with arms on the premises of another against his consent." Order of General Sickles, disregarding the Code, art. XVI (January 17, 1866). The same provision further provides "And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms." *Id.* The Sickles order was consistent with the authority of states and localities, exercising their police powers, to enact generally applicable safety regulations. The same goes for other firearms regulations in the Reconstruction South, including a prohibition on the sale of pistols and knives in Charleston, and a ban in St. James, South Carolina, on carrying "guns, pistols, or other weapons of War."[18]

Likewise, the NRA (at 12) and Constitutional Law Professors (at 29) place great emphasis on the second Freedman's Bureau Bill, which Congress enacted in response to discriminatory laws enacted and enforced by Southern States. But that bill focused on barring state action discriminating against African-Americans. The relevant language provided that the right "to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery." Act of July 10, 1866, § 14, 14 Stat. 173, 176-77. Although petitioners' *amici* highlight the portion of this provision noting a "right to bear arms," they ignore the text surrounding that phrase, *viz.* "equal benefit of all laws" and "without respect to race or color or previous condition of slavery." *Id.*; *see also* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 73 (2009).

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[18] *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621 & nn.19-20 (2006) (citing Letter from Brvt. Brig. Gen. W. Bennet to Capt. Rice (Feb. 27, 1866)).

Other legislation enacted by the Reconstruction Congress likewise targeted discriminatory state action. For example, the Civil Rights Act of 1866, which the Fourteenth Amendment was meant to constitutionalize,[19] explicitly enacted an antidiscrimination rule. *See* Rosenthal, *supra*, at 58-59. At the same time, Senator Trumbull noted that the Act would "in no manner interfere ... with the municipal regulations of any State which protects all alike in their rights of person and property." Cong. Globe, 39th Cong., 1st Sess. 1760-61 (1866).

The NRA also relies (at 17, 46) on the Pomeroy treatise, but that source also reflects a non-discrimination understanding of the Fourteenth Amendment. As Pomeroy observed, if a state statute provided that "certain classes of the inhabitants—

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[19] *See, e.g.*, James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 444 (1985).

say negroes—are required to surrender their arms," the federal Bill of Rights offered no relief. Pomeroy, *supra,* 150-51. The "first section" of the Fourteenth Amendment "now pending before the people," however, "would give the nation complete power to protect its citizens against local injustice and oppression * * *." *Id.* at 151 (quoted in NRA Brief at 17). But, Pomeroy emphasized, it would not "interfere with any of the rights, privileges, and functions which properly belong to the individual states." *Id.* And as already noted, *supra* p. 21, Pomeroy recognized that the constitutional right to bear arms is consistent with bans on "dangerous" weapons.

Indeed, Pomeroy's view—that the first section of the Fourteenth Amendment prohibited state statutes directed at "certain classes of the inhabitants," Pomeroy, *supra*, at 150, but did not prohibit reasonable and neutral regulations aimed at protecting the public—also reflected the view of the Reconstruction Congress. Senator Morrill (R-Me.), for example, emphasized that the "principle of equality before the law ... does not prevent the State from qualifying the rights of the citizen according to the public necessities." Cong. Globe, 39th Cong., 2d Sess. 40 (1866). Representative Thaddeus Stevens (R-Pa.) noted that the Fourteenth Amendment "allow[ed] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate equally upon all." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Representative Hotchkiss (R-N.Y.) argued that "no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another." *Id.* at 1095. As a result of the Fourteenth Amendment, states could thus no longer enact or enforce firearms laws that discriminated against "classes of inhabitants." Pomeroy, *supra*, at 150. But, consistent with the views of these Republican Congressmen, "Republican state officials believed they wielded a well-established right . . . to control the use of firearms . . . when it threatened public safety or state authority." Emberton, *supra*, at 626.

By contrast, petitioners cite no source from the period—and we are not aware of any—suggesting that the Fourteenth Amendment limited states' long-recognized police powers to protect the public safety, including by banning classes of weapons deemed particularly dangerous by elected officials.

* * * * *

The historical record, as summarized above, shows that states and localities had broad authority during the Reconstruction period to determine what would "best serve the public interest." The people of Chicago, through their elected representatives, have determined that the regulations at issue in this case serve the important and longstanding local mission of preserving public safety. The city's non-discriminatory exercise of its police powers reflects a two-century's old tradition at the heart of this nation's democratic system of government. No one in the era leading up to and following the adoption of the Fourteenth Amendment contemplated that the federal Constitution would, should, or could remove decisions of this kind from local communities and their elected leaders, by placing them instead in the hands of federal judges in a distant locale. Accordingly, it would be contrary to the early practice under that Amendment to invalidate the reasonable safety regulations at issue here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

SELECTED STATE STATUTES

Alabama

1837

AN ACT To suppress the use of Bowie Knives.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened*, That if any person carrying any knife or weapon, known as Bowie Knives or Arkansas Tooth-picks, or either or any knife or weapon that shall in form, shape or size, resemble a Bowie-Knife or Arkansaw [sic] Tooth-pick, on a sudden rencounter, shall cut or stab another with such knife, by reason of which he dies, it shall be adjudged murder, and the offender shall suffer the same as if the killing had been by malice and aforethought.

Section 2. *And be it further enacted*, That for every such weapon, sold or given, or otherwise disposed of in this State, the person selling, giving or disposing of the same, shall pay a tax of one hundred dollars, to be paid into the county Treasury; and if any person so selling, giving or disposing of such weapon, shall fail to give in the same to his list of taxable property, he shall be subject to the pains and penalties of perjury.

Approved June 30, 1837.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 146 (1999).)

1839

AN ACT

To suppress the evil practice of carrying weapons secretly.

Sec. 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened,* That if any person shall carry concealed about his person any species of fire arms, or any bowie knife, Arkansaw [sic] tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending, shall on conviction thereof, before any court having competent jurisdiction, pay a fine not less than fifty nor more than five hundred dollars, to be assessed by the jury trying the case; and be imprisoned for a term not exceeding three months, at the discretion of the Judge of said court.

Approved Feb. 1, 1839.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 151-52 (1999).)

Arkansas

1838

Every person who shall wear any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor, and upon conviction thereof, in the county in which the said offence shall have been committed, shall be fined in any sum not less than twentyfive dollars, nor more than one hundred dollars, one half to be paid into the county treasury, the other half to the informer, and shall also be imprisoned not less than one, nor more than six months.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 150 (1999).)

1881

Ark. Act of Apr. 1, 1881, as codified in Ark. Stat., chap. 45 (1884).

Section 1907. Any person who shall wear or carry in any manner whatever as a weapon any dirk or bowie knife, or a sword, or a spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor. *Provided*, that officers whose duties require them to make arrests, or to keep and guard prisoners, together with persons summoned by such officers to aid them in the discharge of such duties, while actually engaged in such duties, are exempted from the provisions of this act. *Provided, further*, that nothing in this act be so construed as to prohibit any person from carrying any weapon when upon a journey or upon his own premises.

Section 1908. Any person, excepting such officers or persons on a journey and on their premises as are mentioned in section 1907, who shall wear or carry any such pistol as is used in the army or navy of the United States, in any manner except uncovered and in his hand, shall be deemed guilty of a misdemeanor.

Section 1909. Any person who shall sell, barter or exchange, or otherwise dispose of, or in any manner furnish to any person, any dirk or bowie knife, or a sword or a spear in a cane, brass or metal knucks, or any pistol of any kind whatever, except such as are used in the army or navy of the United States, and known as the navy pistol, or any kind of cartridge for any pistol, or any person who shall keep any such arms or cartridges for sale, shall be guilty of a misdemeanor.

Section 1910. Any person convicted of a violation of any of the provisions of this act shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Colorado

1881 Colo. Rev. Stat. pt. 229 § 149, as codified in Colo. Stat. Ann., chap. 35 (1911).

Section 1830. Carrying concealed weapons—Second offense—Search without warrant—Confiscation.

SEC 223. No person, unless authorized to do so by the chief of police of a city, mayor of a town or the sheriff of a county, shall use or carry concealed upon his person any fire arms, as defined by law, nor any pistol, revolver, bowie knife, dagger, sling shot, brass knuckles or other deadly weapon. Any person who violates the foregoing provisions shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment in jail for a period of not exceeding one year or by a fine of not more than five hundred ($500.00) dollars, or by both such fine and imprisonment. Any person who has been once convicted hereunder shall for a second offense be guilty of a felony and, upon conviction shall be punished by a fine of not more than one thousand ($1,000.00) dollars or by imprisonment in the penitentiary for not exceeding two (2) years, or by both such fine and imprisonment.

Florida

Fla. Act of Feb. 12, 1885, Chap. 3620, § 1, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2421. Carrying concealed weapons. — Whoever shall secretly carry arms of any kind on or about his person, or whoever shall have concealed on or about his person any dirk, pistol or other weapon, except a common pocket knife, shall be punished by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars.

Fla. Act of Aug. 6, 1888, Chap. 1637, subchap. 7, § 10, as codified in Fla. Rev. Stat. , tit. 2, pt. 5 (1892).

2423. Persons engaged in criminal offence having weapons. — Whoever, when lawfully arrested while committing a criminal offence or a breach or disturbance of the public peace, is armed or has on his person slung-shot, metallic knuckles, billies, firearms or other dangerous weapon, shall be punished by imprisonment not exceeding one year and by fine not exceeding fifty dollars.

Fla. Act of Feb. 12, 1885, Chap. 3620, § 3, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2424. Officer to take possession of arms. — The officer making any arrest under the preceding sections shall take possession of any arms or weapons found upon the person arrested, and shall retain the same until after the trial of such person, and if he be convicted, said arms or weapons shall be forfeited and the sheriff shall sell the same a t public sale and account for and pay over the proceeds thereof, as in the case of fines collected, but if such person be acquitted, the said arms or weapons shall be returned to him.

Fla. Act of Aug. 8, 1868, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2425. Manufacturing or selling slung-shot. — Whoever manufactures, or causes to be manufactured, or sells or exposes for sale any instrument or weapon of the kind usually known as slung-shot, or metallic knuckles, shall be punished by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars.

Georgia

1837

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of same.* That, from and after the passage of this act, it shall not be lawful for any merchant, or vender of wares or merchandize in this State, or any other person or persons whatsoever, to sell, or offer to sell, or to keep, or have about their person or elsewhere, any of the hereinafter described weapons, to wit: Bowie, or any other kind of knives, manufactured and sold for the purpose of wearing, or carrying the same as arms of offence or defence, pistols, dirks, sword canes, spears, & c., shall also be contemplated in this act, save such pistols as are known and used, as horseman's pistols, &c.

Section 2. *And be if further enacted by the authority aforesaid*, That any person or persons with in the limits of this State, violating the provisions of this act, except as hereafter excepted, shall for each and every such offence, be deemed guilty of a high misdemeanor, and upon trial and conviction thereof, shall be fined, in a sum not exceeding five hundred dollars for the first offence, nor less than one hundred dollars at the direction of the Court; and upon a second conviction, and every after conviction of a like offence, in a sum not to exceed one thousand dollars, nor less than five hundred dollars, at the discretion of the Court.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 146-48 (1999).)

Illinois

Ill. Act of Apr. 16, 1881, as codified in Ill. Stat. Ann., Crim. Code, ch. 38 (1885).

88. Possession or sale forbidden – Penalty.
§ 1. Be it enacted by the People of the State of Illinois represented in the General Assembly. That whoever shall have in his possession, or sell, give or loan, hire or barter, or whoever shall offer to sell, give, loan, have or barter, to any person within this State, any slung shot or metallic knuckles, or other deadline weapon of like character, or any person in whose possession such weapons shall be found, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten dollars ($10), nor more than two hundred dollars ($200).

91. Concealed weapon - Flourishing weapon.
§ 4. Whoever shall carry a concealed weapon upon or about his person of the character in this Act specified, or razor as a weapon, or whoever, in a threatening or boisterous manner, shall display or flourish any deadly weapon, shall be guilty of a misdemeanor and shall be fined, in any sum not less than twenty-five dollars ($25) nor more than two hundred dollars ($200).

Indiana

1820

AN ACT to prohibit the wearing of concealed weapons.

Approved, January 14, 1820

Sec. 1. *BE it enacted by the General Assembly of the State of Indiana*, That any person wearing any dirk, pistol, sword in cane, or any other unlawful weapon, concealed, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, for the use of county seminaries: *Provided, however*, that this act shall not be so construed as to affect travellers.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 145 (1999).)

1831

Sec. 58. That every person, not being a traveller, who shall wear or carry a dirk, pistol, sword in a cane, or other dangerous weapon concealed, shall upon conviction thereof, be fined in any sum not exceeding one hundred dollars.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 145-46 (1999).)

Kentucky

1813

An Act to prevent persons in this Commonwealth from wearing concealed Arms, except in certain cases.

Sec. 1. *Be it enacted by the General Assembly of the commonwealth of Kentucky*, That any person in his commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined in any sum, not less than one hundred dollars; which may be recovered in any court having jurisdiction of like sums, by action of debt, or on the presentment of a grand jury — and a prosecutor in such presentment shall not be necessary. One half of such fine shall be to the use of the informer, and the other to the use of the commonwealth.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 143-44 (1999).)

1880

1880 Ky. Gen. Stat. ch. 29, §§ 1, 5

§ 1. If any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife, or shall sell a deadly weapon to a minor other than an ordinary pocket knife, such person shall, upon indictment and conviction, be fined not less than twenty five nor more than one hundred dollars and imprisoned in the county jail for not less than ten nor more than thirty days in the discretion of the court or jury trying the case.

§ 5. Carrying concealed deadly weapons shall be lawful in the following cases: 1st. When the person has reasonable grounds to believe his person or the person of some of his family, or his property is in immediate danger from violence or crime; 2nd. By sheriffs, constables, marshals, policemen, and other ministerial officers, when necessary for their protection in the discharge of their official duties.

Louisiana

1813

Sec. 1. *Be it enacted by the senate and the house of representatives of the State of Louisiana in general assembly convened*, That from and after the passage of this act, any person who shall be found with any concealed weapon, such as a dirk, dagger, knife, pistol or other deadly weapon, concealed in his bosom, coat or in any other place about him that do not appear in full open view, any person so offending, shall on conviction thereof before any justice of the peace, be subject to pay a fine not to exceed fifty dollars nor less than twenty dollars, one half to the use of the state, and the balance to the informer, and should any person be convicted of being guilty of a second offence before any court of competent jurisdiction, shall pay a fine of not less than one hundred dollars to be applied as aforesaid, and be imprisoned for a time not exceeding six months.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 144-45 (1999).)

Massachusetts

1850 Mass. Gen. Lawa, ch. 194, §§ 1, 2, as codified in Mass. Gen. Stat., chap. 164 (1873).

SECT. 10. Whoever when arrested upon a warrant of a magistrate issued against him for an alleged offence against the laws of this state, and whoever when arrested by a sheriff, deputy-sheriff, constable, police officer, or watchman, while committing a criminal offence against the laws of this state, or a breach or disturbance of the public peace, is armed with, or has on his person, slung shot, metallic knuckles, billies, or other dangerous weapon, shall be punished by fine not exceeding fifty dollars, or by imprisonment in the jail not exceeding one year.

SECT. 11. Whoever manufactures, or causes to be manufactured, or sells, or exposes for sale, any instrument or weapon of the kind usually known as slung shot, or metallic knuckles, shall be punished by fine not less than fifty dollars, or by imprisonment in the jail not exceeding six months.

Nebraska

1893 Neb. Con. Stat. § 5604

Whoever shall carry a weapon or weapons concealed on or about his person, such as a pistol, bowie-knife, dirk, or other dangerous weapon, on conviction of the first offense shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days, and for the second offense not exceeding one hundred dollars or imprisoned in the county jail not more than three months, or both, at the discretion of the court; *Provided, however*, If it shall be proved from the testimony on the trial of any such case that the accused was, at the time of carrying any weapon or weapons as aforesaid, engaged in the pursuit of any lawful business, calling or employment and the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid, for the defense of his person, property, or family, the accused shall be acquitted.

North Carolina

1879 N.C. Sess. Laws ch. 127, as codified in North Carolina Code, Crim. Code, ch. 25 (1883)

Sec. 1005. Concealed weapons, the carrying of unlawfully, a misdemeanor.

If any one, except when on his own premises, shall carry concealed about his person any pistol, bowie knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court. And if any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties.

North Dakota

N.D. Penal Code §§ 456, 457, as codified in N.D. Rev. Code (1895).

§ 7312. Carrying or using slung shot. Every person who carries upon his person, whether concealed or not, or uses or attempts to use against another, any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a felony.

§ 7313. Carrying concealed weapons. Every person who carries concealed about his person any description of firearms, being loaded or partly loaded, or any sharp or dangerous weapon, such as is usually employed in attack or defense of the person, is guilty of a misdemeanor.

Ohio

Act of Mar. 18, 1859, 1859 Ohio Laws 56.

If it shall be proved to the jury, from the testimony on the trial of any case presented under the [section of this act banning the carrying of concealed weapons], that the accused was, at the time of carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business, calling, or employment, and that the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property or family, the jury shall acquit the accused.

(Reprinted from Saul Cornell & Nathan DeNino, *A Well Regulated Right: Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004).)

Oregon

An Act to Prevent Persons from Carrying Concealed Weapons, Feb. 18, 1885, as codified in Ore. Code, ch. 8 (1892).

§ 1969. It shall be unlawful for any person to carry concealed about his person in any manner whatever any revolver, pistol, or other fire-arm, or any knife (other than an ordinary pocket-knife), or any dirk or dagger, slung-shot or metal knuckles, or any instrument by the use of which injury could be inflicted upon the person or property of any other person.

§ 1970. Any person violating any of the provisions of section 1969 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than five days nor more than one hundred days, or by both fine and imprisonment, in the discretion of the court. Nothing in this act shall be construed to apply to any sheriff, constable, police, or other peace officer, whose duty it is to serve process or make arrests. Justices of the peace shall have concurrent jurisdiction to try any person or persons charged with violating any of the provisions of this act.

South Carolina

1880 S.C. Acts 448, §§ 1, 4, as codified in S.C. Rev. Stat. (1894).

SEC. 129. (2472.) Any person carrying a pistol, dirk, dagger, slungshot, metal knuckles, razor, or other deadly weapon usually used for the infliction of personal injury, concealed about his person shall be guilty of a misdemeanor, and upon conviction thereof before a Court of competent jurisdiction shall forfeit to the County the weapon so carried concealed, and be fined in a sum not more than two hundred dollars or imprisoned not more than twelve months, or both, in the discretion of the Court. Nothing herein contained shall be construed to apply to peace officers while in the actual discharge of their duties as such officers, or to persons carrying concealed weapons while upon their own premises.

South Dakota

S.D. Terr. Pen. Code §§ 455-57, as codified in S.D. Rev. Code, Penal Code (1903).

§ 469. Every person who manufactures or cause to be manufactured, or sells or offers or keeps for sale, or gives or disposes of any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a misdemeanor.

§ 470. Every person who carries upon his person, whether concealed or not, or uses or attempts to use against another, any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a felony.

§ 471. Every person who carries concealed about his person any description of firearms, being loaded or partly loaded, or any sharp or dangerous weapon, such as is usually employed in attack or defense of the person, is guilty of a misdemeanor.

Tennessee

1838

An Act to suppress the sale and use of Bowie Knives and Arkansas Tooth Picks in this State.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That if any merchant, pedlar, jeweler, confectioner, grocery keeper, or other person or persons whatsoever, shall sell, or offer to sell, or shall bring into this State, for the purpose of selling, giving or disposing of in any other manner whatsoever, any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape or size resemble a Bowie knife or any Arkansas tooth pick, such merchant, pedlar, jeweler, confectioner, grocery keeper, or other person or persons for every such Bowie knife or knives, or weapon that shall in form, shape or size resemble a Bowie knife or Arkansas tooth pick so sold, given or otherwise disposed of, shall be guilty of a misdemeanor, and upon conviction thereof upon indictment or presentment, shall be fined in a sum not less that one hundred dollars, nor more than five hundred dollars, and shall be imprisoned in the county jail for a person not less than one month nor more than six months.

Section 2. That if any person shall wear any Bowie knife, Arkansas tooth pick, or other knife or weapon that shall in form, shape or size resemble a Bowie knife or Arkansas toothpick under this clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than two hundred dollars, nor more than five hundred dollars, and shall be imprisoned in the county jail not less than three months and not more than six months.

Sec. 3. That if any person shall maliciously draw or attempt to draw any Bowie knife, Arkansas tooth pick, or any knife or weapon that shall in form, shape, or size resemble a Bowie knife or Arkansas tooth pick, from under his clothes or from any place of concealment about his person, for the purpose of sticking, cutting, awing, or intimidating any other person, such person so drawing or attempting to draw, shall be guilty of a felony, and upon conviction thereof shall be confined in the jail and penitentiary house of this State for a period of time not less than three years, nor more than five years.

Sec. 4. That if any person carrying any knife or weapon known as a Bowie knife, Arkansas tooth pick, or any knife or weapon that shall in form, shape or size resemble a Bowie knife, on a sudden rencounter, shall cut or stab another person with such knife or weapon, whether death ensues or not, such person so stabbing or cutting shall be guilty of a felony, and upon conviction thereof shall be confined in the jail and penitentiary house of this State, for a period of time not less than three years, nor more than fifteen years.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic:*
Dueling, Southern Violence, and Moral Reform 148-49 (1999).)

1879

1879 Tenn. Pub. Acts ch. 96, as codified in Tenn. Code (1884).

5522. Any person who carries under his clothes, or concealed about his person, a bowie-knife; Arkansas tooth-pick, or other knife or weapon of like form, shape, or size, is guilty of a misdemeanor, and, upon such conviction, shall be fined not less than two hundred dollars nor more than five hundred, and shall be imprisoned in the county jail not less than three nor more than six months.

5523. It is misdemeanor to sell, or offer to sell, or into this State for the purpose of selling, giving away, or otherwise disposing of any knife or weapon mentioned in the preceding section; and the person guilty thereof, for each knife shall, upon conviction be fined not less than one hundred nor more than five hundred dollars, and be imprisoned in the county jail not less than one month nor more than six months.

1879 Tenn. Pub. Acts ch. 186, as codified in Tenn. Code (1884).

5533. It shall not be lawful for any person to carry, publicly or privately, any dirk, razor concealed about his person, sword cane, loaded cane, slung-shot or brass knucks, Spanish stiletto, belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand.

5534. Any person guilty of such offense shall be subject to presentment or indictment, and on conviction shall be fined fifty dollars and imprisoned in the county jail of the county where the offense was committed, the imprisonment only in the discretion of the court; *Provided*, the defendant shall give good and sufficient security for all the costs, fine, and any jail fees that may accrue by virtue of his imprisonment.

Texas

Tex. Act of Apr. 12, 1871, as codified in Tex. Penal Code (1879).

Art. 163. If any person, other than a peace officer, shall carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 161 of this Code.

Art. 316. If any person shall discharge and gun, pistol or fire-arm of any description, on or across any public square, street or alley in any city, town or village in this state, he shall be fined in a sum not exceeding one hundred dollars.

Art. 318. If any person in this state shall carry on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie knife, or any other kind of knife manufactured or sold, for purposes of offense or defense, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars; and, in addition thereto, shall forfeit to the county in which he is convicted, the weapon or weapons so carried.

Art. 319. The preceding article shall not apply to a person in actual service as a militiaman, nor to a peace officer or policemen, or person summoned to his aid, nor to a revenue or other civil officer engaged in the discharge of official duty, nor to the carrying of arms on one's own premises or place of business nor to person traveling, nor to one who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attacked, upon legal process.

Art. 320. If any person shall go into any church or religious assembly, any school room, or other place where persons are assembled for sacrament or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball-room social party, or social gathering, or to any election precinct on the day or days of any election, where any portion of the people of this state are collected to vote at any election, or to any other place where people may be assembled to muster, or to perform any other public duty, or to any other public assembly, and shall have or carry about his person a pistol or other fire-arm, dirk, dagger, slung-short, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of a knife manufactured and sold for the purpose of offense and defense, he shall be punished by fine not less than fifty nor more than five hundred dollars, and shall forfeit to the county the weapon or weapons so found on his person.

Virginia

1838

An ACT to prevent the carrying of concealed weapons.

Be it enacted by the general assembly. That if any person shall hereafter habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind, from the use of which the death of any person might probably ensue, and the same be hidden or concealed from common observation, and he be thereof convicted, he shall for every such offence forfeit and pay the sum of not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the common jail for a term not less than one month or more than six months, and for each instance at the discretion of the jury; and a moiety of the penalty recovered in any prosecution under this act, shall be given to any person who may voluntarily institute the same.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 150-51 (1999).)

1869

1869-70 Va. Acts, ch. 349, pt. 510, as codified in Virginia Code, tit. 54 (1873).

7. If a person habitually carry about his person, hid from common observation, any pistol, dirk, bowie knife, or any weapon of the like kind, he shall be fined fifty dollars, and imprisoned for not more than

twelve months in the county or corporation jail. The informer shall have half of such fine.

1856-57 Va. Acts, ch. 140, pt. 554, as codified in Virginia Code, tit. 54 (1873).

8. If a person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family or property, he may be required to give a recognizance, with the right of appeal, as before provided, and like proceedings shall be had on such appeal.

Washington

Wash. Code § 929 (1881).

If any person carry upon his person any concealed weapon, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days: *Provided*, That this section shall not apply to police officers and other persons whose duty it is to execute process or warrants, or make arrests.

West Virginia

W. Va. Code ch. 148, § 7 (1870)

If any person, habitually, carry about his person, hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars. The informer shall have one half of such fine.

W. Va. Code ch. 153, § 8 (1870)

If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance, with the right of appeal, as before provided, and like proceedings shall be had on such appeal.

Wyoming

1876 Wyo. Comp. Laws ch. 52 § 1, as codified in Wyo. Rev. Stat., Crimes (1887).

Carrying concealed weapon.

SEC. 980. Hereafter it shall be unlawful for any resident of any city, town or village, or, for any one not a resident of any city, town or village, in said territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.

1876 Wyo. Comp. Laws ch. 52 § 2, as codified in Wyo. Rev. Stat., Crimes (1887).

Non-resident carrying weapons after notification by officer.

SEC. 981. If any person not a resident of any town, city or village of Wyoming Territory, shall, after being notified of the existence of the last preceding section by a proper peace officer, continue to carry or bear upon his person any fire-arm or other deadly weapon, he or she shall be deemed to be guilty if a violation of the provisions of said section and shall be punished accordingly.

1876 Wyo. Comp. Laws ch. 52 § 3, as codified in Wyo. Rev. Stat., Crimes (1887).

Penalty for violating last two sections.

SEC. 982. Any person violating any of the provisions of the last two preceding sections shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than five dollars nor more than fifty dollars, and, in the default of the payment of any fine which may be assessed against him, shall be imprisoned in the county jail for not less than five days nor more than twenty days.

1884 Wyo. Sess. Laws ch. 67 § 1, as codified in Wyo. Rev. Stat., Crimes (1887).

Exhibiting deadly weapon in angry manner.

SEC. 983. whoever shall, in the presence of one or more persons, exhibit any kind of fire-arms, bowie knife, dirk, dagger, slung shot or other deadly weapon, in a rude, angry or threatening manner not necessary to the defense of his person, family or property, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

1879 Wyo. Sess. Laws ch. 43 § 1, as codified in Wyo. Rev. Stat., Crimes (1887).

SEC. 984. It shall be unlawful for any person in this territory to fire any rifle, revolver or other fire-arm of any description whatever, from any window, door, or other part of any railroad car or train, engine or trailer, or along the line of railroad during the passing of any train or engine, or when any person is passing in the vicinity of the person having in his possession, such fire-arm, and any person so offending, shall, on conviction, be fined in a sum not exceeding twenty dollars, and for second offense, confined in the county jail for a term not exceeding sixty days. And it shall be the duty of any railroad company to post a copy of this and the next succeeding section in every railroad car used for the transportation of passengers passing through this territory. But nothing in this section contained, shall be construed as preventing employees on railroad trains from carrying fire arms, and using the same when necessary for protection of themselves and the persons and property under their charge.

1876 Wyo. Comp. Laws ch. 35 § 127, as codified in Wyo. Rev. Stat., Crimes (1887).

Having possession of offensive weapons.

SEC. 1027. If any person or persons shall have upon him any pistol, gun, knife, dirk, bludgeon or other offensive weapon, with intent to assault any person, every such person, on conviction, shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months.

AMICUS
CURIAE
BRIEF

60 pages - A
Batch 32

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In The
Supreme Court of the United States

◆

OTIS MCDONALD, ET AL.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, ET AL.,

Respondents.

CORRECTED COPY

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF THE STATES OF TEXAS, OHIO, ARKANSAS, GEORGIA, ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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INTEREST OF AMICI CURIAE[1]

Texas, Ohio, Arkansas, Georgia, and the other amici States have a profound interest in this case as guardians of their citizens' constitutional rights. As our Founding Fathers recognized, and as this Court reaffirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Second Amendment right to keep and bear arms is a critical liberty interest, essential to preserving individual security and the right to self-defense. But uncertainty remains as to whether this right fully extends to the vast majority of citizens who live not in a federal enclave, but in one of the several States. Unless the ruling of the court of appeals below is reversed, millions of Americans will be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case.

Enforcement of the Second Amendment right to keep and bear arms against state and local governments is especially important in an era of robust interstate travel and commerce. As the Court has observed, "the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). Indeed, the Court has described the right to interstate travel as "so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Id.* (quoting

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[1] Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)). Accordingly, the States have an interest in ensuring that citizens who must travel in the course of their personal or professional lives remain free from unconstitutional arrest and prosecution for engaging in their right to self-defense by carrying properly-licensed weapons. If local governments may completely ban possession of handguns—"the most popular weapon chosen by Americans for self-defense," *Heller*, 128 S. Ct. at 2818—citizens of all the States may find that they are unable to travel to certain jurisdictions unless they are willing to forego their Second Amendment rights.

Finally, the States have an interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law. Interpretive guidance from this Court, and from other federal courts, would help the States as they construe and enforce their own, analogous state-law protections—including the 44 state constitutions that guarantee a right to keep and bear arms. *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 194 n.113 (1983) ("'In a community that perceives the Supreme Court to be the primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base.'") (citation omitted).

INTRODUCTION

Over the last century, the Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to state and local government through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment). Under the doctrine of selective incorporation, these rights have been applied to state and local government because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The right to keep and bear arms under the Second Amendment is a "fundamental" liberty interest subject to incorporation against the States. Indeed, in the Anglo-American tradition, it is among the *most* fundamental of rights because it is essential to securing all our other liberties. The Founders well understood that, without the protections afforded by the Second Amendment, all of the other rights and privileges ordinarily enjoyed by citizens would be vulnerable to governmental acts of oppression. As St. George Tucker wrote, the right protected by the Second Amendment "may be considered as the true palladium of liberty" because "[t]he right to self-defence is the first law of nature," and wherever "the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." St. George Tucker, *View of the Constitution of the United States*, *in* WILLIAM BLACKSTONE, 1 COMMENTARIES app., at 300 (Philadelphia, Birch & Small 1803) (1765).

Two familiar events in our Nation's history are particularly instructive in illustrating the fundamental nature of the right to bear arms. The very first battle of the Revolutionary War was sparked by British efforts to disarm American colonists. As news spread of these efforts, colonists formed militias to secure their arms. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976). These tensions culminated in April 1775, when British General Sir Thomas Gage sent a column of Redcoats to destroy arms and ammunition stored by colonists in Lexington and Concord, triggering the first battle of the Revolutionary War. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 145-46 (1994). Notably, in forming their militias, the colonists were keenly aware that the right to bear arms was critical to the protection of their other liberties. When George Mason (in conjunction with George Washington and others) began organizing a militia in Fairfax County, Virginia, he noted that the colonists were being "threat'ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen." 1 THE PAPERS OF GEORGE MASON 1725-1792, at 210-11 (Robert A. Rutland ed., 1970). After raising the militia company, Mason praised it as necessary "for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors." *Id.* at 229.

Nearly one hundred years later, in the aftermath of the Civil War, the Southern States engaged in a brutal campaign to disarm and thereby oppress the recently freed slaves. Those efforts included enactment of the so-called "Black Codes" prohibiting the possession of firearms by African-Americans. *See Heller*, 128 S. Ct. at 2810. Disarmament was frequently followed by acts of lawlessness perpetrated on defenseless African-Americans. *See, e.g.*, Report of the Joint Comm. on Reconstruction, H.R. REP. NO. 39-30, pt. 4, at 49-50 (1866) (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them"); CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (statement of Sen. Wilson) ("There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description."). The Reconstruction Congress attempted to remedy these injustices through the Fourteenth Amendment, the Freedmen's Bureau Acts, and the Civil Rights Act, with the clear understanding that an "indispensable" "safeguard[] of liberty . . . under the Constitution" is a man's "right to bear arms for the defense of himself and family and his homestead." *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

The common thread in these transformative events in our Nation's history was the fundamental importance of the right to keep and bear arms as the ultimate guarantor of all the other liberties enjoyed by Americans. The source of the threat to liberty shifted from the British Crown during the Founding to oppressive local governments in the post-Civil War era, but the cure remained the same: recognition and enforcement of an individual right to keep and bear arms, as an essential component of the natural right of self-preservation and the right of "resistance . . . to the violence of oppression." WILLIAM BLACKSTONE, 1 COMMENTARIES 139 (Legal Classics Library 1983) (1765).

As history has proven, the right to bear arms provides the foundational bulwark against the deprivation of all our other rights and privileges as Americans—including rights that have already been incorporated against the States by this Court. Accordingly, the Court should hold that the Second Amendment also secures a "fundamental" right that can no more be abrogated by local government than by the federal government.

SUMMARY OF ARGUMENT

The Second Amendment expressly provides that "[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II. Accordingly, in *Heller*, the Court held that the Second Amendment protects an individual right to keep and bear arms, 128 S. Ct. at 2816-18, and that a District of Columbia prohibition on possession of handguns violated the Amendment, *id.* at 2818. *Heller* did not decide whether the Amendment is applicable to the States. But the Court observed that its earlier, nineteenth-century decisions that the Amendment applies only to the federal government "did not engage in the sort of Fourteenth Amendment inquiry required by our later decisions." *Id.* at 2813 n.23. In doing so, *Heller* presaged the issue presented here: whether the Second Amendment is a "fundamental right" enforceable against state and local governments under the doctrine of selective incorporation.

The City of Chicago has enacted the same type of handgun ban that the Court determined was invalid in *Heller*. *See* CHICAGO, ILL., MUN. CODE §§ 8-20-040(a) (prohibiting possession of unregistered firearms); 8-20-050(c) (providing that no registration certificates will be issued for handguns). Chicago also requires that registerable weapons must be re-registered annually, a process that must be initiated at least sixty days prior to the registration's expiration. *Id.* § 8-20-200. This re-registration process requires the payment of additional fees and the resubmission of all initial registration materials. *Id.* And if re-registration is not properly and timely completed, the particular gun becomes "unregisterable" and therefore illegal to possess in Chicago. *Id.* Likewise, if a firearm is acquired prior to its registration, it is also "unregisterable" and illegal in Chicago. *Id.* § 8-20-090.

Petitioners are residents of Chicago who challenged the validity of these ordinances because they, like the *Heller* plaintiffs, wish to own handguns for the lawful and reasonable purpose of self-defense. Petitioner Otis McDonald, for example, is a community activist who lives in a high-crime Chicago neighborhood. His efforts to make his neighborhood a better place to live have subjected him to violent threats from drug dealers, and he wishes to own a handgun for self-protection.[2] Similarly, Petitioner Colleen Lawson is a Chicago resident whose home has been targeted by burglars. She too would like to own a handgun for self-defense.[3] Like gun owners across the Nation, Petitioners are relying on the Second Amendment to secure among the most basic of rights—the protection of one's home and family.

The district court held that Petitioners' claims were foreclosed by circuit precedent upholding the constitutionality of handgun bans and rejecting the application of the Second Amendment to state and local governments. Pet. App. 13-14, 17-18 (citing *Quilici v. Village of Morton Grove*, 695 F.3d 261 (7th Cir. 1982)). The court of appeals likewise concluded that this Court's precedent and its own precedent precluded enforcement of the Second Amendment against state and local government. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857-58 (7th Cir. 2009) (citing *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894); *Quilici*, 695 F.3d 261).

But the decisions relied upon by the court of appeals are the same nineteenth-century cases that *Heller* dismissed as predating the Court's selective incorporation jurisprudence. 128 S. Ct. at 2813 n.23. As such, they do not control this case. Under this Court's selective incorporation jurisprudence, the determination whether the Second Amendment applies to state and local governments turns on whether it secures an individual right that is "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

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[2] *See* Petitioners' Complaint, at 1-2, *available at* http://www.chicagoguncase.com/wp-content/uploads/2008/06/complaint.pdf (last visited Nov. 23, 2009).

[3] *See id.*

Given the deeply rooted nature of the individual right to arms in the American experience, there can be little doubt that it meets the selective incorporation test. Grounded in English law and recognized by both our Founders and the drafters of the Fourteenth Amendment as among the most fundamental of rights because it was necessary to preserve all their other liberties, the right to arms has remained central to our Nation's regime of ordered liberty. The right to keep and bear arms also appears in the constitutions of 44 States. And the legislatures of all 50 States are united in their rejection of bans on the possession of handguns, the "quintessential self-defense weapon" in America. *Heller*, 128 S. Ct. at 2818.[4]

For the vast majority of Americans who do not live in a federal enclave, the stakes involved in this case could not be higher. If Chicago's ban is upheld, it will confirm that local governments, unrestrained by the Second Amendment, may deny American citizens what they could not be denied by the federal government:

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[4] The relevant state constitutional and statutory provisions concerning firearms are attached in the Appendix to this brief.

the right to possess "the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family." *Id.* (internal quotation and citation omitted). For untold numbers of Americans, including the millions of residents of Chicago, such a result will render the Second Amendment—aptly described as the "the palladium of the liberties of the republic," JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (Carolina Academic Press 1987) (1833)—effectively meaningless.

ARGUMENT

I. THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

Under this Court's established Due Process jurisprudence, all "fundamental" rights under the Bill of Rights are enforceable against state and local governments—including the Second Amendment. The fundamental nature of the right to keep and bear arms, as necessary to the protection of all other rights, has been deeply embedded in the American conscience at every stage of our history: It was imported into the colonies from English law, sparked the American Revolution, animated the Founding spirit of this Nation, and drove the adoption of the Fourteenth Amendment and other post-Civil War measures designed to protect recently-freed slaves from both government and private oppression.

A. The Due Process Clause Incorporates "Fundamental" Rights.

The Due Process Clause of the Fourteenth Amendment bars "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has recognized that this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Rather, due process also encompasses "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The doctrine of selective incorporation is premised on the Court's conclusion that any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Applying this doctrine in a series of decisions over the last century, the Court has held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. *See, e.g.*, *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Excessive Bail Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Speedy Trial Clause); *Pointer*, 380 U.S. 400 (Confrontation Clause); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (free assembly); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech).

In the doctrine's initial formulation, as expressed in *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969), the Due Process Clause incorporated against the States only those rights "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325. The analysis has since been refined to focus on the Anglo-American historical background of the right. The incorporation inquiry now turns on whether a right is "necessary to an

Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. Applying this test in *Duncan* to determine that the Sixth Amendment right to jury trial in criminal cases applied to the States, the Court reviewed the history of the right in English law, as well as its importance in the Founding era. *See id.* at 151-54. The Court also reviewed the current state systems for criminal trials, noting that every State "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* at 149 n.14. Because the Second Amendment also secures a fundamental right with a necessary place in the Anglo-American regime of ordered liberty, it too applies to the States.

B. The Right to Keep and Bear Arms Was Considered "Fundamental" Under English Law and During the Founding Era.

As the Court observed in *Heller*, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. In reaching this conclusion, the Court cited Blackstone, "whose works . . . 'constituted the preeminent authority on English law for the founding generation.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Blackstone explained that "having" arms was among the five basic rights of every Englishman, those rights which secured the "primary rights" of each individual. WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139 (Legal Classics Library 1983) (1765). Indeed, Blackstone saw the right to bear arms as a natural right because it arose from the natural right of self-preservation, and the right of "resistance . . . to the violence of oppression." *Id.* at 139. And, as *Heller* also noted, Blackstone's view was shared by his contemporaries. 128 S. Ct. at 2798 (citing several eighteenth century authorities). The right to arms recognized by Blackstone was also part of the English Declaration of Right (codified as the English Bill of Rights) of 1689, the relevant portion of which "has long been understood to be the predecessor to our Second Amendment." *Id.*

The American colonists likewise viewed the right to arms as fundamental, derivative of their rights as Englishmen. During the 1760s and 1770s, as relations between the colonists and the British Crown deteriorated, King George III "began to disarm the inhabitants of the most rebellious areas." *Id.* at 2799. This forced disarmament "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Id.* It also led to the formation of independent militias in the colonies, *see* Robert Gross, The Minutemen and Their World 59 (1976), which were described by the patriot Josiah Quincy as "a well regulated militia composed of the freeholders, citizens, and husbandmen, who take up arms to preserve their property as individuals, and their rights as freemen." Josiah Quincy, Observations on the Act of Parliament Commonly Called the Boston Port-Bill 413 (1774).

The colonists associated the growing presence of British regulars in America, and the Crown's policy of disarming the citizenry, as a profound threat to all of their liberties. When stores of gunpowder were seized in Virginia, the House of Burgesses observed that Virginians were well aware of the "many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property." VA. GAZETTE (Williamsburg), Aug. 5, 1775, at 2, col. 1. The prospect of disarmament was especially daunting given the well-recognized power and military prowess of the British army and navy. *See* JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6 (2000) ("Taken together, the British army and navy constituted the most powerful military force in the world, destined in the course of the succeeding century to defeat all national competitors for its claim as the first hegemonic power of the modern era."). In short, for the Founding Generation, the importance of the right to arms "was not merely speculative theory. It was the lived experience of the [] age." AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998).

Given the colonists' experience before and during the Revolutionary War, it is unsurprising that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms] and declares only that it 'shall not be infringed.'" *Heller*, 128 S. Ct. at 2797. The Framers were well aware of the central importance of this right, recognizing "the advantage of being armed, which the Americans possess over the people of almost every other nation." THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

The Framers also understood that the right to arms was essential to preserving all the other "fundamental" liberties enjoyed by the American people. Alexander Hamilton articulated this understanding in his Federalist No. 29:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

THE FEDERALIST NO. 29, at 145 (Alexander Hamilton) (G. Carey & J. McClellan eds., 1990).

Finally, the actions of the States themselves during the Founding era establish that they too viewed the right to keep and bear arms as "fundamental." *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 126-69 (2008) (providing State-by-State analysis). For example, after the adoption of the Declaration of Independence in 1776, several of the colonies adopted written constitutions of their own. The constitutions of Massachusetts, North Carolina, Pennsylvania, and Vermont all included provisions that guaranteed the right to bear arms. MASS. CONST. pt. 1, art. XVII; N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII; PA. CONST. of 1776, DECLARATION OF RIGHTS, § XIII; VT. CONST. of 1777, ch. 1, art. XV. And when the States voted on the ratification of the Constitution, several of them recommended amendments securing the right to keep and bear arms.

4 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 912 (1980) (noting that New Hampshire, New York, North Carolina, Rhode Island, and Virginia recommended including a provision on the right to keep and bear arms); *see also* 1 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 326-28 (Jonathan Elliott ed., 1859).

The States' understanding of the fundamental nature of the right to arms was further demonstrated in the decades after the adoption of the Constitution. As more States were admitted to the Union, the right to keep and bear arms was recognized by a growing number of state constitutions. By 1868, twenty-two state constitutions explicitly guaranteed a right to bear arms. *See* App. The judicial opinions of state courts during this time also consistently recognized the importance of the right to arms. *See, e.g.*, *Cockrum v. State*, 24 Tex. 394, 401-02 (1859) ("The right of a citizen to bear arms, in the lawful defence of himself . . . is absolute . . . . A law cannot be passed to infringe upon it or impair it . . . ."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (the right to bear arms is "calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (stating that the right to keep and bear arms protects the "*natural* right of self-defence," and that the Second Amendment secured a right "originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!").

In sum, the historical record, much of it detailed by this Court in *Heller*, demonstrates that the right to keep and bear arms was understood as a fundamental right of English subjects at the time of the Founding. Throughout this period the Framers, and Americans generally, considered the right to arms essential to preserving the other "fundamental" liberties enjoyed by our citizens at the birth of the Nation.

C. The Right to Keep and Bear Arms Was Considered "Fundamental" When the Fourteenth Amendment Was Adopted, and It Remains So to This Day.

As it was during the Founding era and in the succeeding decades leading up to the Civil War, the right to keep and bear arms continued to be considered "fundamental" at the time the Fourteenth Amendment was adopted. The Court described this period in *Heller*, noting that, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S. Ct. at 2809-10. A significant concern in these debates was the disarming of newly freed African-Americans in the Southern States, by statute as well as by vigilantism. *See id.* at 2810 (citing STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) (hereinafter HALBROOK, FREEDMEN)).

The Framers of the Fourteenth Amendment acted to end these oppressions by drafting the Amendment itself and by passing the Freedmen's Bureau Acts and the Civil Rights Act of 1866. A prominent constitutional scholar has noted that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of African-American citizens who had been stripped of their arms and subjected to violent attacks, and to "affirm the full and equal right of every citizen to self-defense." AMAR, *supra*, at 264. Indeed, "more evidence exists that the framers of the Fourteenth Amendment intended to protect the right to keep and bear arms from state infringement than exists for any other Bill of Rights guarantee." HALBROOK, FREEDMEN, *supra*, at at 188.

The debates of the Thirty-Ninth Congress, which drafted the Fourteenth Amendment, are replete with evidence that the Second Amendment was understood to protect a fundamental right. For example, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" one's "right to bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S. Ct. at 2811. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms" as inherent in a "republican government." CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866). Even the opponents of these Reconstruction measures acknowledged that the right to keep and bear arms was fundamental; they disagreed only as to whom that right extended and whether the federal government should enforce it. *See, e.g., id.* at 371 (statement of

Sen. Davis) (objecting to the Freedmen's Bureau bill but agreeing that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"); *cf.*, *id.* at 914-15 (Sen. Saulsbury) (objecting to a bill to disband white southern militias, arguing that such a measure by Congress would violate the Second Amendment).

Other actions by the Thirty-Ninth Congress further confirmed the critical importance of the Second Amendment in the Reconstruction period. The Freedmen's Bureau bill specifically declared that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." Act of July 16, 1866, ch. 200, sec. 14, 14 Stat. 173, 176 (1866) (emphasis added). "No other guarantee in the Bill of Rights was the subject of this official approval by the same Congress that passed the Fourteenth Amendment." HALBROOK, FREEDMEN, *supra*, at 42.

The state constitutions adopted during the Reconstruction period, including those adopted by States that had previously joined the Confederacy, likewise demonstrate that the right to arms was considered fundamental by the States that ratified the Fourteenth Amendment. *See, e.g.*, ARK. CONST. of 1868, art. II, § 5 ("The citizens of this state shall have the right to keep and bear arms for their common defense."); MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); TEX. CONST. of 1869, art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State.").

In sum, at the time the Fourteenth Amendment was drafted and ratified, as during the Founding era, the right to keep and bear arms remained central to the American conception of liberty. The post-Civil War disarmament of the freed slaves in the Southern States—followed swiftly by the deprivation of other basic liberties—powerfully demonstrated that the Second Amendment preserves a right essential to securing all the other rights and privileges of free citizens. The Fourteenth Amendment, Freedmen's Bureau Acts and Civil Rights Act, designed to remedy these injustices, were predicated on the recognition that the right to arms is "fundamental."

Events since the adoption of the Fourteenth Amendment further confirm that the right to arms remains of central importance to the States. Today 44 state constitutions expressly protect a right to bear arms. *See* App. Three other States protect a right to self-defense and defense of property. *See* CAL. CONST. art. I, § 1 (originally adopted in 1849); IOWA CONST. art. I, § 1 (originally adopted in 1846); N.J. CONST. art. I, ¶ 1 (originally adopted in 1844). As the Court has noted, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. Only Maryland, Minnesota, and New York have neither guarantee in their state constitutions. Moreover, the legislatures of all 50 States have rejected bans on private handgun ownership. As a result, every State in the Union permits private handgun ownership. *See* App.

Finally, 32 States submitted an amicus curiae brief in *Heller* arguing that the Second Amendment secures a "fundamental" right that is "properly subject to incorporation." Brief for the State of Texas et al. as Amici Curiae Supporting Respondent, at 23 n.6, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). In this case, 34 States urged the Court to grant review of the decision below and hold that the Second Amendment is applicable to the States. *See* Brief for the State of Texas et al. as Amici Curiae in Support of Petitioners; Brief of the State of California as Amicus Curiae in Support of Petitioners. And the submission of this amicus brief provides further evidence of the States' understanding of the fundamental importance of the arms-bearing right guaranteed by the Second Amendment.

II. THE FEDERALISM CONCERNS INVOKED BY THE COURT OF APPEALS ARE MISPLACED.

The decision below was based in part on the belief that incorporation of the Second Amendment would raise federalism concerns. *See Nat'l Rifle Ass'n*, 567 F.3d at 859-60. Those concerns are misplaced.

To begin with, the federalism concerns expressed below are based on the mistaken premise that the Second Amendment protects state militias against federal interference. *Id.* at 859. *Heller* expressly rejected the argument that the Second Amendment addressed any concern about federal control over state militias. As the Court explained, "[t]he Second

Amendment right, protecting *only* individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia." 128 S. Ct. at 2804 (emphasis added). The Founders sought to address their fear of federal abolition of state militias not through the Second Amendment, but "in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so." *Id.*

The court of appeals further suggests that incorporation may be incorrect because "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Nat'l Rifle Assoc.*, 567 F.3d at 860. To be sure, amici States agree that "[i]t is one of the happy incidents of the federal system" that each State may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cited in *Nat'l Rifle Assoc.*, 567 F.3d at 860). But the discretion of state and local governments to explore legislative and regulatory initiatives does not include "the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights." *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring). As the Court stated in *Heller*, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 128 S. Ct. at 2821. Just as local governments cannot constitutionally act as "laboratories" for initiatives to abrogate their citizens' right to free speech or their freedom from unreasonable searches and seizures, nor can they nullify the fundamental right to keep and bear arms secured by the Second Amendment.

State and local experimentation with reasonable firearms regulations will continue under the Second Amendment. As noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 2816. Many firearms regulations would plainly survive Second Amendment scrutiny, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17. For example, in *Nordyke v. King*, the Ninth Circuit applied the Second Amendment to the States, but nonetheless upheld an Alameda County, California ordinance prohibiting firearms on county property. 563 F.3d 439, 457, 460 (9th Cir. 2009).

As "independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the amici States are particularly concerned when the Court engages in constitutional or statutory interpretation that implicates federalism issues. The incorporation of the Second Amendment presents no such concerns. Denying local governments the power to nullify the Amendment will not increase federal power, mandate any state action pursuant to federal directives, or preclude reasonable state and local regulation of firearms. It will simply prevent local governments, like the federal government, from abrogating the fundamental, individual right to keep and bear arms. *See Pointer*, 380 U.S. at 413-14 (Goldberg, J., concurring) ("[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual.").

III. THE CITY OF CHICAGO MISREADS *HELLER*.

Because the Second Amendment's right to arms applies to the States through the Due Process Clause, it necessarily follows that Chicago's complete ban on the possession of handguns, like that of the District of Columbia considered in *Heller*, is invalid. In its brief opposing certiorari, Chicago attempts to avoid this result by making three mistaken arguments about the scope of the Second Amendment as construed in *Heller*. None of Chicago's arguments was endorsed by the court of appeals below.

Chicago's first mistake is that it asks the wrong question. According to Chicago, the question is not whether the Second Amendment is incorporated against the States; rather, Chicago asks the Court to determine whether the Second Amendment is incorporated against the States on a case-by-case, weapon-by-weapon basis. *See* Resp. 9. But the Court has never taken such a piecemeal approach to incorporation.

Chicago's approach to incorporation also misunderstands *Heller*. Contrary to Chicago's assertion, the "precise Second Amendment right" recognized in *Heller* was an individual right to keep and bear arms, not merely a "right to handguns." Indeed, *Heller* made clear that the Second Amendment protects an individual right to keep and bear *any* weapons that are "in common use" by Americans—that is, the "sorts of lawful weapons that they possessed at home," and that they could therefore bring with them if called to militia duty. *Heller*, 128 S. Ct. at 2817. So when the Court invalidated the District of Columbia's handgun ban, it did so because it determined that handguns were weapons "in common use" by Americans and therefore could not be categorically banned. *Id.* at 2817-18. Accordingly, the question in this case is not whether a "right to handguns" is incorporated, as Chicago suggests, but rather whether the Second Amendment in its entirety—securing the individual right to keep and bear any weapon in common use—applies to state and local governments.

Chicago likewise misreads *Heller* when it argues that local governments may ban handguns so long as they allow citizens to have some other type of weapon in the home for self-defense. Resp. 9, 15-16. In fact, the Court has already rejected the contention that handguns may be prohibited consistent with the Second Amendment so long as long guns are permitted:

> "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as

> we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. . . . and a complete prohibition of their use is invalid."

Heller, 128 S. Ct. at 2818.

And in any event, Chicago's apparent belief that there is no tradition upholding a right to handguns is mistaken. As the Court observed in *Heller*, "[f]ew laws in the history of our Nation have come close to the severe restriction" of the type of handgun ban enacted by the District of Columbia and Chicago, and those laws have typically been overturned. *See id.* (citing *Nunn*, 1 Ga. at 251 (striking down a prohibition on carrying pistols openly); *Andrews v. State*, 50 Tenn. 165, 187 (1871) (holding that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time place, or circumstances," violated the state constitutional provision—which the court equated with the Second Amendment); *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.")).

Second, Chicago argues that "[t]he right recognized in *Heller* to keep and bear arms in common use [like handguns] is not implicit in the concept of ordered liberty," Resp. 11, and therefore is not incorporated. This argument turns on Chicago's belief that, although the Second Amendment "conferred an individual right, as against the federal government, to keep and bear weapons in common use," the "purpose of the common-use rule was to protect, not individual personal liberties, but the militia-related need for militiamen to possess and be familiar with weapons necessary for their militia service." Resp. 12.

Again, Chicago misunderstands *Heller*. Although the Court acknowledged that the individual right to arms secured by the Second Amendment is limited to those weapons that are "'in common use at the time,'" *Heller*, 128 S. Ct. at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)), this limitation does not alter the Amendment's purpose to protect a fundamental, individual right to arms. Rather, the Court made clear in *Heller* that the purpose of the Second Amendment is to secure an individual right to arms that is *not* dependent upon an individual's service in the militia. *Id*. at 2815-17.

And, contrary to Chicago's formulation, wherein the Second Amendment's purpose was driven by the need for militiamen to possess and be familiar with particular weapons "necessary for their militia service," Resp. 12, the Court explained in *Heller* that "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, *who would bring the sorts of lawful weapons that they possessed at home* to militia duty." 128 S. Ct. at 2817 (emphasis added). In short, Chicago fails to recognize that Americans' right to possess lawful weapons in common use has remained implicit in the concept of ordered liberty, even when those weapons could not be "useful against modern-day bombers and tanks" and therefore would be of limited efficacy in modern militia service. *Id*.

Finally, Chicago argues that "the scope of arms rights under state constitutions confirms that the right to keep and bear arms in common use is not so firmly entrenched that it is implicit in the concept of ordered liberty." Resp. 14. This argument is particularly puzzling, because Chicago implicitly acknowledges, as it must, that 44 state constitutions protect an individual right to arms, and all 50 state legislatures have rejected bans on handguns. *See* Resp. 14 & n.6; *see also* App. Nonetheless, according to Chicago, because state courts have routinely upheld reasonable regulations on the possession of firearms, the right to keep and bear arms has not become "so firmly entrenched" in the States as to be considered "fundamental." *See* Resp. 14-15.

But the enactment by state and local governments of reasonable regulations on firearms, subsequently upheld by state courts, can hardly be equated with a failure on the part of the States to recognize the central importance of their citizens' right to arms. Chicago points to felon-in-possession laws, bans on unusual or military weapons such as sawed off shotguns and assault rifles, and concealed carry regulations, as indicative of the States' rejection of the notion that the right to arms is "implicit in the concept of ordered liberty." *See id.* (citing Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 599-612 (2006)). But none of these laws comes close to completely prohibiting the possession of an entire category of lawful weapons in common use, nor do any of these regulations reflect that the States do not consider the Second Amendment right to arms to be "fundamental."

Rather, as described herein, *see supra* Part I, the States' commitment to securing their citizens' right to arms in common use was evident at the Founding and continues to this day through state constitutional provisions and through the States' uniform rejection of handgun bans. As the submission of this brief further demonstrates, Chicago's position that the right to arms is of little importance, and may be abrogated at will by local government, is directly contrary to the view of the majority of the States.

CONCLUSION

The judgment of the court of appeals should be reversed.

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STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS:[1] AT THE FOUNDING (1776–1790s)

STATE	PROVISION
Kentucky	KY. CONST. of 1792, art. XII, § 23
Massachusetts	MASS. CONST. pt. I, art. XVII
North Carolina	N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII
Pennsylvania	PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, DECLARATION OF RIGHTS § XIII
Tennessee	TENN. CONST. of 1796, art. XI, § 26
Vermont	VT. CONST. ch. I, art. 16; VT. CONST. of 1786, ch. I, art. XVIII; VT. CONST. of 1777, ch. I, art. XV

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[1] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192-217 (2006) (further detailing the statutory and jurisprudential history of these provisions).

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: AT THE ADOPTION OF THE FOURTEENTH AMENDMENT (1868)

STATE	PROVISION
Alabama	ALA. CONST. of 1868, art. I, § 28
Arkansas	ARK. CONST. of 1868, art. II, § 5
Connecticut	CONN. CONST. of 1818, art. I, § 15
Florida	FLA. CONST. of 1868, DECLARATION OF RIGHTS § 22
Georgia	GA. CONST. of 1868, art. I, § 14
Indiana	IND. CONST. art. I, § 32
Kansas	KAN. CONST., Bill of Rights § 4
Kentucky	KY. CONST. of 1850, art. XIII, § 25
Maine	ME. CONST. of 1819, art. I, § 16
Massachusetts	MASS. CONST. pt. I, art. XVII
Michigan	MICH. CONST. of 1850, art. XVIII, § 7
Mississippi	MISS. CONST. of 1868, art. I, § 15
Missouri	MO. CONST. of 1865, art. I, § 8

STATE	PROVISION
North Carolina	N.C. CONST. of 1868, art. I, § 24
Ohio	OHIO CONST. art. I, § 4
Oregon	OR. CONST. art. I, § 27
Pennsylvania	PA. CONST. of 1838, art. IX, § 21
Rhode Island	R.I. CONST. of 1843, art. I, § 22
South Carolina	S.C. CONST. of 1868, art. I, § 28
Tennessee	TENN. CONST. of 1835, art. I, § 26
Texas	TEX. CONST. of 1866, art. I, § 13
Vermont	VT. CONST. ch. I, art. 16

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: CURRENTLY GUARANTEED

STATE	PROVISION
Alabama	Ala. Const. art. I, § 26
Alaska	Alaska Const. art. I, § 19
Arizona	Ariz. Const. art. II, § 26
Arkansas	Ark. Const. art. II, § 5
California	None
Colorado	Colo. Const. art. II, § 13
Connecticut	Conn. Const. art. I, § 15
Delaware	Del. Const. art. I, § 20
Florida	Fla. Const. art. I, § 8
Georgia	Ga. Const. art. I, § 1, para. VIII
Hawaii	Haw. Const. art. I, § 17
Idaho	Idaho Const. art. I, § 11
Illinois	Ill. Const. art. I, § 22
Indiana	Ind. Const. art. I, § 32
Iowa	None
Kansas	Kan. Const., Bill of Rights § 4

STATE	PROVISION
Kentucky	KY. CONST. § 1, cl. 7
Louisiana	LA. CONST. art. I, § 11
Maine	ME. CONST. art. I, § 16
Maryland	None
Massachusetts	MASS. CONST. pt. I, art. XVII
Michigan	MICH. CONST. art. I, § 6
Minnesota	None
Mississippi	MISS. CONST. art. III, § 12
Missouri	MO. CONST. art. I, § 23
Montana	MONT. CONST. art. II, § 12
Nebraska	NEB. CONST. art. I, § 1
Nevada	NEV. CONST. art. I, § 11, cl. 1
New Hampshire	N.H. CONST. pt. I, art. 2-a
New Jersey	None
New Mexico	N.M. CONST. art. II, § 6
New York	None
North Carolina	N.C. CONST. art. I, § 30
North Dakota	N.D. CONST. art. I, § 1

STATE	PROVISION
Ohio	OHIO CONST. art. I, § 4
Oklahoma	OKLA. CONST. art. II, § 26
Oregon	OR. CONST. art. I, § 27
Pennsylvania	PA. CONST. art. I, § 21
Rhode Island	R.I. CONST. art. I, § 22
South Carolina	S.C. CONST. art. I, § 20
South Dakota	S.D. CONST. art. VI, § 24
Tennessee	TENN. CONST. art. I, § 26
Texas	TEX. CONST. art. I, § 23
Utah	UTAH CONST. art. I, § 6
Vermont	VT. CONST. ch. I, art. 16
Virginia	VA. CONST. art. I, § 13
Washington	WASH. CONST. art. I, § 24
West Virginia	W. VA. CONST. art. III, § 22
Wisconsin	WIS. CONST. art. I, § 25
Wyoming	WYO. CONST. art. I, § 24

FIREARMS REGULATIONS BY STATE

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Alabama	ALA. CODE §§ 13A-11-50 to -61.1, 13A-11-70 to -85
Alaska	ALASKA STAT. §§ 18.65.700–.800
Arizona	ARIZ. REV. STAT. ANN. §§ 13-3101 to -3119
Arkansas	ARK. CODE ANN. §§ 5-73-101 to -133, 5-73-301 to -402
California	CAL. PENAL CODE §§ 12000–12040, 12050–12054, 12125–12133
Colorado	COLO. REV. STAT. ANN. §§ 18-12-101 to -111, 18-12-201 to -216
Connecticut	CONN. GEN. STAT. ANN. §§ 29-27 to -36L
Delaware	DEL. CODE ANN. tit. 11, §§ 1441–1459

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Florida	FLA. STAT. ANN. §§ 790.001–.335
Georgia	GA. CODE ANN. §§ 16-11-126 to -135
Hawaii	HAW. REV. STAT. §§ 134-1 to -27
Idaho	IDAHO CODE ANN. § 18-3302
Illinois	430 ILL. COMP. STAT. ANN. 65/1 to /16; 720 ILL. COMP. STAT. ANN. 5/24-1 to -10
Indiana	IND. CODE ANN. §§ 35-47-2-1 to -24
Iowa	IOWA CODE ANN. §§ 724.1–.30
Kansas	KAN. STAT. ANN. §§ 75-7c01 to -7c26
Kentucky	KY. REV. STAT. ANN. §§ 237.020–.106, 237.110–.142
Louisiana	LA. REV. STAT. ANN. §§ 40:1379.3, 40:1781–:1792

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Maine	ME. REV. STAT. ANN. tit. 25, §§ 2001-A to 2006
Maryland	MD. CODE ANN., CRIM. LAW §§ 4-201 to -209; MD. CODE ANN., PUB. SAFETY §§ 5-101 to -143, 5-301 to -314
Massachusetts	MASS. GEN. LAWS ANN. ch. 140, §§ 129B, 131–131L
Michigan	MICH. COMP. LAWS ANN. §§ 28.421–.435, 750.222–.239a
Minnesota	MINN. STAT. ANN. §§ 609.66–.667, 624.71–.719
Mississippi	MISS. CODE ANN. § 45-9-101
Missouri	MO. REV. STAT. §§ 571.030, 571.070, 571.101–.121
Montana	MONT. CODE ANN. §§ 45-8-316 to -330
Nebraska	NEB. REV. STAT. §§ 28-1202, 28-1204, 69-2401 to -2448

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Nevada	NEV. REV. STAT. ANN. §§ 202.3653–.369
New Hampshire	N.H. REV. STAT. ANN. §§ 159:1 to :22
New Jersey	N.J. STAT. ANN. §§ 2C:39-3, -5, -6, 2C:58-4
New Mexico	N.M. STAT. ANN. §§ 29-19-1 to -14, 30-7-1 to -16
New York	N.Y. PENAL LAW §§ 265.01–.40, 400.00–.10
North Carolina	N.C. GEN. STAT. ANN. §§ 14-402 to -406, 14-415.10 to -415.26
North Dakota	N.D. CENT. CODE §§ 62.1-02-01 to -04-05
Ohio	OHIO REV. CODE ANN. §§ 2923.12–.1213
Oklahoma	OKLA. STAT. ANN. tit. 21, §§ 1272–1290.26
Oregon	OR. REV. STAT. ANN. §§ 166.173–.295

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Pennsylvania	18 PA. CONS. STAT. ANN. §§ 6105–6127
Rhode Island	R.I. GEN. LAWS §§ 11-47-8 to -60
South Carolina	S.C. CODE ANN. §§ 16-23-10 to -60, 23-31-110 to -240
South Dakota	S.D. CODIFIED LAWS §§ 22-14-9 to -11, 23-7-1 to -46
Tennessee	TENN. CODE ANN. §§ 39-17-1301 to -1362
Texas	TEX. GOV'T CODE ANN. §§ 411.171–.208; TEX. PENAL CODE ANN. §§ 46.01–.06
Utah	UTAH CODE ANN. §§ 53-5-701 to -711, 53-5a-102, 76-10-500 to -530
Vermont	VT. STAT. ANN. tit. 13, § 4003
Virginia	VA. CODE ANN. §§ 18.2-308 to -308.2:01
Washington	WASH. REV. CODE ANN. §§ 9.41.010–.810

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
West Virginia	W. VA. CODE ANN. §§ 61-7-3 to -14
Wisconsin	WIS. STAT. ANN. §§ 941.23–.237, 941.29, 941.296
Wyoming	WYO. STAT. ANN. § 6-8-104

AMICUS
CURIAE
BRIEF

[illegible] CLERK

No. 08-1521

IN THE

Supreme Court of the United States

OTIS MCDONALD, *ET AL.*
Petitioners,
v.
CITY OF CHICAGO, *ET AL.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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Statement of Interest[*]

Amici Winnetka, Skokie, and Evanston are, like respondents Chicago and Oak Park, political subdivisions of the State of Illinois, endowed by the Illinois Constitution with home rule powers. *Amicus* Illinois Municipal League (IML) is a non-political association of and advocate for 1132 Illinois cities, villages, and incorporated towns. *Amicus* International Municipal Lawyers Association (IMLA), is an organization of over 3500 local government entities, as represented by their chief legal officers, municipal leagues, and individual attorneys, which serves as a resource and voice for local governments.

Although this case, like *District of Columbia* v. *Heller*, primarily involves gun regulations in a large urban jurisdiction, firearm regulation is also a concern of suburbs and their residents. The problems of violence and gang activity that plague large cities do not respect political boundaries, and other social problems associated with firearms – heightened risks of suicide and lethal domestic violence, of accidental shootings, and of crimes committed with stolen weapons – are of deep concern to suburban communities.

In noting these harms, however, *amici* do not mean to suggest unanimity that the regulatory approach challenged here is the best one for addressing them. We recognize that debates about the appropriateness and efficacy of handgun restrictions and competing policy alternatives are occurring across the country and that their resolution depends on diverse communities' local conditions, experiences, and values.

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[*] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel for all parties have filed written consents to the filing of *Amicus* briefs.

Indeed, *amici* here exemplify this heterogeneity. For many years, Evanston and Winnetka had in place strict handgun regulations like those challenged here; Skokie and many other IML members do not (a difference due, in part, to Winnetka's experience with a tragic 1988 school shooting). Though the relevant provisions have very recently been repealed (to avoid costly litigation), there remains strong support in both communities for such a policy approach.

Amici are united, however, in agreement that decisions whether to adopt (or repeal) measures like these should be made at the local level, by citizens and their representatives. On this point, the governing law (as it currently stands) is quite clear: the Illinois State Constitution, as adopted in 1970, recognizes both an individual right to keep and bear arms *and* local authorities' historic and continuing police power authority to regulate the possession and use of firearms. That provision, which was extensively debated by the drafters and ratifying voters, has been interpreted by Illinois's highest court to allow an array of regulatory measures, including a locally-enacted ban on handgun possession like the ones at issue here.

Were petitioners' position to prevail, the efforts of the constitution-drafters four decades ago, as well as those of the ratifiers and judicial interpreters and of *amici* and others, who debated and enacted regulations at the local level, would prove to have been an idle undertaking – as would countless other instances of serious and *bona fide* lawmaking on this subject across the Nation since 1868.

Another aspect of *amici's* experiences should concern the Court. When Evanston and Winnetka repealed their more restrictive laws in 2008, it was not because their citizens or legislators had been persuaded by policy arguments like the ones advanced by petitioners, respondent NRA, and their *amici* – but rather because they determined that the costs of defending the laws in federal court (even of doing so successfully) were too high to have local taxpayers bear. The prospect of resolution through litigation – and threat of it – against local governments, for legislative actions taken in good faith to advance important public aims, is a further reason for rejecting the unprecedented constitutional interpretation petitioners ask the Court to impose.

Summary of Argument

Petitioners ask the Court to depart drastically from long-settled practice and constitutional understanding and recognize, for the first time in the Nation's history, a broad power in federal courts to pass substantive judgment on state and local legislation regulating the ownership and use of firearms.

These efforts should fail because petitioners do not take up, let alone discharge, the especially heavy burden of justification that the proponent of any such abrupt and far-reaching reversal must bear. As this Court has recognized and the experiences of *amici* well illustrate, the present means for resolving tensions between individual rights of self-defense and firearm ownership and public safety and welfare, through deliberation and debate at the local level, within bounds set by the constitutions and laws of the 50

States – the means the Nation has known throughout its history – exhibits the many virtues of the federal system. Indeed, this subject matter bears the hallmarks of ones the Court has recognized to be especially suited to local resolution: (1) there are large, significant differences in local conditions and (2) wide, value-laden differences of opinion about the subject among different communities across the Nation, both making a single uniform rule less satisfactory; (3) interest and awareness are high enough that laws (and constitutional provisions) can be expected to express citizens' views; (4) issues of law and policy are sufficiently intertwined with complex, technical, and unresolved empirical questions to make provisional, legislative resolution preferable to a definitive judicial one; and (5) there is no reason to believe that lawmaking activity in this area is pursued in bad faith or to disadvantage any unpopular or politically powerless subgroup.

Rather than acknowledge their burden, petitioners and *amici* largely seek to minimize it, insisting that the ruling they ask from the Court would cause little disruption of the traditional State/federal bal ance, treating as proof the impressive number of state constitutions that now include rights to keep and bear arms – and the large number of States and their officials signing *amicus* briefs supporting reversal.

The premises of these arguments are dubious: (1) the readiness of a significant number of States to implement or champion a right (or a particular understanding of a right) usually counsels against, not in favor of, federal judicial intervention; and (2) States and individual officials cannot consent even to intrusions on their own sovereignty, let alone on those of other States.

But they are, in any event, surely incorrect on the merits. The federalism costs of shifting the locus of decision-making on this subject from local and state legislative chambers (and state courts) to federal courts are large, even before accounting for those of a *nunc pro tunc* declaration by this Court that more than a century of state- and local-level lawmaking had been *ultra vires*. Moreover, the practical burdens of defending laws against federal court challenge would skew processes of local self-government even in cases where judicial invalidation would be unlikely, and important crime prevention strategies would be compromised.

To the extent petitioners attempt to carry their burden, they do not (and cannot) succeed. As we explain briefly below (and Chicago and *amici* do in fuller depth), the evidence that Framers of the Fourteenth Amendment intended any clause of it to "incorporate" particular provisions of the Bill of Rights (or all of them) is itself equivocal; that they contemplated, let alone favored, the particular categorical limitation on regulatory authority indicated in *Heller* is highly implausible; and we are aware of no evidence that the Amendment was widely understood by its *ratifiers*, including the State of Illinois, to have established a permanent limit, enforceable by federal judges in private lawsuits, on state and local governments' ability to adopt *bona fide* public safety measures.

In fact, the contemporaneous evidence petitioners and *amici* do put forward – statements of congressional framers and supporters – does not establish an intent to divest States and their subdivisions of authority to enact neutral, generally applicable police power measures of the sort at issue here, but rather a strong disapproval of discriminatory "class legislation."

This distinction also highlights the flaws of the most urgently advanced reason for the historic rearrangement petitioners seek – to foster greater "consistency" between the judicially enforceable guarantees of the Second Amendment and those of other provisions of the Bill of Rights. Such arguments disregard fundamental differences between this right and ones that were held to be indispensable to ordered liberty – and incorporated against the States "jot for jot" in the twentieth century on that basis. Few of the cited decisions entailed substantive review of generally applicable police power legislation. Many arose in the field of state criminal justice, where the Fourteenth Amendment already spoke; involved matters of core judicial expertise on which majority rule has never been the norm; and responded to serious problems of racial discrimination, and even the Free Speech incorporation cases petitioners and *amici* emphasize involved matters fundamentally less suited to democratic resolution than are the ones here.

The issues presented by petitioners' claim are in fact much more like the ones canvassed last Term in *District Attorney's Office* v. *Osborne*, 129 S. Ct. 2308 (2009), than the First Amendment decisions petitioners and *amici* proffer as analogous. As in that case, recognition of a novel Fourteenth Amendment right here threatens to preempt ongoing State and local efforts; to thrust federal courts into an uncomfortable prescriptive role, on a subject matter far outside their core expertise; and claims authority from abstractly stated principles that lack solid grounding in existing constitutional doctrine.

I. The Rule Petitioners Seek Would Work A Vast And Unjustifiable Disruption of Self-Government

This Court has long recognized that questions of federal law – both statutory and constitutional – should be resolved with due regard for the States' role in our federal system and for the Constitution's historic allocation of decisionmaking authority. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 349 (1971).[1]

Petitioners and their *amici* do not deny outright, but try to minimize the significance of these principles to this case, at turns asserting that the construction of Fourteenth Amendment advanced here "[d]oes not disrupt the balance," State Legislators Br. at 9, that "incorporation of the Second Amendment presents no [federalism] concerns," Texas *et al.* Br. 23, and pointing to the large number of States (44) with constitutional provisions recognizing a right to keep and bear arms, Petr. Br. 69.

This is all exceedingly strange. By any honest reckoning, the disruption of the federal balance of "incorporating" the Second Amendment against the States would be vast. Doing so would disable State and local authorities from "experiment[ing] and exercis[ing] their own judgment," *United States* v. *Lopez*, 514 U.S 549, 583 (1995) (Kennedy, J., concurring), on a subject matter – preventing harms associated with firearms – to which they "lay claim by right of history and expertise," a pattern that "reveal[s]" the "theory and utility of our federalism," *id.* It would immediately and irreversibly transfer policymaking responsibilities from democratic majorities to federal courts. Doing so not only would shift the locus of future debates, it would entail holding (1) that important and historic regulatory powers were taken from the people "[in] 1868," Pet. App. 7a (Easterbrook, J.); (2) that this transfer was effected by the States themselves (in ratifying the Fourteenth Amendment then); and (3) that much ensuing local- and state-level lawmaking on the subject was (unbeknownst to the participants – and to the state jurists who for a century have construed and applied those enactments) *ultra vires*.

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[1] These considerations, frequently cited in interpreting federal statutes, are fully operative in constitutional adjudication, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); in cases involving the Fourteenth Amendment, see, *e.g.*, *Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), including ones involving its core guaranty of racial equality, *Milliken* v. *Bradley*, 418 U.S. 717, 741-42 (1974), and rights enumerated in the Bill of Rights, see *Younger* v. *Harris*, 401 U.S. 37, 44 (1971) (relying on "Our Federalism" in declining to enjoin state criminal proceedings on First Amendment grounds); *Hurtado* v. *California*, 110 U.S. 516, 535, 537-38 (1884).

A. History and Comparative Expertise Support States' and Municipalities' Power to "Experiment[] and Exercis[e] Their Own Judgment" in this Field

1. Firearms Regulation Is a Traditional and Important Exercise of the Police Power

As the Court in *Heller* recognized, local firearms regulation pre-dated the Constitution, see 128 S Ct. at 2819-20 (noting laws in colonial Boston, Philadelphia, and New York); it continued through the early days of the Republic, when laws requiring registration and forbidding keeping of powder were enacted, into the Nineteenth Century, with adoption of measures targeted at the use of pistols and other weapons understood to heighten dangers of crime and public disorder, into the present mass of laws and constitutional provisions (and judicial decisions). See generally Chicago Br. 28-31.

The source of authority for these regulations has been the "police power," widely described as the authority, indeed the duty, "'to protect[] the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State,'" which supports enactment of "'all kinds of restraints and burdens'" on both "'persons and property'" *Slaughter-House Cases*, 83 U.S. 36, 62, (1872) (quoting *Thorpe* v. *Rutland & B.R. Co.*, 27 Vt. 149 (1855)); *Brown* v. *Maryland*, 25 U.S. 419, 422 (1827). See generally W. Novak, THE PEOPLE'S WELFARE (1996). The interests sought to be protected by past and present firearms regulations – combating crime and preventing lethal domestic violence, suicide, and accidental death and injury – are likewise at the heart of States' responsibilities. See, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 618 (2000) (combating violent crime); *Castle Rock* v. *Gonzales*, 545 U.S. 748, 780-787 (2005) (Stevens, J., dissenting) (countering domestic violence); *Glucksberg*, 521 U.S. at 710-716 (prevention of suicide); *Lopez*, 514 U.S. at 582 (Kennedy, J., concurring) (protecting schoolchildren from guns).

Moreover, local and state regulation of firearms has been, for most of the Nation's history, nearly exclusive. There were few federal laws on the subject of any kind until well into the twentieth century, and no precedent whatsoever for federal *judicial* superintendence of State and local laws. See *Morrison*, 529 U.S. at 618 ("we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims").

In Illinois and elsewhere, the police power repeatedly has been exercised to enact local firearms restrictions, and the State Supreme Court has settled that "a reasonable prohibition of handguns" is compatible with the State Constitution's "right of the individual citizen to keep and bear arms," "[s]ubject * * * to the police power." Ill. Const. Art. I., § 22. *Kalodimos* v. *Morton Grove,* 470 N.E.2d 266, 273 (1984); accord *Quilici* v. *Morton Grove*, 695 F.2d 261, 267-269 (7th Cir. 1982).

Describing it as "long recognized that the police power comprehends laws restraining or prohibiting anything harmful to the welfare of the people," *id.* at 272 (citation omitted), the Illinois Supreme Court explained that the State Constitution had been worded to recognize that "'arms pose an extraordinary threat to the safety and good order of society,'" and their possession therefore "'is subject to an extraordinary degree of control under the police power,'" *id.* at 269 (quoting Constitutional Convention Maj. Rep.), noting that members of the 1970 Convention had expressly affirmed the permissibility of "a total prohibition of 'the sale of some weapons in some circumstances' * * * citing a * * * Texas case, *Caswell & Smith* v. *State*, 148 S.W. 1159 (Tex. Civ. App.1912), [involving] pistols," *id.*, as well as the government's "*'authority * * * to forbid all hand guns.'*" *id.* at 271 (quoting Convention Delegate presenting majority report) (emphasis supplied by *Kalodimos*).

The court also rejected a claim that such measures were not an appropriate subject for local legislation. After canvassing local communities' "obvious" legitimate "interest[s] * * * in reducing premeditated crime within their boundaries["]; "in minimizing the effects of domestic violence or spontaneous quarrels[;

and] in reducing the possibility of serious accidents resulting from the accessibility to children of attractive but dangerous instrumentalities such as handguns," the court explained (470 N.E.2d at 274):

> Home rule * * * is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem.

Numerous state constitutional provisions recognizing a right to keep and bear arms (including a number adopted soon after the Fourteenth Amendment was ratified) include express reservations of regulatory power, Petr. Br. 24 n.13, and ones without explicit references have been construed as leaving intact police powers. See Petr. Br. 25 (noting that courts in 36 States have not invalidated any restriction in past fifty years) (citing Winkler, *Scrutinizing the Second Amendment,* 105 MICH. L. REV. 683 (2007)).

Illinois municipalities have considered and experimented with firearms policy at the local level. Rural jurisdictions have enacted relatively few measures; Chicago, the State's largest city, with endemic problems of gang-related gun violence, has pursued multiple, aggressive strategies. Smaller cities and suburbs have taken a range of approaches, with some, including *amici* Winnetka and Evanston, adopting restrictive handgun laws. In part such measures have been adopted to prevent urban crime from crossing borders – and provide local police tools to effectively curb gang activity; but they also express values of tranquility and family safety particular to such communities. Cf. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people").

And as elsewhere, particular approaches not only reflect diverse conditions, but also express communities' distinct experiences. *Amicus* Winnetka's decision to ban handguns resulted from a searing 1988 tragedy, in which a mentally ill individual, wielding three legally-purchased handguns, invaded a Winnetka elementary school, murdering an eight-year-old boy and shooting five other children, before fleeing to a nearby house, taking its residents hostage, and finally fatally shooting herself. In a nonbinding referendum, Winnetka residents voted 2125 to 1407 in favor of broadly restricting handguns, and soon after that vote, the Village Council unanimously enacted an ordinance implementing that policy choice. Ordinance Amending Section 45.02 * * * of the Winnetka Village Code (approved April 11, 1989).

2. Experience Under Current Arrangements Reveals the Benefits of Leaving Intact States' Traditional Power to Regulate Firearms

This Court has frequently pointed to the benefits "citizens * * * derive from the diffusion of sovereign power," *New York* v. *United States*, 505 U.S. 144, 181 (1992) (internal quotation and citation omitted). Our "federalist structure"

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. *Ashcroft*, 501 U.S. 452, 458 (1991).

Preempting a diversity of approaches to firearms regulation – in favor of the Second Amendment's "common use" limitation – would come at a high social cost, because "no national consensus has yet emerged on the best solution for this difficult and sensitive problem," *Cruzan* v. *Director, Missouri Dept. Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring), and because the undeniably high costs of poorly designed policies in this area.

As Justice Brandeis's famous "laboratory" metaphor reflects, judicially-mandated uniformity forecloses policy experimentation that might, through experience, persuade others to reconsider strongly held views and assumptions. *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Gregory*, 501 U.S. at 458. The efficacy of gun regulation, and the degree to which the ready availability of guns impairs or serves vital public interests in protecting life and limb, are actively disputed throughout the Nation. "[T]here is no reason to suppose that [federal courts'] answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite." *Osborne*, 129 S. Ct. at 2323.

Moreover, the "considerable disagreement," *Lopez*, 514 U.S. at 581 (Kennedy, J.), surrounding gun regulation is not merely empirical. Communities differ markedly in ways that bear on gun policy – in population density, problems of crime, traditions and preferences respecting guns (or types of guns), and views about the role of government. As *Heller* and this Court's many prior decisions recognize, on matters where such great heterogeneity exists, nationally uniform rules are, by definition, less likely to conform to citizen preferences than ones adopted at lower levels of government. See, e.g., *Gregory*, 501 U.S. at 458; McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. CHI. L. REV. 1484, 1493-1494 (1987).

And just as the federal rule petitioners seek would deny other States the benefit of *amici*'s experience, it also would deny localities with more restrictive rules the opportunity to decide *on their own* that current approaches are overly restrictive or ineffectual. See *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 49-50 (1973) (highlighting "the opportunity [local control] offers for participation in the decisionmaking process"); cf. *Planned Parenthood* v. *Casey,* 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting)) (democratic resolution provides "all participants, even the losers, the satisfaction of a fair hearing and an honest fight").

Equally problematic is the large, unprecedented and uncomfortable responsibility that such a rule would confer on federal courts. Petitioners' rule would "enlist the Federal Judiciary in creating a new constitutional code of rules for [firearm regulation]," *Osborne,* 129 S. Ct. at 2322, requiring resolution of complex factual issues far outside the judicial ken. See *id.* at 2323 (noting "questions" that would soon arise and that "it is hard to imagine what tools federal courts would use to answer them").[2]

Indeed, the number of measures that would ultimately be invalidated were petitioners to prevail is only part of the federalism calculus. In practice, a far larger array of laws regulating firearms could be subject to federal court *challenge*; while only the successful ones would carry attorney's fee awards, see 42 U.S.C. § 1988, and potentially damages, see *Monell* v. *New York City Dept. Social Servs.*, 436 U.S. 658, 701 (1978), even those distinctly *unlikely* to succeed impose significant litigation costs, ones small communities are unable or understandably disinclined to bear. Cf. *Leatherman* v. *Tarrant County NICU*, 507 U.S. 163, 166 (1993) (municipal governments have no § 1983 suit immunity).

These concerns are not hypothetical. *Amici* Winnetka and Evanston repealed longstanding handgun laws to avoid costly litigation brought by respondent NRA and others, *NRA* v. *Village of Winnetka*, No. 08-cv-5439 (N.D. Ill.); *NRA* v. *City of Evanston*, No. 08-cv-3693 (N.D. Ill.). Winnetka officials described the repeal as reflecting the Village Council's responsibility to "balance * * * community prudence" against "community values." Minutes,

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[2] As Judge Wilkinson explains, the guidance in *Heller* does not anticipate even a small fraction of the questions lurking in the complex array of firearms regulation across the United States. For example, a court's resolution of challenge to a ban on semi-automatic weapons (or a conviction for possessing a particular one) would entail deciding "how many shots a gun must be able to fire without manual reloading before it is too uncommon, and therefore, no longer protected by the Second Amendment." *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 285 (2009).

Winnetka Village Council, Regular Meeting at 2 (Nov. 18, 2008) (quoting Trustee Ken Behles). Second Amendment claims have exploded since *Heller*, see Chicago Br. 20 n.11, and the sheer number of state and local laws that regulate weapons, the strong incentives that those dissatisfied with current law have to plead their case in federal court, and the lack of meaningful disincentives to doing so, strongly suggest floodgates would be opened.

That dicta in *Heller* described certain categories of laws as "presumptively lawful," 128 S. Ct. at 2816, does not dispose of these concerns. As the cases already pending make clear, that declaration will not preclude litigants from challenging – or courts from invalidating – laws within these categories. See, *e.g.*, *United States* v. *Skoien*, 587 F.3d 803, 805 (7th Cir. 2009) ("*Heller*'s language about certain 'presumptively lawful' gun regulations—notably, felon dispossession laws * * * cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights"). And as *amici* can attest, even claims understood to be extremely difficult to establish on the merits can be prohibitively costly for government defendants, especially when (as here) the applicable legal standards are undeveloped, see, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam) ("class of one" Equal Protection); cf. *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion) (lamenting "[e]ighteen years of essentially pointless [partisan gerrymandering] litigation").

A federal rule limiting state and local governments' power to regulate firearms – particularly handguns – would also have serious consequences for local governments' crime control strategies. As Chicago and its *amici* explain, courts have held that local laws restricting the possession and/or carrying of firearms affect Fourth Amendment "reasonableness" determinations, strengthening the power of police to disrupt the criminal activities of members of street gangs, who account for a vast share of violence and drug trafficking crime in many communities. See Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URBAN LAWYER 1, 37-48 (2009) (discussing importance of legal restrictions on handgun possession to constitutionality under Fourth Amendment of "stop-and-frisk" practices that have proven important to crime control in New York and elsewhere).

B. Neither The Representations Nor The Actual Experiences of Petitioners' *Amici* Support Abandoning The Historic Allocation of Authority

That many States are actively engaged on these issues and sympathetic to petitioners' interests is an argument against, not in favor, of this Court's intervention. See *Osborne*, 129 S. Ct at 2322 (explaining that "sudden[] constitutionalizat[ion] would short-circuit * * * responses * * * [in] 44 States"); *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) ("[J]udicial imposition of a categorical remedy * * * might pretermit other responsible solutions being considered in Congress and state legislatures"). And state officials who are opposed to stringent legislation are, for obvious reasons, not reliable fiduciaries for the "federalism concerns," Texas Br. 21, of those who in fact have actively exercised regulatory powers.

Even were it true, as these arguments imply, that most or many state constitutional provisions impose limitations coextensive with *Heller*'s, the novel federal rule would hardly be costless. It would deny the people of those States the power to reconsider for themselves the judgments embodied in their constitutions, based on their own or other jurisdictions' experiences. And far from supplying "[i]nterpretive guidance" for ostensibly parallel state provisions, Texas Br. at 2, a ruling would relegate these – and state courts – to the sidelines. Questions of the permissibility of local legislation, long the subject of state constitutional litigation in state courts, see *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984), would migrate to federal district courts, where attorneys fee awards (and in the case of municipal defendants, damages) are available to prevailing parties. See *Osborne*, 129 S. Ct. at 2322 n.4 ("thrust[ing] the Federal Judiciary into an area previously left to state courts and legislatures").

But as Chicago demonstrates, see Br. 23-31, it is simply not the case that the States have provisions in place that approximate *Heller*'s categorical "common use" rule, and measures that have survived scrutiny under state constitutions (and the state provisions themselves) would be would "'cast * * * into constitutional doubt," 129 S. Ct. at 2322, under *Heller*. See also Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1458 (2009).

That some officials of those States represent that they would "welcome" such a development, State Legislators Br. 9, is not a sign that the federalism concerns are insubstantial. See *New York*, 505 U.S. at

182 (a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials"). Nothing in current law denies state legislators the "opportunity to review and conform [their] laws," State Legislators Br. 9, to a more demanding standard. If limitations on police power are less stringent than individual officials would like – if they do not believe their own laws and jurisprudence represent "responsible solutions," *Murray*, 492 U.S. at 14 (Kennedy, J., concurring in judgment) – the obstacle to stronger ones is not this Court's *Cruikshank* or *Presser* precedents, but rather their own state constitutions and laws (and own courts' interpretation of them) – and ultimately the views of their States' citizens. Federal courts do not and should not sit to relieve those who are successful in the political process – but not entirely so – of obligation to avail themselves of the competitive rigors of democratic argument. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1020 (1994) (describing the obligation of minority groups "to pull, haul, and trade").

II. Petitioners and *Amici* Have Adduced No Compelling Reason for the Court, 142 Years After the Fourteenth Amendment's Ratification, to Recognize Novel Limitations on Police Powers

There is no claim that intervention is necessary here in the sense that it often has been in this Court's Fourteenth Amendment jurisprudence – to counter the effects of an exclusionary system or protect the rights of an unpopular or disenfranchised minority. See *United States* v. *Carolene Prods.*, 304 U.S. 144, 152-153 & n.4 (1938). Although petitioners' and the NRA's briefs recur repeatedly to instances of racially-motivated disarmament of African-Americans after the Civil War, no novel reading of the Fourteenth Amendment is required to declare those unconstitutional, see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) ("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws"), and contemporary examples of the race-based (or otherwise selective) disarmament are nonexistent (or at least vanishingly rare). See *Boerne*, 521 U.S. at 430 (noting lack of "examples of modern instances of * * * [religious] persecution in this country"). Indeed, modern "Second Amendment" litigants have included the KKK. See *Vietnamese Fishermen's Ass'n* v. *Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982).

There is no claim in this case that Chicago or Oak Park actually has deprived plaintiffs of the ability to defend themselves – or do so with arms, though they may not use their first-choice weapon. Neither Illinois nor to our knowledge any other State has abolished self-defense in criminal law.

Petitioners do not contend that factual circumstances have changed, in a direction that supports the Court's intervention. Indeed, *Heller* acknowledged as "[p]erhaps debatable" whether the right it recognized "is outmoded in a society in which our standing army is the pride of the Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem." 128 S. Ct. at 2822, but concluded (over vigorous dissent) that the Court was constrained to enforce what the majority understood to be a clear constitutional mandate.

Nor is there any suggestion that the present arrangement is, in any relevant sense, unworkable. See *Garcia* v. *San Antonio Metro. Trans.* Auth. 469 U.S. 528, 539-547 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), principally on that basis). Questions pertaining to firearm regulations have been settled at the State and local levels, according to well defined and developed state constitutional rules, for generations.

Instead, petitioners maintain that, however substantial the costs of doing so may be, this Court must now interpret the Fourteenth Amendment as "incorporating" the limits on State and local police powers associated with the Second Amendment, (1) to implement the true meaning of the Fourteenth Amendment or (2) as a matter of "consistency," *i.e.*, to avoid the "embarrassment" of a regime in which State and local government actions are subject to First, Fourth, Fifth, Sixth and Eighth Amendment limitations, but not those of the Second.

Neither submission is correct.

A. The Adoption of the Fourteenth Amendment Did Not Embody Any Agreement to Subject Duly Enacted Local Police Power Regulations To Federal Court Superintendence

As is detailed in the briefs of other *amici*, contentions that the language of the Fourteenth Amendment was widely understood by those in ratifying States as incorporating the First Eight Amendments *in toto*, the right to keep or bear arms, in particular, or the version of that right described in this Court's 2008 *Heller* decision encounter multiple difficulties. Whatever limitations can be read into this Court's post-1868 decisions refusing to apply the Second Amendment to the States, Petr. Br. 7-8, the record of the ratification debates is eerily quiet on the subject of incorporation, and circumstantial evidence – contemporaneous adoption by ratifying States of laws and constitutional provisions irreconcilable (or in palpable tension) with the understanding petitioners ascribe – also weighs heavily against that claim.[3]

Under the standard that *Heller* indicates should be determinative, *i.e.*, "public understanding," 128 S. Ct. at 2805, this evidence is conclusive, whatever the historical record might indicate about the individual intentions of legislators who helped draft and secure congressional passage of the Fourteenth Amendment. But even on this point, the evidence that petitioners and *amici* do muster – almost exclusively floor statements by members of the 39th Congress supportive of a right to bear arms – does not support the interpretation they seek to impose.

First, nearly every reference occurred in the context of discussing *discriminatory* measures: although various members of Congress inveighed against contemporaneous efforts to disarm African Americans and attacks on unarmed Freedmen, there were few, if any, comparable denunciations of generally applicable, legislatively enacted firearms restrictions or of well-known nineteenth century judicial decisions that had sustained their validity under the police power. See Chicago Br. 27-29.

This is especially significant because the 1866 Civil Rights Act (the reinforcement of which was the Fourteenth Amendment's original motivation), Article IV of the Constitution (from which the "privileges or immunities" language was derived), and the Freedmen's Bureau Act (which, unlike these, included an explicit reference to arms-bearing) were all concerned with impermissible ***discrimination***, see 14 Stat. 173, 176–77 § 14 (1866). In addition, nineteenth-century lawyers and constitutionalists attached central importance to the distinction between *general* laws – a description that applies to most antebellum firearms regulations and to the ones at issue here – and suspect "class legislation." See T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 391-392 (7th ed. 1903) ("[E]very one has a right to demand that he be governed by general rules"); *Hayes* v. *Missouri*, 120 U.S. 68, 71-72 (1887) ("The fourteenth amendment * * * requires that all persons subjected to * * * legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed"); Nourse & Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 963 (2009) ("One of the more important post-Civil War arguments against the Black Codes was that they * * * violated the rule against class legislation"). Indeed, this distinction is no nineteenth-century relic. See *Employment Div.* v. *Smith*, 494 U.S. 872, 87 8-880 (1990) (declining to strictly scrutinize religious burdens incidental to "neutral laws of general application"); *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring) (emphasizing importance of Equal Protection Clause "requir[ement that] the democratic majority * * * accept for themselves and their loved ones what they impose on you and me").

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[3] Just as multiple States dispensed with grand jury indictments soon after ratifying the Fourteenth Amendment, numerous post-1868 state constitutions adopt right-to-bear-arms provisions that, like Illinois's 1970 one, featured express reservations for police power regulation. See Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 211-15 (2006) (chronological listing of provisions).

Moreover, these references occurred against the backdrop of a long tradition of understanding firearms regulation as a fit subject of the "police power" and the right to bear arms as one subject to that power. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) at 139 (describing the "right of the subject * * * of having arms for their own defence, suitable to their condition and degree, and *such as are allowed by law*") (emphasis added). Likewise, the description of "privileges and immunities" from *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), celebrated by petitioners as the "most-influential early definition," Br. 16, not only placed "protection *by the government*" first, but made clear that rights to pursue individual "liberty [and] * * * safety" were ones "*subject * * * to such restraints as the Government may justly prescribe for the general good of the whole.*" *Id.* at 551-552 (emphasis added).

And special respect was accorded police power *legislation*. Thus, the *Slaughter-House* Court faulted plaintiffs for failing to appreciate the distinction between "monopolies established by the monarch," which "arise out of transactions *in which the people were unrepresented, and their interests uncared for*" and those established in laws enacted by bodies in which "the people [are] represented." 83 U.S. at 65 (emphasis added).[4] See also *Hurtado*, 110 U.S. at

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[4] The *Slaughter-House* plaintiffs - who were represented by former Justice John Campbell, Assistant Secretary of War in the Confederacy and an ardent opponent of Reconstruction – urged that the challenged statute was unworthy of respect because it had been enacted by a legislature that included African Americans and signed by a Republican Governor. See R. LABBÉ & J. LURIE, THE SLAUGHTERHOUSE CASES 72-73 (2003) ("race was an inseparable element in the opposition").

Thus, while petitioners' *amici* identify "governments in the *post*-Civil War era," Tex. Br. at 5, assert that as "[t]he source of the threat to liberty," many of those were ones in which African-

534-535 ("Due process of law in the [Fourteenth Amendment] refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure").

Indeed, as this Court explained in *Boerne*, the Fourteenth Amendment was carefully re-drafted to dispel concerns that it would displace States' authority to regulate in their "traditional areas of responsibility," and to preserve "the federal design central to the Constitution," 521 U.S. at 521. Thus, consistently with Senator Bingham's assurance to Ohio voters that "[t]he Constitutional Amendment," "takes from no State any right which hitherto pertained to the several States of the United States," *Cincinnati Commercial*, Aug. 27, 1866, at 1, post-1868 treatises affirmed continuing state authority to regulate classes of weapons "employed in quarrels, brawls, and fights between maddened individuals," J. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES

American citizens were for the first time represented. And claims that members of the 39th Congress sought to promote the keeping of firearms as a means of overthrowing a corrupt or oppressive government, see, *e.g.*, *id.* at 3, seem even more doubtful. Whatever resonance such ideas had for the Founders in 1789, fresh from casting off a monarch and his notoriously repressive standing army, it is incredible that those who had prosecuted a bloody war to defeat an armed (and elaborately self-justifying) rebellion – and had recently witnessed the fatal shooting of a President, by an assassin denouncing "tyranny" – would have any sympathy for them.

(1873) at 497-498. See W. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES at 698 (1904) ("[t]he police power was reserved by the states at the time the original constitution was adopted, and the Fourteenth Amendment was not designed to interfere in the least with the exercise of that power").

B. Claims of Inconsistency with Treatment of Other Rights Are Unfounded

Arguments that this Court's decisions reading the Fourteenth Amendment as incorporating certain provisions of the Bill of Rights and, in particular, ones taking a "jot for jot," approach, *Duncan* v. *Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting), somehow require imposing a Second Amendment limitation on the States fail as a matter of law, logic, and history.

At the outset, this is no ground for shifting the burden from those urging an interpretation that disrupts the historic balance to those resisting it. It is not the law that because a right is "important enough" to have been enumerated in the first Eight Amendments, it is perforce important enough to incorporate. On the contrary, States may continue to experiment, as they did immediately after the Fourteenth Amendment's ratification, with diminishing grand jury indictments, cf. U.S. Const. Amend. V, or modifying civil jury rights, Amend. VII; and they are subject to substantive limitations on interference with individual freedom to marry and rear children that do not appear explicitly in the Bill of Rights. See *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

Moreover, claims of present uniformity are themselves overstated. To a significant degree, central

Fourteenth Amendment terms – "Liberty" and "Property," vary State-by-State. See, *e.g.*, *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998); *Greenholtz* v. *Inmates Neb. Penal & Correctional Complex*, 442 U.S. 1, 11 (1979) (recognizing state-created "liberty interest").

That said, the premise of inconsistency between the rule of *Presser* and *Miller* and later incorporation decisions ignores central, constitutionally fundamental differences. As explained above, incorporating the Second Amendment, as interpreted in *Heller*, would create a freestanding right to obtain substantive review of general, neutral police power laws duly enacted after substantial debate by an engaged citizenry.

In contrast, many of the Court's landmark "incorporation" decisions were rendered in the course of deciding individual cases that already raised a question under the Fourteenth Amendment: whether a State had deprived a criminal defendant of liberty without "Due Process." In concluding that that term should be read to "incorporate" particular rules the Bill of Rights establishes for federal criminal trials, the Court was acting in an area, fair criminal trials, where the judiciary has plain expertise, and adopting a rule that, in important respects, limited judicial policy-making discretion.

Likewise, petitioners and *amici* mistake the history and significance of this Court's eventual embrace of "jot for jot" incorporation. First, that development was itself gradual, the Court's having first tried less rigid approaches. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319 (1937); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Brown* v. *Mississippi*, 297 U.S. 278 (1936). And the practical realities of federal jurisdiction in this field – vindication of federal constitutional rights entails overturning a final state court judgment of conviction, see *Younger*, 401 U.S. at 47-52, often years later by federal *district* courts exercising habeas corpus powers – provides strong reason for familiar and widely understood rules. Cf. *Dickerson* v. *United States*, 530 U.S. 428, 444 (2000) (noting experience that *Miranda* rule has proved less "difficult * * * for law enforcement officers to conform to, and for courts to apply in a consistent manner" than totality-of-circumstances test).

In that realm, moreover, the ordinary rule that requirements of neutrality and general application provide sufficient protection does not hold. Although the substance of state criminal laws is a proper subject of democratic decision, see *Ewing* v. *California*, 538 U.S. 11, 24 (2003), questions of fairness to the accused – whether coerced confessions should be admissible or convictions should require proof of guilt beyond a reasonable doubt – are ones that historically have not been subject to resolution by majority vote.

And a full account of the Court's twentieth-century incorporation cases requires reference to the problems that led to adoption of the Fourteenth Amendment in the first place: racial discrimination and inequality. The Court's decisions were rendered at a time when judges, juries, and prosecutors in many States did not afford African-American defendants equal respect, see, *e.g.*, *Powell*, 287 U.S. at 72; *Moore* v. *Dempsey*, 261 U.S. 86, 89-90 (1923). Under those circumstances, strong, detailed mandates were necessary to assure that state trials provided a minimum of fairness (and reliability), and general rules enabled the Court to correct (or at least counteract) entrenched discrimination without pointing an accusing finger at particular judges, courts, or States.

To be sure, this Court's incorporation jurisprudence has not been limited to the administration of criminal justice and, as petitioners repeatedly note, has held the right of Free Speech and other guarantees of the First Amendment to be within the "liberty" the Fourteenth Amendment protects. But there are important limits to such analogies: because of its role in self-government and commerce, speech (and "more speech") is viewed as an affirmative constitutional good, see *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), and the core of the guarantee – freedom of opinion and belief – has not been thought a proper subject of the police power, see *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("freedom to believe * * * is absolute"); *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in judgment).

Equally important, core violations of First Amendment rights are denials of equality. See *Rosenberger* v. *Rector and Visitors Univ. Va.*, 515 U.S. 819, 828 (1995). Unlike with laws regulating weapons, modern instances of impermissible discrimination are commonplace, *id.*; *R.A.V.* v. *St. Paul*, 505 U.S. 377, 391 (1992), and enforcement of that norm requires close scrutiny of laws neutral on their face. See *United States* v. *Eichman*, 496 U.S. 310, 315 (1990); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 534 (1993); cf. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in judgment) ("discrimination against any group finds a more ready expression at the state and local * * * level").[5]

Finally, when claims risk impinging on traditional police powers, First Amendment doctrine has in fact shown respect for federalism and community standards. See *Miller* v. *California*, 413 U.S. 15, 32-33 (1973) ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City"); *Cantwell*, 310 U.S. at 304 (religiously motivated "[c]onduct remains subject to regulation for the protection of society"); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) ("citi[es] must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

The domain in which the Second Amendment would operate is fundamentally different. There is no claim of modern-day discriminatory or selective disarmament; the measures that would be placed before federal courts are ones that apply generally and neutrally; there is no reason to expect that those favoring less government restriction cannot participate equally in state and local legislative processes – indeed experience teaches they are highly effective there.

The Fourteenth Amendment claim petitioners press is much more like the one rejected in *Osborne*. As here, the right the Court was asked to recognize in that case was one already acknowledged, in some form, by large majority of States. And as in *Osborne*, the claim here depends on extensions from general principles that, while resonant, have not been deeply rooted or particularized in constitutional doctrine. While recognizing that "the central purpose of [the] system of criminal justice is to convict the guilty and free the innocent," *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993), the Court has been cautious about reducing that abstract principle to a freestanding right enforceable in federal court, *id.* at 402-409, and therefore more reluctant to recognize a right to DNA testing, let alone (as Osborne sought) pass judgment on particular state standards governing the availability of tests.

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[5] And in this field, too, *racial* discrimination played a distinctive role in doctrinal developments. See H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

Here, similarly, while there is a long tradition of recognizing the legitimacy of self-defense, there is scant doctrinal support for a constitutional mandate, see *Martin* v. *Ohio*, 480 U.S. 228, 236 (1987) (State may place burden of raising, and proving, self-defense on the accused); cf. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2000) (necessity); *Clark* v. *Arizona*, 548 U.S. 735 (2006) (insanity), let alone for extending a right to arm oneself for that purpose (as opposed to supplying a defense to criminal prosecution), or to an individual choice of a particular weapon.

And this case echoes *Osborne* in a third way: "Establishing a freestanding right * * * would force [federal courts] to act as policymakers," 129 S. Ct. at 2323. There, the Court recognized that sustaining the plaintiff's Due Process right would soon require the judiciary

> to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. * * * If so, for how long? Would it be different for different types of evidence? Would the

> State also have some obligation to gather such evidence in the first place? How much, and when?

Id.; see *id.* ("These questions would be before us in short order, and it is hard to imagine what tools federal courts would use to answer them").

Indeed, as the author of the judicial opinion the Court cited as authority on this point, see *id.* (citing *Harvey* v. *Horan*, 285 F.3d 298, 300-301 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing)), has explained, the list of questions that will be "before federal courts in short order" were the Court to take the step sought here is no less confounding:

> If the Second Amendment only protects a right to bear arms for the purpose of self-defense, what type of proof suffices that someone sought the weapon for some other purpose? What classes of persons may be presumed to possess a weapon for other than self-defensive purposes and what classes of weapons may be presumed non self-protective? Can a municipality that wants strict gun control regulations simply ban the possession of weapons outside the home – for example, in the car? Does the right to bear arms protect the possession of weapons for purposes other than purely self-defense – for recreational pursuits, for the protection of property, or for the protection of others?

95 VA. L. REV. at 259; *id.* ("it behooves the judiciary to be cautious in creating for itself new substantive – hence prescriptive – power that the Constitution did not clearly envision").

* * * *

There is nothing "embarrassing," cf. Levinson, 99 YALE L. J. 637 (1989) about a construction of the Fourteenth Amendment that, among other things, forbids States from enacting discriminatory firearms laws, secures the free speech and equal representation rights of those with petitioners' policy views, and recognizes the potential of firearms regulations (and other measures) to burden self-defense, but that otherwise reserves questions of which public safety measures are necessary or appropriate – and which sorts, if any, to place beyond authority of legislative prescription – "to the States respectively, or to the people," U.S. Const. Amend. X, rather than rules formulated by district court judges.

Nor does the assault petitioners and *amici* direct at Justice Miller's opinion for the Court in the *Slaughter-House Cases* seem warranted. Although there is room to disagree about dicta in that opinion, both the holding and its two central premises were correct. In rejecting plaintiffs' plea for judicial invalidation of Louisiana legislation regulating the slaughtering of animals in New Orleans, in the name of the Constitution, the Court emphasized both that the Fourteenth Amendment's primary concern is denials of equality, especially but not exclusively, to African Americans, see 83 U.S. at 67-68, and the absence of intent to set federal courts up as "censors" on the exercise of States' and localities' historic police powers, *id.* at 78.

This Court's later Fourteenth Amendment decisions attest to the value of heeding these admonitions. See *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937) (overruling *Lochner* v. *New York*, 198 U.S. 45 (1905));

Brown v. *Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)).[6]

Conclusion

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[6] As Justice Miller's opinion makes vivid, the conclusions petitioners ask the Court to cast aside, were hardly off-hand observations:

> We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us.

83 U.S. at 67.

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OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF *AMICAE CURIAE* WOMEN STATE LEGISLATORS AND ACADEMICS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICAE CURIAE*[1]

Amicae Curiae, listed in the Appendix, are an ad hoc group of seventy five women state legislators and academics from across the United States. *Amicae* assert that women have a fundamental right to self-defense and that possession of a handgun in the home should be a legal option for any law-abiding woman. The case now before the Court directly implicates that right, as the City of Chicago currently criminalizes any woman who feels such a decision would be best for her.

Amicae often strenuously disagree among themselves about the tenability of the Court's privacy and personal autonomy jurisprudence that parallels women's self-defense concerns. What *Amicae* share is the belief that self-defense is as integral to women's personhood as are the previously incorporated yet unenumerated rights that directly affect women's lives. It is an abiding belief of *Amicae* that women are capable of determining for themselves whether a handgun will best protect them, and that this decision must be free from governmental paternalism and others' personal value judgments. It is therefore with hope that this Court will respect women's decisions regarding self-defense that *Amicae* submit this Brief for the Court's consideration.

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[1] Rule 37.6 notice. Counsel of Record is an Assistant General Counsel to the National Rifle Association of America, a party in this case. Additional named counsel serves on the Board of Directors of the National Rifle Association. Lindsay Charles provided assistance while serving a one-year Fellowship with the NRA Civil Rights Defense Fund during leave from Goodwin Procter LLP in Boston, Massachusetts. Funding for printing and submission of this brief was provided by the NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. *Amicae* complied with the conditions of those consents by providing advance notice of at least 10 days of their intention to file this brief.

◆

SUMMARY OF THE ARGUMENT

Plaintiff Colleen Lawson is a 51-year-old woman who wishes to possess a handgun in her Chicago home. She is not a felon or domestic abuser, nor does she meet any of the other firearms prohibitions contained in federal law.[2] In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home. Mrs. Lawson understands that a handgun is a potentially dangerous tool, and she is willing to assume the moral responsibility that attends handgun ownership.

The City of Chicago is denying Mrs. Lawson that choice. To women like Mrs. Lawson, the ability to defend themselves effectively is not an activity or an interest. It is not an "untouchable right to keep guns in the house to shoot burglars." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2848 (2008) (Breyer, J., dissenting). It is the very means by which millions of women[3] who have decided to own handguns protect the personal autonomy and bodily privacy guaranteed them in other areas of jurisprudence. These women recognize the unique threats they face as women and deserve that their choices be respected by male dominated legislatures and others who would deny them that choice.

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[2] Mrs. Lawson already lawfully owns a handgun that she keeps outside the City of Chicago. (McDonald Compl. ¶ 19.)

In *Heller*, this Court emphasized that the text of the Second Amendment was the driving force behind the Court's decision to find an individual right to firearms possession. This right includes the right to possess a handgun within the home. The Court's previous Fourteenth Amendment selective incorporation jurisprudence is sufficient on that basis alone to hold Chicago's handgun ban unconstitutional. However, because of the special importance to women of owning handguns, the Court could also consider incorporating that right using the Court's privacy and personal autonomy jurisprudence protected by substantive due process.[4] Not only would this approach be jurisprudentially consistent, but it could serve to strengthen the arguments that the rights of privacy and personal autonomy are likewise incorporated even though unenumerated.

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[3] L. Hepburn *et al.*, *The U.S. Gun Stock: Results From the 2004 National Firearms Survey*, Inj. Prev. 2007; 13:15-19 (12% of women living alone and 30% of all women own at least one firearm.); *see* Philip J. Cook, *et al.*, National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 3, NIJ Research in Brief (May 1997) (67% of women gun owners possessed firearms (usually handguns) primarily for protection against crime.), *available at* http://www.ncjrs.gov/pdffiles/165476.pdf.

Amicae also proffer that women's personal liberty interests affected by the Chicago handgun ban merit incorporation under the Fourteenth Amendment's Privileges or Immunities Clause. A resurrection of the Privileges or Immunities Clause would reinforce the right to self-defense and buttress the Court's jurisprudence for implied unenumerated liberties that may not rise to the level of fundamental rights.

Amicae therefore urge the Court to consider closely the importance to women of holding that the Second Amendment's core right to self-defense may not be thwarted by individual municipalities and states. The women of Chicago deserve the Court's favorable consideration of this highly personal decision regarding their autonomy.

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[4] *See* Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and "Reasonable Regulation"*, 75 Tenn. L. Rev. 137, 142-47 (Fall 2007).

ARGUMENT

I. The Second Amendment Is a Fundamental Right that Should Be Incorporated Under the Due Process Clause of the Fourteenth Amendment

Last year this Court decided that the Second Amendment guarantees the right of individuals to keep and bear arms. This right includes, at the least, the right of individuals to keep a handgun in the home for the purpose of immediate self-defense. *Heller*, 128 S. Ct. at 2822.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court established its current standard by which a particular right is to be made binding upon the individual states through selective incorporation. Courts are to weigh whether the right "is fundamental – whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149, n.14. Without directly answering the question of whether the Second Amendment is necessary to "ordered liberty," *Heller* emphasized that the right was indeed "one of the fundamental rights of Englishmen." *Heller*, 128 S. Ct. at 2798. Another factor to consider is whether the right has been recognized by the states themselves. Under the *Duncan* analysis, a right's recognition by the states would indicate widespread acceptance of that right as sufficiently "fundamental" to merit codification in state constitutions. That was indeed the case, as at least seven of the nine state constitutional arms provisions enacted between 1789 and 1820 expressly protected the individual citizen's right to self-defense.[5] Under the Court's *Duncan* test, the expressly enumerated right to keep and bear arms should therefore be recognized as protected by the Fourteenth Amendment's Due Process Clause.

Chicago or its *amici* may counter that current crime levels decrease the relevance of state constitutional arms provisions passed in the 18th and 19th centuries. At the time of this case, however, forty-four states now have constitutional provisions expressly protecting a right to arms, and no municipality or state has attempted to prohibit all firearms ownership. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 193-205 (2006). The fact that no states have amended their constitutions despite changing social conditions is indication of how deeply rooted the right to arms is across the nation. In fact, Chicago is one of only two municipalities that ban the possession of handguns in the home.

There is little evidence that states considered women's self-defense as a primary concern when drafting these constitutional rights to arms. The male drafters most likely considered it a man's prerogative and responsibility to protect the women in their lives.

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[5] *See* Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. Ill. U. L.J. 251, 259-260 (1992). *E.g.*, Conn. Const., Art. I, § 17 (1818) ("Every citizen has a right to bear arms in defence of himself and the state.")

Recognizing that, however, the authors of the constitutional guarantees later used to protect privacy and reproductive autonomy rights were likely not considering those rights the Court has since found so essential to women's equality. Nonetheless, the Court has held that those rights may not be infringed by states even though those liberty interests have less textual support than the Second Amendment.

Of greater importance to women than 19th Century Constitutional law, however, is the self-defense component in the *Heller* decision. The Court emphasized the "natural," "fundamental," and "inherent right of self-defense" as "central" to the Second Amendment, and noted that the right to arms in the English Bill of Rights was "an individual right protecting against both public and private violence." *Heller*, 128 S. Ct. at 2798-99. The Court's recognition of the right of self-defense is further buttressed by the Court's previous eleven cases applying the federal common law right of armed self-defense. David Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-first*, 27 AM. J. CRIM. L. 293 (2000). The right to arms, particularly the right to keep a handgun in the home, must therefore be considered "fundamental" in the sense articulated in the Court's substantive due process decisions.

Increasing numbers of women of all political backgrounds are choosing to exercise the right to own a handgun.[6] Women who have never owned a firearm are being trained in large numbers and opting to purchase their first handguns.[7] These women recognize that their right to personal autonomy, ignored for generations by the courts, continues to expand and now encompasses their right to protect their bodily integrity using the means they decide is most appropriate. *See* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 Rutgers L. Rev. 97 (1997). The Court should give this contemporary understanding of women's rights the same respect it has afforded other life decisions that determine women's autonomy. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965).

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[6] L. Hepburn *et al.*, *supra* note 3, at 17-18. (Of men and women who own firearms, 16% described themselves as having liberal political views, 26% moderate political views, and 32% conservative political views. Those who own only handguns are just as likely to live in an urban environment as a rural one and are demographically more diverse than owners of only long guns who are more likely to be rural men.)

[7] *Number of Women Buying Handguns Increasing* (CBS Chicago Channel 2, Oct. 27, 2009), *available at* http://cbs2chicago.com/local/women.handguns.increasing.2.1274866.html. *See also* The National Shooting Sports Foundation, Inc., *First Shots Handgun Seminars: Female Perspective* 2, 5 (August 2009), *available at* http://www.firstshots.org/PDF/Female_Perspective.pdf (Nearly half of all participants in nationwide handgun seminars are female; 74% of female participants listed personal protection as their main reason for purchasing a handgun.)

II. For Women, the Fundamental Right to Self-Defense Must Include the Right to Possess a Handgun in the Home

Increasing numbers of women live alone. In Chicago, these women do not have access to handguns that equalize the inherent biological differences between a female victim and her most likely male attacker. Without the means to protect themselves or the help of housemates, women in Chicago have therefore been compelled to rely upon the protections of a government-provided police force.

Courts have found that such reliance is unfounded. *See* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 (2001). Despite women's expectations, courts across the nation have ruled that the Constitution does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Soc. Servs.*, 489 U.S. 189, 195 (1989). Women simply have no legal right to law enforcement protection unless they are able to prove special and highly narrow circumstances. *Castle Rock v. Gonzales,* 545 U.S. 748 (2005). In *Castle Rock*, the Court found that a temporary restraining order, a mandatory arrest statute passed with the clear legislative intent of ensuring enforcement of domestic abuse restraining orders, and Gonzalez's repeated pleas for help were insufficient for her to demand protection. *Castle Rock* therefore left open the question of just what a woman and her legislature would have to do to create a right to police protection from a known and specific threat.

Even if courts did find a duty to protect individuals, municipalities simply do not have the resources to provide anything but investigative services and auxiliary crime deterrents. Given "the crushing nature of the burden," the police cannot be expected to protect an individual citizen from all threats at all times. *Weiner v. Metro. Transp. Auth.*, 433 N.E.2d 124, 127 (N.Y. 1982). Illinois courts have likewise recognized this reality and exonerated law enforcement from not fulfilling the non-existent duty to guarantee individuals' protection. *Keane v. City of Chicago*, 240 N.E.2d 321 (Ill. 1968). Consequently, women cannot rely upon the state to provide them protection or sue for damages when this protection is not available.

A. Women Themselves Have the Responsibility to Provide Their Own Security Within the Home

Widespread demographic changes now make it more likely that women will live alone and be responsible for their own safety. Today women are less likely to be married than in earlier years,[8] more commonly divorced, and more frequently widowed as female longevity rates outstrip those of men.[9] Women may therefore not depend upon male relatives, an often inadequate and unaccountable police force, or tools of self-defense that are currently prohibited under Chicago gun ordinances. They remain, however, among those who feel most highly vulnerable to violent crime given the unique threats they face as women.

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[8] U.S. Census Bureau, *Living Together, Living Alone*, 5 Population *Profile of the United States: 2000*, p.5-2, www.census.gov/population/www/pop-profile/2000/chap05.pdf. (Between 1970 and 2000, the proportion of women aged 20 to 24 who had never married increased from 36 to 73%; for women aged 30 to 34, that proportion tripled from 6 to 22%.)

As householders, these women are the most immediate and often sole source of protection for themselves and any children in their care. Many do not have the resources to install expensive monitoring systems and alarms, or to choose neighborhoods in which they and their children face few threats. Moreover, many will not have the knowledge or social network to access those violence prevention services that are available.[10] An affordable handgun, responsibly stored to prevent access to children, could therefore very well be the sole means available for these women to protect themselves and their children.

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[9] Frank Hobbs *et al.*, U.S. Census Bureau, *Demographic Trends in the 20th Century*, Series CENSR-4, p. 137 (2002). (In 2000, women aged 65 and over accounted for a single digit percentage of the total population but more than 30% of households consisting of only one person.) This population of older women living alone will only increase as baby boomers age and fewer children are capable of caring for aging parents.

[10] Immigrant women suffering from domestic violence may face a more difficult time escaping abuse because of immigration laws, language barriers, a misunderstanding of U.S. domestic abuse laws, a lack of financial resources, and social isolation.

The City of Chicago perhaps does not appreciate the injustice of denying the right to have a handgun to women who have no other real options. The City cannot guarantee all women complete protection from grave injury, nor can it eliminate those threats that will always exist. In light of these realities, those recognizing the inherent value of each woman should cede to women the best option available until conditions in the City are perfect. Authorities and women may deem this a "second best option," but the constitutional theory that second best options must be available is commonly cited for abortion rights as well. *Cf.* Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 Hastings L.J. 961, 967 (1994) (arguing that "[u]ntil the societal demand that the women's right to choose be exercised justly and responsibly is circumscribed by a requirement that society itself be minimally just – the imposition by the state of a requirement that the woman make the decision to abort justly. . . . constitutes, itself, an arrogant act of injustice.").

Since Chicago cannot provide a safe environment for women nor guarantee police protection, the City cannot disrespect a woman's privacy interests in her home. As this Court found that the state had no legitimate interest in consenting adults' private sexual lives in residences, the state here "cannot demean their existence or control their destiny" by denying women a tool that harms no one unless used criminally or irresponsibly. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The home is the area most protected from governmental interference in U.S. law, especially in those areas of life where reasonable people most deeply disagree. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 37 (2001); *Griswold*, 381 U.S. at 485; *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). Even more than choices concerning reproduction and intimate activity, a woman's reasoned decision to possess a handgun to protect her life is a liberty interest the state must have more than fear or moral passions before infringing.

A woman's decision to defend her personal safety as she chooses should be considered as inviolate as is the home.[11] Moreover, to deny a woman the right of self-defense is as egregious a constitutional violation as if the state were to commit injury to a woman directly. No government would pass a law forbidding doctors from treating rape survivors, but the City of Chicago is depriving women of the right to protect themselves from harm in the first place. *See* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 127 (1989) (noting in the context of abortion, "the state would plainly infringe its citizens' bodily integrity whether its agents inflicted knife wounds or its laws forbade surgery or restricted blood transfusions in cases of private knifings.") Whether prohibiting treatment for the physical effects of rape, or denying women the ability to prevent it, the result is an intrusion upon the "realm of personal liberty which the government may not enter." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

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[11] Linda C. McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and the Body*, 7 Yale J.L. & Human. 195, 201-203 (1995) (associating the female body's inviolability with privacy jurisprudence).

B. Handguns Provide Special Benefits to Women

For years women were advised not to fight back and to attempt to sympathize with their attackers while looking for the first opportunity to escape. Well-meaning women's advocates counseled that such passivity would result in fewer and less serious injuries than if a woman attempted to defend herself. However, recent empirical studies indicate that owning a firearm is one of the best means a woman can have for preventing crime against her. In fact, the National Crime Victimization Survey (NCVS) and other researchers have concluded that women who offer no resistance are 2.5 times more likely to be seriously injured than women who resist their attackers with a gun. John R. Lott, Jr. & David B. Mustard, 26 Journal of Legal Studies 1, 23 (No. 1, Jan. 1997). While the overall injury rate for both men and women was 30.2%, only 12.8% of those using a firearm for self-protection were injured. Gary Kleck & Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes,* 42 Criminol. 861, 902 (2005); *see* Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUSTICE 351-370 (2000) (concluding that "[t]he use of a gun by the victim significantly reduces her chance of being injured . . . ").

Providing women handguns simply increases their ability to defend themselves far more than does providing handguns to generally more physically able men. *See* Paxton Quigley, *Armed and Female* (E.P. Dutton 1989). The NCVS indicates that allowing a woman to have a gun has a "much greater effect" on her ability to defend herself against crime than providing that same gun to a man.

Given relative size disparities, men who threaten women can easily cause serious bodily injury or death using another type of weapon or no weapon at all. Of women murdered between 1990 and 2005, 10% of wives and 14% of girlfriends were killed by men using only the men's "force" and no weapon of any type.[12] It should also be noted that a violent man turning a gun on a woman or child announces his intent to do them harm. A woman using a gun in self-defense does so rarely with the intent to cause death to her attacker. Instead, a woman in such a situation has the intent only to stop the assault and to gain control of the situation until she can summon assistance. The simple brandishing of a weapon often results in the assailant choosing to discontinue the crime without a shot having been fired.[13]

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[12] U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Intimate Homicide*, http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm.

The value of widespread handgun ownership lies not only in the individual instances in which a violent act is thwarted, but in the general deterrent effects created by criminals' knowledge of firearms ownership among potential victims. Researchers confirm the common-sense notion that those wishing to do harm often think closely before confronting an individual who *may* be armed. Some 39% of the felons interviewed said they personally had been deterred from committing at least one crime because they believed the intended victim was armed. Almost three-quarters agreed that "[o]ne reason burglars avoid houses when people are at home is that they fear being shot during the crime." James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous, a Survey of Felons and Their Firearms* 145 (Aldine de Gruyter, 1986). As it is now in Chicago, those inclined to harm women know that all law-abiding women will be unarmed.

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[13] In almost half a million cases each year, an intruder is scared away by an individual in the home with a firearm. Robert Ieda *et al.*, *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997); *see* Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 Law and Contemporary Problems 35, 44 (No. 1, Winter 1986) (noting that only 8.3% of defensive gun uses resulted in the assailant's injury or death).

Stalkers and abusive boyfriends, spouses, or ex-spouses may be even more significantly deterred than the hardened, career felons participating in this survey. Under current Chicago gun regulations, stalkers and violent intimate partners may be confident that their female victims have not armed themselves since the threats or violence began. Many of these men have already been emboldened by women's failure to report previous threats, or by the oftentimes inadequate resources available to help such women. Allowing women the option to own a serviceable handgun will not deter all stalkers and abusive intimate partners willing to sacrifice their own lives. However, the fact that men inclined toward violence will know that women have that choice, and may well have exercised it, will no doubt inhibit those less willing to pay that price.

Chicago would like to appropriate women's choice of firearm rather than to allow rational women the ability to decide whether a handgun is best suited to their needs. A shotgun is certainly better than nothing and could provide deterrence benefits. However, most women are best served by a lighter handgun, less unwieldy for women with shorter arm spans, and far more easily carried around the home than a shotgun or rifle. Moreover, women holding a handgun are able to phone for assistance, while any type of long gun requires two hands to keep the firearm pointed at an assailant. The fact that others may choose differently should not impinge upon a woman's ability to select the firearm with which she feels most comfortable.

C. Allowing Women to Own Handguns in Private Residences Will Not Increase Murders and Accidental Injury

Amici for Chicago will likely claim that permitting handguns in the home will increase the number of women murdered by abusive husbands and the number of accidental injuries and death by firearms. Empirical evidence supports neither assertion.

A firearm in the home does not increase a woman's risk of being murdered. A common statistic cited and misconstrued is that, when a gun is in the home, an abused woman is six times more likely to be killed than other abused women. Jacquelyn C. Campbell, *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study* in 93 Am. J. Pub. Health 1090-1092 (No. 7, July 2003). However, this statistic has some verifiable basis only when particular adjustments for other risk factors are weighed. Most importantly, any validity that statistic holds is only for battered women who live with abusers who have guns. The odds for an abused woman living apart from her abuser, when she herself has a firearm, are only 0.22, far below the 2.0 level required for statistical significance. The most important risk factor for the murder of abused women is the male's unemployment. *Id.* Programs that help women leave already terribly violent situations and that decrease unemployment should therefore be keys to the abatement of femicide, not laws that serve only to disarm potential victims.

Respondents' *amici* may also claim that allowing handguns in homes will lead to an increase in accidental injuries and deaths, particularly among children. These fears have proven unfounded. From 2000 to 2006, the rate of accidental death from firearms was 1.6% of that for motor vehicles.[14] The accidental firearms fatality rate has dropped dramatically over the last three decades (a 73.2% decrease between 1981 and 2006)[15] while the number of guns in circulation has risen. Fatal gun accidents are generally caused by "an unusually reckless subset of the population" who often have a long record of violent crime, heavy drinking, and other types of accidents.[16] Moreover, gun accidents involving preadolescent children are exceedingly rare.[17] Other hazards in the home are far more dangerous to children. In 1997 alone, approximately 550 children under the age of 10 drowned in residential swimming pools; only 48 were accidentally killed by firearms.[18] Responsible parents can be trusted to exercise due care in storing their firearms safely away from children.

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[14] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, http://webappa.cdc.gov/sasweb/ncipc/mortrate.html. Firearms involved in 5,150 deaths (0.25 per 100,000 people); motor vehicles involved in 312,871 deaths (15.4 per 100,000 people).

[15] *Id.* 0.82 deaths per 100,000 people in 1981; 0.22 deaths per 100,000 people in 2006.

[16] *See* Gary Kleck, *Guns and Violence: An Interpretive Review of the Field*, 1 SOC. PATH. 12, 29 (1995). Many of these people would be barred from firearm ownership under existing federal and state law.

[17] *See supra* note 14.

III. The Harms of Denying Women the Choice to Possess a Handgun in the Home Exceed the Social Costs Claimed for Handgun Ownership

Amicae do not deny that there are social costs to handgun ownership in the home. There are murders and accidental injury, although such incidences are significantly lower than those who wish to deny women their autonomy will claim. Despite those costs, however, denying a woman her rational decision to possess a handgun in her home does little but perpetuate her vulnerability to crime and disallows her the moral responsibility that attends firearms ownership. These too are costs that must be considered.

The effects of violent crime on women are well-documented and understandable. Female victims of violent crime suffer a complete disregard of their will and bodily integrity that the Court does not tolerate in other areas of jurisprudence affecting women. This disregard of a woman's will in the case of serious violent injury is far greater than the disregard shown by those who would demand that she carry a child to term or would criminalize her for consensual sexual intimacy within the home. Rape has been described as "an incursion into the private, personal inner space without consent . . . that constitutes a deliberate violation of emotional, physical and rational integrity,"[19] "the closest one can come to destroying the ego except for murder," and an "intrusion upon the most sacred and the most private repository of the self."[20] Many victims of rape remain emotionally debilitated for the rest of their lives.

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[18] *Id.*

Less well documented and understood are the civic costs associated with denying women the ability to make decisions that so profoundly affect their lives. Recognizing women's right to possess an effective means of self-defense and to choose motherhood is an acknowledgement of women's dignity, autonomy, and ability to make highly personal decisions for themselves. This sense of "responsibility as autonomy connotes self-governance" and entrusts women to "exercise moral responsibility in making decisions guided by conscience." Linda C. McClain, *Rights and Irresponsibility*, 43 Duke L.J. 989, 994 (1994) (referring to reproductive rights). Women refused these choices, for whatever reason, are denied the right to exercise their intellectual and moral capabilities by a paternalistic state. Such denial impedes women's capacity for responsible citizenship. *Id.* at 1038.

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[19] Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE, p. 422 (1976).

[20] D.J. Hicks, *Rape: Sexual Assault*, 137(8) AM. J. OBST. & GYN. 931, 932-33 (1980).

This Court has already deemed women's self-autonomy worthy of Fourteenth Amendment protection in cases involving contraception and abortion. The Court found these liberties of fundamental importance even though there was significant disagreement as to whether the right even existed and whether women could make those decisions responsibly. Women's "authority to make . . . traumatic and yet empowering decisions" is linked to "basic human dignity"[21] to an even greater extent in protecting their very lives than in the decision of whether to give birth to a child.[22] When deciding whether to protect themselves by owning a handgun, women are exercising "the moral right – and the moral responsibility – to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions." Ronald Dworkin, LIFE'S DOMINION: AN

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[21] *Casey*, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part).

[22] Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 791 (1989) (noting that abortion restrictions "radically and affirmatively redirect women's lives" and "it is difficult to conceive of a particular legal prohibition with a more total effect on the life and future of the one enjoined" than a law that limits reproductive choice.).

ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM at 166 (1993). Such decision-making is at the very core of this Court's Fourteenth Amendment jurisprudence.

IV. It Is Not Legally Sufficient to Deny Women the Choice to Possess a Handgun by Citing Social Costs

Well-meaning advocates of Chicago's gun restrictions often imply that women will act irresponsibly if afforded this right. This is not the first time that the denial of a right to women has been premised on women's supposed inability to: (1) consider the interests of others, (2) gauge how their actions affect the community, or (3) comply with what a majority feels is the correct moral decision. Those arguments demean women's personhood and devalue their individuality. Moreover, they have not worked to restrict reproductive choice and intimate sexual conduct, and they should not work to deny a woman the choice to own a handgun in this case. In fact, this Court expressly rejected the idea that costs of handguns could serve to prohibit their ownership, stating that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 128 S. Ct. at 2822.

Courts have respected these individual liberties because of the greater danger created by replacing individual decision-making and responsibility with edicts from the state. In their judgment, "the risk that some people may make irresponsible decisions is a lesser evil than the outright denial to everyone of the right to make decisions profoundly affecting their individual destiny." *Thornburgh v. Amer. Coll. of Obst. & Gyn.*, 476 U.S. 747, 781-82 (1986) (Stevens, J., concurring). In cases involving deeply personal choices, courts have often been convinced that society's bearing those costs is preferable to a political regime less protective of human freedom and moral autonomy. *See* Ronald Dworkin, TAKING RIGHTS SERIOUSLY 194 (1977). The societal benefits gained by increasing individual autonomy outweigh the costs in this case as well.

V. The Right to Keep and Bear Arms for Self-Defense Is a Privilege or Immunity of Citizens of the United States and All Other Legal Residents

The Due Process Clause is the most likely avenue for incorporation of the Second Amendment, as the Privileges or Immunities Clause has been largely a dead letter for over one hundred thirty-six years. However, the present case affords this Court the rare opportunity to expand its Privileges or Immunities jurisprudence. Read together with the Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999), incorporation of the Second Amendment through the Privileges or Immunities Clause of the Fourteenth Amendment would breathe new life into this often-overlooked and potentially powerful Constitutional clause.

This Court could decide that the right to keep and bear arms should be enforced against the states through selective incorporation under the Due Process Clause. Moreover, the substantive due process doctrine has been a valuable means of protecting women from state interference with rights such as access to contraception, the ability to choose a safe and legal abortion, and the freedom to engage in intimate activity within the home. However, Due Process may not be the best way to protect both unenumerated and textual rights.

A. Incorporation of the Right to Keep a Handgun in the Home for Self-Defense May Be Accomplished Through the Privileges or Immunities Clause Without Overruling the *Slaughter-House Cases*

The *Slaughter-House Cases,* 83 U.S. 36 (1873), were heavily criticized at the time and remain so to this day. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992). Detractors have noted that the case was decided "without full regard for the congressional purpose or popular understanding" of the Fourteenth Amendment. *Adamson v. California*, 332 U.S. 46, 78 (1947) (Black, J., dissenting). Nor does the case reflect modern understandings of the Fourteenth Amendment. The day after issuing *Slaughter-House*, the Court summarily disposed of Mary Bradwell's application to practice law in Illinois, which had been denied in part because of her status as a married woman. *Bradwell v. Illinois*, 83 U.S. 130 (1873). Relying on *Slaughter-House*, the Court held that the right to practice law was not one of the "privileges and immunities" belonging to citizens of the United States. Since then, courts have therefore been compelled to look to the Due Process Clause to protect those rights that the Privileges or Immunities Clause was intended to cover.

Substantive Due Process has not been free of criticism, however. John Hart Ely has observed that the phrase "'substantive due process' is a contradiction in terms – sort of like 'green pastel redness.'" DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980). Due process mandates the procedures that are required in a given situation; it does not lend itself well to a guarantee of substantive rights. The Privileges and Immunities Clause does protect civil rights and liberties; it announces "that there is a set of entitlements that no state is to take away." *Id.* at 24. Properly interpreted, this clause may be a more logical and less assailable source of certain rights already recognized by this Court, as well as the origin of other fundamental enumerated and unenumerated rights.

However, until the *Slaughter-House Cases* are overruled, it is necessary to at least consider hewing to the opinion issued by this Court in 1873. The *Slaughter-House* Court held that the Privileges or

Immunities Clause of the Fourteenth Amendment protected only those rights "belonging to a citizen of the United States as such." *Slaughter-House*, 83 U.S. at 79. However, the Court did not purport to give an exhaustive list of the rights pertaining to national citizenship, but merely "venture[d] to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*

Since the Court was clear that the rights discussed were only examples and not meant to define the outer limits of rights pertaining to national citizenship, protecting the right to keep and bear arms as a privilege or immunity of United States citizenship is entirely consistent with the text and spirit of the *Slaughter-House Cases*. The colonists' proficiency in the use of their firearms enabled them to defeat the much larger and better-trained English forces, and secured America's independence.

B. A Renewed Privileges or Immunities Clause Supports Incorporation of the Second Amendment and Other Personal Liberties

Although the Court could incorporate the Second Amendment through the Privileges or Immunities Clause consistent with the *Slaughter-House Cases*, the better approach would be to overrule that case, and interpret Privileges or Immunities as intended by the framers of the Fourteenth Amendment. It is debatable whether the Bill of Rights could have operated as a limitation on states' power before the Fourteenth Amendment. It is clear, however, that the amendment was intended in part to overrule *Barron v. Baltimore*, 32 U.S. 243 (1833), and enforce at least the first eight amendments against the states. Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 12-27 (2007).

The legislative history of the Fourteenth Amendment supports incorporation of the entire Bill of Rights and unenumerated rights. Representative Bingham, the principal drafter of Section 1 of the Fourteenth Amendment, repeatedly stated that the amendment would incorporate the Bill of Rights. *See Adamson*, 332 U.S. at 94-118 (appendix). Senator Howard, chair of the Joint Committee on Reconstruction, interpreted the meaning of the Amendment to his fellow Senators in this way:

> It would be a curious question to solve what are the privileges or immunities of the citizens of each of the States in the several States. . . . Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be – for *they are not and cannot be fully defined in their entire extent and precise nature* – to these should be added the personal rights guaranteed and secured by the first eight amendments of the

> Constitution; such as the freedom of speech and of the press . . . [and] *the right to keep and to bear arms*. . . . The great object of the first section of this amendment is, therefore, *to restrain the power of the States* and compel them at all times to respect these great *fundamental guarantees*.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added). The views expressed by Bingham and Howard are persuasive, but especially telling is that no one disagreed with their interpretation. Proponents and critics of the amendment seemed to agree that Section 1 would prevent the states from interfering with all substantive rights guaranteed in the Bill of Rights, and certain other unenumerated rights under the broad language of the Privileges or Immunities Clause. *See* Lawrence, *supra*, at 27.

Numerous scholars have urged expansion of Privileges or Immunities to protect individual rights. Laurence Tribe has suggested that the Supreme Court may, at some point in the future, decide to use the Privileges or Immunities Clause to protect personal rights:

> One should not rule out the possibility that courts and lawyers, growing weary of the heavily encumbered and often sputtering vehicles of due process and equal protection, might yet turn to the still shadowy privileges or immunities clause not only for the rhetorical lift or for a reminder of such peculiarly "national" interests as interstate travel, but for a fresh source of distinctly

> personal rights. . . . [A]dvocates of constitutional progress may find themselves in good company if they treat the clause as alive and potentially robust.

AMERICAN CONSTITUTIONAL LAW 426 (1st ed. 1978). Because the Second Amendment has not yet been incorporated, and in fact had been largely ignored until *Heller*, it presents an ideal opportunity to begin expanding the scope of the Privileges or Immunities Clause. Rather than erasing or amending complicated jurisprudence, the Court will be writing on a nearly blank slate.

Although reasonable minds may differ on the desirability of gay marriage, unfettered access to abortion, and other controversial social issues, it should be recognized that the most logical legal basis for these potential rights is the Privileges or Immunities Clause. Rather than attempting to discover these rights in a nebulous "green pastel redness," the Court could simply recognize them as a privilege or immunity of citizens of the United States.

C. Privileges or Immunities May Be the Best Way for Courts to Recognize Unenumerated Rights in the Future

The Privileges or Immunities Clause was drafted using language capable of growth and recognition of changing circumstances. No matter one's political views, or opinions about women's decision-making abilities, there is common ground: justifying access to abortion under the "right to privacy" is less than ideal. Recognizing the right to an abortion as a liberty interest that furthers personal autonomy is a more compelling justification for protection from governmental intrusion. The right to reproductive autonomy and the right to keep a handgun in the home for self-defense are liberties which "allow what might be crucial private choices in extreme personal crises." Johnson, *supra*, at 98.

The present case is the key to future protection of both textual and unenumerated rights. If the Second Amendment right to keep and bear arms is incorporated through the Privileges or Immunities Clause, it would expand the set of rights protected by the clause. Other rights currently protected under the Due Process Clause could eventually be invited to take shelter under the Privileges or Immunities umbrella as well. Moreover, if new unenumerated rights are declared in the future, the Court's opinions will be viewed as logically consistent provided that the enumerated right to keep and bear arms has already been protected against the states in the same way.

As Justice Stevens has articulated, "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best." *Casey*, 505 U.S. at 916 (Stevens, J., concurring). This applies not just to the abortion choice, but to all potentially life-altering choices a woman can make. Choices regarding where she will live and whether to have a child carry enormous consequences that can change the course of her life.

Each individual woman is trusted to make the best choice for herself, because no one else can know her life as well as she does. Yet the City of Chicago restricts women from making a choice that could not only alter the course of their lives, but protect their very existence. This Court should recognize an individual's right to choose the best method of self-defense, just as it has entrusted women with other life-altering choices.

This Court must strive to protect all civil liberties, without imposing its own moral code.[23] The decision to keep a firearm in the home for self-defense is not the best choice for all women, but every woman deserves the right to make that choice for herself – whether she lives in the District of Columbia or in the City of Chicago. Failing to incorporate a civil right treasured by many Americans can only make already-protected rights weaker and erode the public's faith in the courts.

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[23] *Cf. Casey*, 505 U.S. at 850: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."

D. The Right to Keep and Bear Arms, Recognized as a Privilege or Immunity of Citizenship, Will Apply to All Legal Residents of the United States Through the Equal Protection Clause

The Privileges or Immunities Clause is a source of substantive rights only for citizens of the United States. This does not, however, mean that only citizens may enjoy the freedoms protected by that clause. While the amendment references the privileges and immunities of *citizens*, the same sentence makes clear that all *persons* within the United States' jurisdiction enjoy equal protection of its laws. Therefore, once the Court finds that a right is guaranteed by the Privileges or Immunities Clause, it will evaluate any subsequent legislation that discriminates based on alienage using strict scrutiny.[24] *See Graham v. Richardson*, 403 U.S. 365 (1971).

Legal residents of the United States have "developed sufficient connection with this country to be considered part of [the national] community," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and enjoy many of this country's liberties. Certainly there are some restrictions on gun ownership by legal aliens that would meet strict scrutiny, such as a length of residency requirement or background checks and fingerprinting. These restrictions could be narrowly tailored to accomplish the compelling governmental interest in public safety. However, those who come to the United States would not be guaranteed the right to protect themselves under already extant Equal Protection jurisprudence.

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[24] A different standard of scrutiny may be used for alienage classifications made by the federal government, or in cases involving a political function or illegal aliens. None of these exceptions to strict scrutiny are applicable to statutes that would infringe a legal resident's right to keep and bear arms for self-defense.

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CONCLUSION

Modern incorporation jurisprudence demands that the fundamental right of an individual to keep and bear arms for personal self-defense be protected from state infringement. The stakes in this case are especially high for women. A woman's right to keep a handgun in her home must be secured in order to provide her with the most effective means of protecting her bodily integrity and her life. Moreover, recognition of the right to self-defense and the importance of personal dignity and autonomy could lead to greater protection for other individual rights in the future.

For the foregoing reasons, the decision of the Seventh Circuit below should be reversed.

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Representative Karen Boback (PA-117)

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